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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 international organizations

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American Bar Association (ABA) — Sections of International Law and Dispute Resolution ("the Sections")

[Original: English]
[Date: 12 May 2010]

The UNCITRAL Arbitration Rules, adopted in 1976, have played an important role in promoting resolution of international disputes — both public and private — through binding arbitration. The ABA has long supported the existence and use of such alternative dispute resolution procedures.

The Sections recognize and appreciate the years-long efforts of the Commission and UNCITRAL Working Group II (Arbitration and Conciliation) to update the UNCITRAL Arbitration Rules. We extend our congratulations to UNCITRAL Working Group II for a job well done, and we urge the Commission to adopt the draft revised UNCITRAL Arbitration Rules at the forty-third session of the Commission this summer.

Forum for International Conciliation and Arbitration (FICACIC)

[Original: English]
[Date: 26 April 2010]

Draft article 3: Paragraph 3c contains the phrase from the original article "is invoked". A more comprehensible phrase would be "is relied upon". An alternative to paragraph 5 might be: "The setting up or continuation of the arbitral tribunal shall continue whether or not there is a challenge as to the adequacy or sufficiency of the notice. In the event of such a challenge the arbitral tribunal once established shall hear at the earliest opportunity any such challenge unless the parties agree otherwise."

Draft article 4: Paragraph 2f contains the phrase from the original article "in case". A more comprehensible phrase would be "in the event that". An alternative to paragraph 3 might be: "The setting up or continuation of the arbitral tribunal shall continue whether or not there is a response to the notice of arbitration or whether that response is late or incomplete. In the event of such a situation the arbitral tribunal once established shall hear, at the earliest opportunity, the parties' submissions as to the future conduct of the proceedings unless the parties agree otherwise."

Draft article 6: The Secretary-General of the PCA is the fall back authority. If the Secretary-General of the PCA is the appointing authority and refuses to appoint then there is an immediate problem. It is preferred to exclude the Secretary-General of the PCA as the appointing authority. Thus the paragraph would read: "Unless the

parties have already agreed on the choice of the appointing authority, a party may at any time propose the name or names of one or more institutions or persons, one of whom would serve as appointing authority." Paragraph 2 should be adjusted accordingly. Also the following phrase might emphasize the impartiality of the PCA: "For the avoidance of doubt the PCA will not appoint itself".

In paragraph 4 the phrase "it received a party's request" would be more easily read as "it received a request from the parties or a party". The last sentence of this paragraph would be better positioned within paragraph 41.

The suggested separation of powers between the Secretary-General of the PCA and the appointing authority referred to under paragraph 2 should be better reflected in paragraph 6 by the addition of the phrase "jointly or separately", where appropriate, as follows: "In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may jointly or separately require from any party and the arbitrators information they deem necessary and they shall jointly or separately give the parties and where appropriate the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall jointly or separately also be provided by the sender to all other parties."

Draft article 10: There is no clear link between articles 10.1 and 10.3. Article 10.1 examines a situation where there are three arbitrators to be appointed in a multi-party situation. In case parties fail to agree, article 10.3 then apparently gives the appointing authority power to revoke any appointment already made. In the opinion of FICACIC, it would be unusual to permit an appointing authority, where an appointment has already been made to revoke any appointment thus made. There is no indication given as to the reasons why the act of revocation may be permitted. There is no indication given whether the party who appointed the arbitrator subsequently revoked may be given reasons for the revocation. Nor is seemingly any opportunity given to the party which has appointed the arbitrator to have any means to speak in favour of that arbitrator. In addition, it seems that article 10.3 would also apply in all instances of failure to constitute a tribunal, not limited to the instances referred to under article 10. That provision seems to provide too many powers to the appointing authority to the detriment of the parties.

Draft article 12: In paragraph 2, the possibility exists for the challenge to be made by a party much later than when most reasonable parties would make the challenge. Thus an additional phrase might be: "or when any reasonable party would be deemed to have become aware".

