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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

1. International non-governmental organizations

Milan Club of Arbitrators

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The Milan Club of Arbitrators submits comments it received from two of its members on the draft revised UNCITRAL Arbitration Rules.

***First set of comments*:**

Article 1 (scope of application): After the adoption the revised edition applies "unless the parties have agreed to apply a particular version of the Rules". The 1976 Rules may be such particular version but this also includes modifications made by the parties in applicable rules.

No time limit has been provided for the agreement of the parties to apply a particular version. However, when a dispute has arisen and arbitrators have to be appointed, it should be known which rules apply. In case a particular version applies, this should be specified in the Model arbitration clause. This Model arbitration clause in that case should read: "Any dispute, controversy or claim arising out of or relating to this contract, (…) as at present in force. *In case a particular version of the Rules applies this will be specified*. (… .)"

Paragraph 2 of article 1 states in the second sentence that the presumption thus not apply when the arbitration agreement has been concluded by accepting after the date of adoption an offer made before that date. However, not the arbitration agreement but the contract containing the UNCITRAL arbitration clause may contain an offer which may be accepted after the adoption.

The Draft transfers the Model arbitration clause to an Annex. However, maintaining the Model clause directly under article 1 may be preferred.

Article 3 (Notice of Arbitration): Paragraph 3 states under (a-g) what the Notice "shall" include. Under (g) the Notice shall include proposals "to the number of arbitrators, language and place of arbitration if the parties have not previously agreed thereon". This previous agreement may be found under (b-d) of the Model arbitration clause. The number of arbitrators is regulated in article 7, the place of arbitration in article 18 and the language in article 19. Why should proposals in respect of number of arbitrators, place of arbitration and language be made in the Notice? The test under (g) may be omitted.

Paragraph 4 deals under (a-c) with what the Notice "may" include. Under (a), the notice may contain a proposal for the Appointing Authority (A.A.) referred to in article 6 of the Draft. The Model arbitration clause contains under (a) the words: "The Appointing Authority shall be …. (name of institution or person)". This is an appointment of the A.A. and not a proposal. Article 4 (2) (b) also provides that the

response may contain a proposal for the A.A. made by the respondent. These proposals may differ. It is enough that the Model arbitration clause may contain an appointment and, if not, this appointment will be made under the Rules. What has been stated under (a) could be omitted.

Under (b) a proposal may be made for the appointment of a sole arbitrator in article 8 (1). Again this is repeated in article 4 (2) under (c) for the response. Subparagraph (b) could also be omitted.

Under (c) the claimant may appoint "his" arbitrator in case a tribunal of three has to be appointed. The appointment of "his" arbitrator by the parties is found in article 4 (2). Anticipating on the appointment of an arbitrator by the parties should also be omitted.

Paragraph 4 may be omitted in toto.

Article 20 (1): In my comment on article 3 reference should be made to article 20 on the statement of claim. Paragraph 1 of article 20 (1) states in the second sentence that the claimant may elect to treat his notice of arbitration as statement of claim "provided that the notice also complies with the requirements of paragraphs 2-4 of article 20". However, the notice of arbitration does not contain a copy of the contract out of which the dispute arises and the requirement to annex this copy to the notice as has been provided in paragraph 3. The notice is also not accompanied by documents and other evidence relied upon as stated in paragraph 4. The second sentence of article 20 (1) should be omitted.

Article 4 (Response): The Draft introduces a response to the Notice of arbitration. This can be welcomed. However, at the end of my comment a proposal will be made for a much simpler manner for the introduction of a response. Article 4 contains two paragraphs. Paragraph 1 deals with what the response shall include and paragraph 2 what the response may include.

Paragraph 1 ("shall"): Under (a), the response shall include name and contact details of each respondent. Article 3 (3) (b) states that the Notice of arbitration shall contain the names and contact details of all parties. This already includes the respondents. Under (b), the response shall deal with the information in the Notice of arbitration pursuant to article 3 (3) (c-g). In my comment on article 3 the proposal for the number of arbitrators, language and place of arbitration is omitted. These proposals should also be omitted in the response.

Paragraph 2 ("may"): According to this paragraph the response may also include: Under (a) any plea that an arbitral tribunal constituted under the Rules lacks jurisdiction. The Draft states in article 23 (2) that this plea shall be raised no later than in the statement of defence. On this plea the arbitral tribunal may rule as a preliminary question or in the award on the merits (article 23 (3)). Anticipating this plea in the response to the notice of arbitration at the very beginning of the arbitral proceedings when the arbitral tribunal still has to be appointed should be omitted. Under (b) and (c), proposals may be made for the appointment of an A.A. and the appointment of a sole arbitrator. In article 3 (Notice) paragraph 4 contains under (a) and (b) similar proposals to be made by the claimant. In the Rules the appointment of a sole arbitrator has been regulated and in the Model arbitration clause parties may already have made the appointment of an A.A. These proposals under (a) and (b) may be omitted. Under (d), the defendant may in his response appoint "his"

arbitrator in case of a tribunal of three. In article 3 (4) the same has been stated for the claimant. What has been regulated in the Rules should not be anticipated at the commencement of the arbitration. Under (e) the respondent may introduce a counterclaim or claim for the purpose of set-off. This again has been regulated later on in the Rules. What has been stated under (e) may be omitted. Under (f) is stated that the respondent may introduce a claim "against a party to the arbitration agreement other than the claimant". This is an exceptional situation, not needing regulation in the Rules. In the revision of the Rules the easy reading of the 1976 Rules should be maintained.

Article 21: With respect to the statement of defence, the second sentence of article 21 (1) states that the respondent may elect to treat its response to the notice of arbitration (article 4) as a statement of defence "provided that the response also complies with the requirements of paragraph 2 of article 21". This paragraph states that the statement of defence shall reply to the particulars (b-e) of the statement of claim. However, at the beginning of the arbitration, when notice of arbitration and response are exchanged, arbitrators still have to be appointed and no statement of claim or statement of defence have been produced. How can the response to the notice then comply with article 21 (2)? The second sentence of article 21 should also be omitted.

Comment on article 3 (5) and article 4 (3): The last paragraph of articles 3 and 4 deals with the insufficiency of the Notice and the incompleteness of the Response. This insufficiency or incompleteness shall not hinder the constitution of the arbitral tribunal. At the commencement of the arbitral proceedings with the Notice and response there is no arbitral tribunal which may finally deal with the insufficiency or incompleteness. In practice the other party may draw the attention to insufficiency or incompleteness. The reference in the Rules to any decision later on by the arbitral tribunal may be omitted.

In article 4, the last paragraph also states that "the constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration". However, article 4 (1) provides that respondent "shall" communicate a response. It is interesting that the Draft, although introducing a response as a "must", takes into account that respondent does not communicate a response.

Proposal: My comment on articles 3 and 4 dealt in detail with the manner in which the Draft introduces a response to the Notice of Arbitration. Instead of doing so in the manner of the Draft, the example of the WIPO Arbitration Rules (article 11) may be followed. Following this example the Draft may introduce the response as follows: "Within 30 days from receipt of the date on which the respondent received the notice of Arbitration, the respondent shall communicate to the claimant a response, commenting on any of the elements in the notice of arbitration. The response may include indications of any counterclaim or claim of set-off".

Originally the Working Group introduced a response in a very long article 3. During the discussions in the Working Group, instead of this long article, two articles, article 3 for the Notice and article 4 for the Response, have been drafted. In my comment on article 3 a deletion of article 3 (4) has been proposed. The simple introduction of the response as proposed above could be paragraph 4 of article 3.

Article 6 (Appointing Authority): In the 1976 version of the Rules the Appointing Authority (A.A.) can be found in article 6 (b). In case the parties did not agree on the A.A. in the Model arbitration clause on an arbitral institute or a person, an A.A. shall be appointed. The new article separates the appointment of an A.A. from Section II. However, the Draft maintains the list procedure in Section II (appointment of arbitrators), which procedure the A.A. applies when appointing arbitrators.

Paragraph 1: Unless the parties already agreed on the choice of an A.A. in the arbitration clause, parties may propose the name or names of arbitral institutions or persons. Persons include the Secretary-General of the PCA. This is new. In case the structure of the 1976 Rules is maintained this should be added.

Paragraph 2: If parties did not agree on the A.A. within the time limit stated in this paragraph, the Secretary-General of the PCA will designate the A.A. This has been borrowed from article 6 (2) of the 1976 Rules. The time limit of 60 days has been reduced to 30.

Paragraph 3: This paragraph suspending the time limit may be omitted. It may occur but does not need to be regulated.

Paragraph 4: This paragraph repeats what can be found at the end of article 6 (2) of the 1976 Rules.

Paragraph 5: The A.A. and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and shall give parties and arbitrators an opportunity to present their views. The 1976 Rules do not contain this provision. It may be added in case the structure of the 1976 Rules is maintained.

Paragraph 6: When a sole arbitrator has to be appointed (article 8) or three arbitrators have to be appointed (articles 9 and 10) or an arbitrator has to be replaced (article 14), copies of the notice of arbitration and "if it exists" the response shall be sent to the A.A. With the words "if the response exits" the draft deviates from the "shall" in article 4 (1). Sending a copy of notice and response may be added to the 1976 Rules.

Paragraph 7: The A.A., (and here the Secretary-General of the PCA has not been mentioned) shall have regard to the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationality of the parties. This advisability may be added in case the 1976 Rules would be maintained.

In conclusion, the structure of the 1976 Rules should be maintained consistent with the mandate of the Working Group. The additions as suggested above could be incorporated in Section II (appointment of arbitrators).