Draft article 13: A better drafting of paragraph 1 would be: "after it has been notified of the appointment of the arbitrator it wishes to challenge." The other arbitrators, where applicable, are not given a role in paragraph 3. It may well be that the other arbitrators do not consider that the challenge is valid. Also, for the sake of clarity, the word "withdrawal" should be added before the word "imply" in the last sentence of paragraph 3. The time limit of 15 days set out in paragraph 1 is not repeated in paragraph 3 and should be located there also. In addition the time limit of a further 15 days from the date of the challenge to seek a decision on the challenge is too long. It is suggested that seven days is quite sufficient. Further, the challenge should be made first to the remaining members of the tribunal where the

tribunal consists of a number of more than one arbitrator. The party pursuing the challenge should not have the right to ignore the proper procedure, which would be to seek a ruling from the other members of the tribunal.

Further, paragraph 4 does not give any indication of what evidence shall be placed before the appointing authority, and how the appointing authority shall deal with the challenge when it is received. Whereas, if the challenge is made to the tribunal, where there is more than a single member, then the tribunal could make a ruling in the normal way based on the evidence with which it was familiar or on the evidence which was subsequently brought to its attention. It is suggested that a better drafting of the last sentence of paragraph 4 would be: "it shall seek a decision by the appointing authority on the challenge".

Draft article 14: There is no introductory sentence indicating why a replacement should be required in paragraph 1. Reference to the original article 13.1 makes quite clear in what circumstances replacement shall take place. It states in the event of the death or resignation of an arbitrator during the course of the arbitral proceedings a substitute arbitrator shall be appointed or chosen. It is suggested that the addition of the above sentence is essential in order to clarify the meaning of the new article 14.1.

The last sentence of article 14.1 does not explain why the right to appoint or participate in the appointment may be exercised in such circumstances nor is there any reference back to an earlier article. Paragraph 2 referred to the circumstances where there will be a successful challenge to the appointment of an arbitrator, and generally on the basis of bias or lack of independence. It would generally be assumed that it would not be right, however exceptional the circumstances, to deprive the party, who had appointed the challenged arbitrator, of its right to have a substitute arbitrator. Thus the need for this clause is questioned.

Further, it is questioned whether it is for the appointing authority to make known its views as to the exceptional circumstances. Surely it is more appropriate for the arbitral tribunal to express its views. The next element of this new article permits the tribunal, now truncated, to continue with the hearings. It appears from the drafting of that paragraph that the appointing authority will only make the decision as to whether or not to authorize the other arbitrators to proceed with the arbitration and make any decision or award after the closure of the hearings. This cannot be right. The appropriate time to make any decision of this nature is at the time when the competent authority is of the opinion that exceptional circumstances require that a party should be permanently deprived of its right to appoint a substitute arbitrator. It is suggested that this subclause 2, be re-examined or deleted.

Draft article 16: The concept of excluding liability except for deliberate wrongdoing, is generally accepted. The qualification added to this clause being "To the fullest extent permitted under the applicable law" may not assist in guiding parties as to the limits of this exclusion of liability clause. Further the employees of the various entities mentioned are not described in the clause and their omission does not assist in the grant of exclusion of liability. Finally, the application of exclusion of liability to any person appointed by the arbitral tribunal should be defined as being either an expert or any other type of person, who might be called upon for appointment by the tribunal.

Draft article 17: With respect to paragraph 3, there may be situations where the majority of proceedings can be conducted on the basis of documents and other materials only, but on occasions, the tribunal may wish to hear from one or more key witnesses, or one or more key experts. This option should not be prohibited by its omission.

The concept of joinder in paragraph 5 is new to these rules. It is essential that the concept of joinder be given its own article. It is difficult to determine how the last sentence clarifies or assists in the joinder process outlined earlier in that subparagraph. If the sentence is necessary at all it should be moved to the article relevant to awards and decisions.

Draft article 18: Draft article 18 reiterates the phraseology of the original article 16 of the 1976 version of the rules. The second sentence of paragraph 1 of draft article 18 states: "The award shall be deemed to have been made at the place of arbitration", thus emphasizing the importance given to the place or locus of the arbitration. The place or locus of the arbitration may well have either or both a law which sets out the arbitral procedure to be followed in that place or in the absence of such clarity a set of civil procedure rules on admissibility of evidence. It may well be that the party or parties do not wish to be bound by the rules of admissibility of evidence in the place of arbitration. The arbitral tribunal has the final say as to where the place shall be. In that event, if the authority to decide the issue as to admissibility of evidence remains with the tribunal, then the parties should spell out in the notice of arbitration or preferably before, in the arbitration clause, which rules of admissibility of evidence will apply.

Draft article 21: Both articles 20 and 21 assume that the tribunal shall be composed of more than one arbitrator. Provision should be made in the drafting to allow for a single member tribunal as well as for the more numerous member tribunal, for the avoidance of doubt.

Draft article 22: This article, making reference to amendments, does not make provision for the situation where an amendment or supplement may cause only part of the supplementary claim or defence to fall outside the jurisdiction of the arbitral tribunal. This occurs frequently. This article should make provision to empower the tribunal to disregard those elements of the supplemented or amended claim or defence, where those elements fall outside the jurisdiction of the arbitral tribunal.

Draft article 23: Many discussions have taken place concerning clear construction of the last sentence of paragraph 1. It is suggested that the sentence should be redrafted as follows: "a decision by the arbitral tribunal that the contract is null shall not result automatically in the invalidity of the arbitration clause." In the alternative: "a decision by the arbitral tribunal that the clause is null shall not automatically invalidate the arbitration clause."

The language of the first sentence of paragraph 2 is mandatory. It is made quite clear that a plea as to lack of jurisdiction must be raised in certain situations. Those situations are set out quite clearly in the early part of paragraph 2. The fall back position should not exist under these rules unless moderated or deleted. Therefore it is suggested that either this fall back provision be deleted, which might not be a practical suggestion in view of the various circumstances that can cause a challenge to jurisdiction to arise at any time during the arbitration. The alternative might be that the mandated phraseology in the first element of the paragraph be moderated by

the insertion of the word “usually” or “normally”. The addition of those words will give discretion to a tribunal and make clear to the parties that they are not estopped from making a later challenge to jurisdiction should there be strong circumstances for justification of the delay. It should be made clear that these circumstances are unusual and may well not be sufficient to justify the challenge.

The last sentence of paragraph 3 could be misleading. It should be made clear in the rules that the challenge to jurisdiction shall be first made to the tribunal. Then subsequently should the tribunal rule that it has jurisdiction, or indeed in the alternative that it does not have any jurisdiction, then a party may challenge that decision before a court. It is the first option that the second sentence of paragraph 3 anticipates. That option being that the tribunal has found that it has jurisdiction and the party who challenged that situation now wishes to proceed to the court to obtain a reversal of that decision. That both options exist should be made clear.

Draft article 24: This article is based on the original article 22. This article also refers to further written statements. The draft rules already anticipate amendments to the statement of claim, statement of defence and any counterclaim. It is respectfully suggested that this article adds nothing to what has been set out earlier. In fact the heading in quotation marks “further written statements” has contributed in more to confusion than clarity.

Draft article 25: It would not be good practice for an arbitral tribunal to extend the time limits of its own volition. It would be preferable to add a sentence to the last line. The sub-sentence might be phrased: “…where parties have made an application for an extension.” It may well be that this concept was implied when this original article 23 now draft article 25 was considered. However the balance of the rules makes quite clear that where a variation to the rules takes place it should only take place at the request of a party.

Draft article 26: Where such interim orders are granted in the courts it is normally mandatory for parties to report promptly any material change in the circumstances, as described in paragraph 7. It is recommended that the discretion in paragraph 7 be given a mandatory quality. Thus, the phrase might be: “The arbitral tribunal shall require any party to promptly disclose any material change.”

Paragraph 8 indicates that there is only discretion to make an order of costs and damages against the party bringing the wrongful application for an interim measure. It should be made clear that in the normal circumstances an arbitral tribunal has the power to make a full order as to costs and damages. Further, it should empower the tribunal not only to make such award of costs and damages at any point during the proceedings, but also to suspend the proceedings pending the satisfaction of that award to the party, who has suffered the damage. One of the major concerns about whether or not to grant power to a tribunal to order *ex parte* interim orders was that they might be abused.