Article 7 (Number of arbitrators), paragraph 1: If the parties have not previously agreed (in the Model arbitration clause) on the number of arbitrators and did not agree that there shall be only one arbitrator, three arbitrators will be appointed. It is another way than in article 5 of the 1976 Rules of stating that in UNCITRAL arbitration the number of arbitrators shall be one or three. The Draft extends the 15 days of article 5 to 30 days. However, as means of communication have considerably improved, an extension to 30 days should be omitted.

Paragraph 2: The 1976 Rules do not contain what has been provided in this paragraph. When a party, in case of a three-person arbitral tribunal, fails to appoint "his" arbitrator, the A.A. will at the request of a party, appoint a sole arbitrator if it determines this is more appropriate in view of the circumstances of the case. In my view, the A.A. should not be entitled to change the agreement of the parties. In case of failure of a party to appoint "his" arbitrator, the A.A. will make the appointment.

Article 8: This article contains for the appointment of a sole arbitrator the application of the list procedure. In case three arbitrators will be appointed, article 9 (3) contains the list procedure.

Article 10 (new), paragraph 1: When three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, the multiple parties jointly appoint the arbitrator. In practice this is already done, for example in ICC arbitrations.

Paragraph 2: If the parties agreed on a number of arbitrators "other than one or three" the arbitrators shall be appointed according to the method agreed upon by the parties. In UNCITRAL arbitration the number of arbitrators shall be one or three. It is highly unlikely that parties will ever agree on a number of arbitrators other than one or three and, in that case, regulate the method of appointment. However, exceptionally five arbitrators may be appointed. In that case it may be left to the parties to regulate the appointment. In the Rules this could be omitted.

Paragraph 3: The A.A. may revoke any appointment already made in the event of any failure to constitute the arbitral tribunal. Should the A.A. be entitled to intervene in appointments already made by the parties? In conclusion, article 10 may be omitted.

Article 11 (Challenge): Challenge has been dealt with in articles 11-13. A person who is approached for appointment shall disclose any circumstances likely to give rise to doubts about his impartiality and/or independence. In practice an arbitral institute sends a statement of independence to a candidate to be signed by him or her before the appointment. For doing so the institute does not need a model. The Draft produces a model statement of independence in an annex to the Rules. In my opinion this model statement is not needed but, if done an annex to the Rules should be avoided.

Article 14 (Replacement): The cases for replacement should be mentioned in a new first paragraph. In article 12 (3) of the Draft reference has already been made to an arbitrator failing to act or when it would be *de jure or de facto* impossible to perform his functions. The death or resignation of an arbitrator should be added, as stated in article 13 (1) of the 1976 Rules.

Paragraph 2: In view of exceptional circumstances, the A.A. may, after having given the parties and the remaining arbitrators a possibility to express their views, (a) appoint a substitute arbitrator or (b) in case of a three-person arbitral tribunal authorize the other arbitrators to proceed with the arbitration and render an award. The Draft permits under (b) the possibility of an award by an even number of arbitrators. When introducing this possibility the situation that the even number cannot reach agreement and a deadlock arises, should be regulated.

Article 17 (General provisions), paragraph 1: This paragraph contains provisions of a different character in 5 paragraphs. A proposal will be made to limit article 17 to paragraph 1 which will contain principles. In my opinion paragraphs 2-5 could be

omitted for the following reasons. The provisional timetable (para. 2) will already be established in the first preparatory meeting of the arbitral tribunal (A.T.) with the parties and/or their lawyers. Paragraph 3 refers to hearings for the presentation of evidence or for oral hearing, which are dealt with later on in the Rules. Communications to the A.T. shall be communicated to the parties at the same time. This may be stated at a more appropriate place. Paragraph 5 contains a new article on joinder which deserves an article of its own.

Proposal: Article 17 is the first article on the arbitral proceedings. If this article were limited to principles governing the arbitral proceedings, it would follow the English Arbitration Act 1996, which states the principles governing this new law in article 1. In the revised edition of the UNCITRAL Rules, it may be considered adding as a principle that the efficient conduct of the arbitral proceedings is a responsibility of the A.T., the parties and their lawyers.

During the more than 30 years that the UNCITRAL Arbitration Rules have been applied, it has become customary to hold "preparatory meetings" between arbitrators and the parties or their lawyers. These meetings take place on several occasions, the first one at the very beginning of the arbitration when a programme is drawn up for the conduct of the proceedings. The time periods for the exchange of statements of claim and defence may be determined but also whether the A.T. should give priority to important issues as their own jurisdiction or the law applicable to the substance of the dispute. Later on, preparatory meetings of the A.T. with the parties and/or their lawyers also regularly take place in preparation for the hearing of witnesses and the hearing of experts. These preparatory meetings reflect, in my opinion, the principle that the efficient conduct of the arbitral proceedings has become a joint responsibility of the A.T. and the parties or their lawyers.