Paragraph 8, if properly drafted, will act as a deterrent to those who wish to abuse the system. The meaning of paragraph 9 is not clear. It is thought that the intent behind this article is to prohibit any *ex parte* application. The Working Group by a majority was not in favour of adopting the *ex parte* interim measure changes, which were incorporated into the Model Law on Arbitration. It appears that paragraph 9 is an attempt to ensure that despite the existence of the right to apply for an *ex parte* interim order in any arbitration law that right does not exist in the arbitration rules.

It is suggested that it could be spelt out more effectively thus: “There is no express power in these Rules given to the arbitral tribunal to grant a preliminary order pertinent to any interim measure without notice to the other party.”

Paragraph 10 did not indicate whether the request to judicial authority should be made on the basis that it is compliant with these rules. Paragraph 10 could be understood as impliedly authorizing a party to apply for an interim order or measure without prior notice to a party, albeit not to the arbitral tribunal, but to a judicial authority. Paragraph 10 should be rephrased in order to establish a sequence. Thus: “A request for interim measures addressed by a party to a judicial authority is not deemed incompatible with the agreement to arbitrate or a waiver of that agreement, where that party has in the first place made such a request to the arbitral tribunal.” It is generally agreed that parties should not be able to undermine the arbitration process by leapfrogging the authority of the arbitral tribunal by making applications directly to courts. It is respectfully submitted that this concept should be spelled out.

Draft article 27: Paragraph 2 highlights the possible confusion identified as a result of the perusal of draft article 24, which refers to further written statements. It is quite clear that draft article 24 does not mean statements, it means pleadings or statements of case.

Under paragraph 4, the use of the word “weight” has continued in spite of submissions that the more comprehensible word might be “importance”. It is also a concern that the word “admissibility” continues in this paragraph. The rules as to what evidence may be admissible vary throughout the legal world. If the tribunal is empowered to determine the admissibility of evidence then it should be part of the preliminary proceedings to make clear which rules of admissibility of evidence apply.

It is suggested that it is too late to leave this matter to a preliminary hearing, when it is quite possible that the wishes of the parties will not be acceded to. It is strongly emphasized that the arbitration clause adds precise definition as to the rules of procedure which will govern the arbitration so that the tribunal cannot determine rules of admissibility, which were not envisaged at the time the contract was drawn up.

Draft article 28: Paragraph 2 does not contain the phrase: “Unless the parties agree otherwise.” It does appear that the tribunal with notice to the parties or without hearing the parties can issue directions as to the conditions and the manner in which the witnesses are heard. It is certain that this was not the intention of the Working Group and it is suggested that the phrase outlined above shall be added to paragraph 2.

Regarding paragraph 3, the original paragraph 4 of article 25 stated as follows: “The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses.” While it is quite usual for lay witnesses to be excluded during the testimony of another lay witness in civil proceedings, it is not usual for an expert witness advising the party to be absent while the expert witness for the other party is giving evidence. There will of course be witness statements prepared by the experts. The experts will be cross-examined upon those statements, both by those representing the parties and possibly by the tribunal. If the expert representing the party and not giving evidence is absent that places that party at a considerable disadvantage. Further and on the other hand, there is no obvious reason

for the exclusion from this rule of witnesses, whether lay or expert witnesses, who are parties to the arbitration. It has been known for witnesses, whether lay or expert, who are parties to arbitration to lie. It is submitted that there should be no automatic right for witnesses, who would otherwise be excluded, to be present during the giving of evidence of the witnesses of the opposing party or parties. As has been suggested before, the expert witness, whether a party or not, should be present, unless there is some fundamental consideration to demand that expert's exclusion.

Draft article 29: In paragraph 2, the parties have an opportunity to challenge certain aspects of the attributes of the proposed expert. However in paragraph 1 no allowance is made for a similar opportunity to be granted by the parties to challenge or make representations as to the specific issues to be determined, which are then set out in the terms of reference. This aspect is just as important as the subsequent discussions as to qualifications, impartiality and independence. While, as set out in paragraph 2, the parties are entitled to make comments on such qualifications, they are equally entitled to make representations on the key matters that the expert or experts will decide. It is suggested that the following phrases be added to paragraph 1: "A draft copy of the expert's terms of reference, setting out the specific issues to be determined or upon which guidance is to be sought, shall be communicated to the parties who shall thereafter have seven days within which to make representations to the tribunal as to the contents thereof. The arbitral tribunal may thereafter take into account all or any element of those representations in determining the final draft of the expert's terms of reference."

It might be helpful to spell out the powers of the arbitral tribunal to make an award of costs against the challenging party in the event of such a challenge is subsequently found to be unmerited. In the event of a dispute taking place as outlined in paragraph 3 it is necessary for the views of the other party or parties to be taken into account before the arbitration tribunal makes its decision. That is not provided for in this paragraph.

Concerning paragraph 4: There is no requirement set out in paragraph 1 for the report to list all the matters upon which the expert may have based his or her report arising from paragraph 3. It is also necessary for the expert to set out in the same addendum all the documents which he or she may have relied upon. This will ensure that an expert does not rely upon evidence of which the parties are not aware. There is no requirement in paragraph 4 for the representations or opinions of the parties on the draft report to be given to the expert and for the expert to consider those representations or opinions. It is suggested that more attention to the preparation phase of this report could reduce the challenges likely to be made to that report.

Draft article 31: In paragraph 1, the word "proof" could be replaced by "evidence in whatever form". It is suggested that the phrase "may at the closure of proceedings" be added to the first line. There is no mention of draft articles 17 (2) and 28 in paragraph 2 of this article. It is submitted that it is essential for paragraph 2 of draft article 31 to make clear that the tribunal will not, however exceptional the circumstances, decide on its own initiative to reopen the hearings, unless and until it has taken and sought the representations and opinions of the parties. It should also be made clear that such reopenings are subject to the requirements of articles 17 and 28. It may well be that articles 17 and 28 do not in totality spell out the procedures that should underlie the impartiality and independence of the tribunal; however to do so could be seen to be fettering the flexibility of the tribunal and, on the other

hand, party autonomy. In any event, these concerns need to be set out and made clear within this article.

Draft article 33: This article does not give any discretion or incentive for the arbitrators to come to a consensus as opposed to swiftly agreeing to a majority opinion. The first elements of paragraph 2 have been carried forward from the 1976 rules. However, noting that there is no majority or when the arbitral tribunal has itself given authority to the president, then it is difficult to understand why there should be a further power to revise the award, being only procedural in nature, given to the arbitral tribunal.

Draft article 34: It is noted that various sections of paragraph 2 are placed in square brackets. What is absent here is any definition of an award. Paragraph 1 makes clear that separate awards on different issues may be made. However there are a variety of decisions which fall under the jurisdiction of an arbitral tribunal. The rules themselves have set out a variety of occasions where discretion is given to the tribunal. Paragraph 3 of this article provides that the awards shall be reasoned. That requirement is appropriate. There are many occasions when the tribunal shall be required to issue partial awards and separate awards on procedural issues. Those awards are not identified in this article. Yet it cannot be said that partial or interim awards are final awards as required in the first sentence of this paragraph. It is suggested that the first sentence is amended as follows: "All awards shall be made in writing and, where appropriate to the form of decision required by the tribunal, the final and binding on the parties." That condition or caveat gives the required discretion to the arbitral tribunal to issue a variety of awards or decisions. It is submitted that all decisions are and should be awards, whether they are final and binding or not.

The next area of concern is that these rules appear to be attempting to adopt and incorporate the imposition of a requirement of the parties that they waive any right of appeal. There is concern among the arbitral community that all arbitral proceedings shall be expeditious and economical and thus limit any right of appeal; however, it is submitted that it would be wrong to phrase such an imposition in such a negative manner. Preferably, this second element of paragraph 2 should be removed. There is no need for the requirement that the place of arbitration be stated in the award. It is suggested that the requirement whereby the award shall state the reason for the absence of signature in case one arbitrator fails to sign may be insufficient. That provision would be sufficient for failure to sign for any reason other than objection to the contents of the award. However, should the arbitrator who fails to sign be a dissenting voice then, it is insufficient to merely state that the arbitrator is dissenting. There should be a requirement that the dissenting decision be attached to the award.

Paragraph 5 of article 32 of the original rules directed simply that: "An award may be made public, with the consent of all parties." That direction is sufficient for all purposes. Confidentiality or lack of confidentiality is deemed to be a major reason why parties are unwilling to submit themselves to arbitration. The provisional rule in article 32 is totally appropriate and should be retained on its own.

In paragraph 6, a reference to paragraph 4 should be added. This paragraph should read: "Copies of the award signed by the arbitrators shall be communicated to the

parties by the arbitral tribunal, except where modified under the circumstances set out in paragraph 4 above."

Draft article 35: Paragraph 2 of the original article 32 had added to this sentence as follows: "And if the law applicable to the arbitral procedure permits such arbitration." It is not clear why this has been removed from this proposed draft article. It is submitted that it should be reinstated. The reason for reinstatement is that any party comparing the original rules with the proposed draft articles, which will presumably become the revised articles could justifiably consider that by removing this qualification the tribunal can act in this manner where expressly authorized, even if the law applicable does not permit such form of arbitration. That would be totally wrong and give a misleading impression of the reality.

Draft article 36: As in earlier proposed draft articles, the requirements that the arbitral tribunal seeks the opinions or views of the parties have been omitted. In the original article 34 paragraph 2 the following statement was set out: "the arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection." That condition has been replaced by what appears to be the granting of unfettered powers to the tribunal without consultation of the parties to consider whether there are remaining matters, whether they need to be decided and whether it is appropriate to make those decisions. It would be quite wrong for the tribunal to make any of those steps without inviting the opinions or views of the parties. The addition of the phrase at the beginning so frequently utilized: "Unless the parties have agreed otherwise" would assist in the reining in of the powers of the tribunal. However, it is suggested that a more appropriate form of words might be: "The arbitral tribunal shall have the power to issue such an order after consultation with the parties. That order can be made unless the arbitral tribunal is persuaded that there are matters which fall to be decided when the proceedings become unnecessary or impossible, and therefore can be decided independently and further, where the tribunal considers, after seeking the opinions of the parties it appropriate to make such decisions." An alternative phraseology might be: "that the order for termination shall be issued within seven days of giving notice to the parties, unless the parties make representations to the tribunal that there are remaining matters which require decisions outside the body of the dispute and subsequently the arbitral tribunal consider it appropriate to decide those matters."

Draft article 37: Since article 34 makes clear that there may be a variety of separate awards on different issues at different times it might be more appropriate to remove the definite article and replace it with the indefinite article "an" in paragraph 1.

Draft article 39: In paragraph 1, the phrase "the award" could be confusing. What is required here is wording as in the original article 37 being that the parties have an opportunity to suggest to the tribunal that there are matters yet to be decided. An award has been issued. A party will be of the view that there are matters outstanding. The applying party would seek that the tribunal makes decisions on the outstanding matters. Those decisions should be encompassed in what is purported to be an additional award but in reality would be the final award. There is no need for any reference to a further award. What is required is an addition to the final award. These comments apply to paragraphs 1 and 2 of draft article 39. The addition of the adjective "final" to the sentence at the commencement of this paragraph would make this draft article more explicit.

Article 39 is intended to address the situation where the proceedings have come to an end. Therefore, in this circumstance, the variety of awards considered earlier is not being taken account of. The award in question is the final award. The way the matter is raised in the draft article gives the impression that this definition forms part of the early considerations of award in the previous paragraphs and is unfortunate. The proposed amendment should be as follows: "Within 30 days after the receipt of the termination order or the final award,".

Paragraph 2 could be redrafted as follows: "If the arbitral tribunal considers the request for an addition to the final award to be justified it shall render that addition within 60 days after receipt of the request." Please note that the option given by paragraph 2 to extend the time within which the award shall be made is not conditional upon the arbitral tribunal consulting the parties. Again, it is necessary to insert some phrase to the effect that: "Unless the parties have agreed otherwise" in order to ensure that tribunal cannot conduct the proceedings in a dictatorial manner.

In view of the comments made above it is suggested that paragraph 3 be phrased as follows: "When such an addition to the final award is made the provisions of article 34, paragraph 2 that it shall apply."

Draft article 40: This direction to the tribunal ignores the reality of arbitration. Frequently awards will be issued except as to costs leaving that issue until the issuance of the final award. The parties will then make the decision whether or not to settle the matter of costs between themselves or apply to the tribunal to make a decision as to fixing the costs. It would be more appropriate to phrase paragraph 1 as follows: "The arbitral tribunal shall fix the costs of the arbitration in the final award unless the parties agree otherwise. In the event the costs are not fixed in the final award then the arbitral tribunal shall give the parties the opportunity to address it both on the matter of costs and the manner in which it might fix those costs." This proposal leaves the matter beyond doubt that the parties will have an opportunity to address the tribunal, should they so wish, as to how and in what manner costs should be awarded.

In brief, as a result of the comments made above applicable to paragraphs 1 and 2 of this article, paragraph 3 requires amendment. The line would then read: "In relation to interpretation, correction or any additional award, under articles 37 to 39".

Draft article 41: This article has been proposed without amendment from the 1976 rules. Paragraph 1 is not subject to any conditions yet paragraphs 2 to 6 have inserted elements of conditionality. Therefore paragraph 1 should be explicitly stated to be subject to the contents of paragraph 2 to 6. A proposal to paragraph 1 would be as follows: "Unless otherwise agreed by the parties or subject to, where appropriate, paragraphs 2 to 6 of this article".

Regarding paragraphs 2 and 3, no option is given to the arbitral tribunal to make representations to the appointing authority as to the basis for determination of its fees and expenses. It should be noted that the situation in paragraph 2 does not apply as a schedule presumably has not been identified or designated. Nor has there been a method of determining fees in international cases put into place. Therefore it would be appropriate for the same opportunity given to parties to address the tribunal be given to the tribunal itself on the relatively important matter of fees and expenses. Corrections to an award are of a very technical nature. They usually arise from errors of calculation or typographical errors. This change as to fees and

expenses does not arise from an error in calculation or typographical error. It arises from the exercise of discretion without hearing evidence from the tribunal as to how it arrived at its fees and expenses. It is submitted that such an award cannot form part of the original award. It would have to take the form of an additional award, and be attached to the original award by the appointing authority or the Secretary-General of the PCA.

It is important that the Commission takes note of the concerns raised here, as to consider the fundamental attack on the expenses and fees of the arbitral tribunal as mere corrections would be misleading. Please note that UNCITRAL might consider recommending that there should be available a service which was empowered to tax or determine the fairness of not only the arbitrators but also the parties as paragraph 4 appears to require the ability to undertake a detailed analysis which it is doubted would come within the abilities of the PCA.

Draft article 42: Here yet again the draft article has omitted any reference to the phrase: "Unless the parties have agreed otherwise." It should not be thought that the arbitral tribunal may, of its own volition, determine that apportionment is appropriate and thereafter the form of apportionment. It should be made clear that any act of apportionment should only be followed through after the tribunal has heard submissions from the parties both upon the concept of apportionment, and how apportionment should be implemented.

Draft article 43: There is a procedural gap in paragraph 3. There is a request from a party that the tribunal fix the amount of any deposits or supplementary deposits after consultation with an outside body. Again there is no opportunity for the parties to agree otherwise. Further it is not clear what procedure applies where the procedure for determination of the initial deposit has been agreed by all concerned, and it is the question of a supplementary deposit, which causes a party to request the assistance of the appointing authority. It also appears that in the latter instance, there is no opportunity for the requesting party or indeed the objecting party to make submissions to both the appointing authority and the arbitral tribunal before the matter has been referred to the appointing authority nor is any opportunity given to the arbitral tribunal to comment on the recommendations of the appointing authority as to the appropriateness of such deposits as supplementary deposits.

It is noted that this paragraph is identical to paragraph 3 of article 41 of the original rules. It is submitted that that is not a reason not to re-examine this paragraph and clarify it as suggested above.

It is noted that paragraph 4 is identical to paragraph 4 of article 41 of the original rules. It is submitted that it would be inappropriate without more clarity as to procedure for the arbitration tribunal to be able to terminate the arbitral proceedings in the event of failure to make such a payment. There must be a requirement for the tribunal after the order for suspension has been made for further directions to be issued to the parties by the tribunal and in the event of failure to adhere to such directions then termination would take place.