For article 17, I thus propose to provide: "Subject to these Rules the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The efficient conduct of the arbitral proceedings is a joint responsibility of the arbitral tribunal and the parties and their lawyers."

Article 19 (Languages): Like the place of arbitration, the language may also be agreed upon in the Model arbitration clause. The Draft refers to agreement on the language or languages. Indeed in exceptional cases the use of more than one language may be permitted.

Article 20 (Statement of claim), paragraph 1: At the end of my comment on article 3 I already proposed the omission of the second sentence: election by claimant of his notice of arbitration as statement of claim.

Article 21 (Statement of defence): The election by respondent of its response as statement of defence should also be omitted. I refer to my comment at the end of article 4.

Article 22 (Amendments to claim or defence): According to the last sentence of this article, the counterclaim or claim for set-off may not be amended or supplemented if

this would fall outside the jurisdiction of the A.T. This may be omitted and left to the decision of the A.T.

Article 23 (The plea of lack of jurisdiction): This article is largely based on article 16 of UNCITRAL's Model Law on Arbitration. Paragraph 1 repeats article 16 (1). Paragraph 2 is based on article 16 (2). To the requirement that the plea shall be raised no later than in the statement of defence is added "or, with respect to a counterclaim or a claim for the purpose of a set-off in the reply to the counterclaim or to the claim for the purpose of a set-off". Paragraph 3 repeats that the A.T. may rule on the plea as a preliminary question or in an award on the merits as stated in article 16 (3). What has been stated in article 16 (3), that the party may request the court to decide on jurisdiction without appeal within 30 days upon receipt of the preliminary ruling, is not repeated. In any case the court has the last word on jurisdiction.

Article 26 (Interim measures): In the 1976 Rules, article 26 on Interim Measures (I.M.) contains only 3 paragraphs. In contrast, the Draft contains a provision on I.M.'s in 10 paragraphs, following the new provision on I.M in the 2006 amendment of the UNCITRAL Model Law. Paragraph (3) may cause discussions whether the A.T. may be satisfied with the introduction of I.M.'s under (a-c). Paragraph 10 repeats paragraph 3 of the 1976 Rules.

Article 27 (Evidence), paragraph 2 (new): Also an individual who is a party may testify as witness. Including "expert witnesses" should be omitted. In the second sentence reference is made to "witness statements" which may be presented in writing and signed by them. In practice these statements are often produced as they greatly facilitate the hearing of witnesses. However, these statements are drawn up by the lawyer who presents the witness. The IBA Rules on Taking Evidence refer in article 4 to these statements which shall be in writing and signed but should also affirm the truth. In the revised edition of the Rules these witness statements should receive more attention. In particular I refer to paragraph 7 of article 4 of the IBA Rules stating that each witness who has submitted a witness statement "shall appear for testimony at the Evidentiary Hearing unless the parties agreed otherwise". This should be added in the Draft.

Article 28 (Hearings): When witnesses are heard a "preparatory meeting" of the parties and/or their lawyers will take place. In important arbitrations the hearing of witnesses may take several days or even weeks. Finding dates when arbitrators, parties, their lawyers and the witnesses will be available can be fixed at this meeting. The names and addresses of the witnesses and the subject on which they will testify have to be submitted by the parties. Will the parties (their lawyers) or the A.T. begin with the interrogation? Will cross-examination be practiced? Are all witnesses familiar with the languages of the arbitration or is translation needed? Will there be a record of the hearing? Will parties, after the hearing, have the opportunity to express their views in writing? All this is not a subject for the Rules but may be dealt with in the preparatory meeting. Paragraph 1 also refers to an oral hearing of the parties. Here again questions may arise that may be discussed or regulated at a preparatory meeting. But in particular, when witnesses are to be heard, preparatory meetings take place. In paragraph 2, including expert witnesses should be omitted. Also in paragraph 3, expert witnesses should be omitted.

Article 29 (Experts appointed by the A.T.): As a rule the arbitrators will have enough expertise to decide the dispute for which they are appointed. Appointment of a tribunal expert is exceptional in contrast to the reports submitted by party-appointed experts.

Paragraphs 1 and 2: The A.T. will make the appointment after consultation with the parties. This is of importance in view of the requirement in paragraph 2 that the tribunal's expert should be impartial and independent. On objections made by a party the A.T. will decide.

For the issues on which the expert shall report the A.T. draws up the Terms of Reference (ToR). Discussion of a draft with the parties is useful. It should be avoided, later on, that disputes arise about the interpretation of the ToR.

Paragraph 4: When the parties have received a copy of the expert's report, the A.T. shall give them an opportunity to express their opinion on the report in writing. In writing should be omitted. The parties will get full opportunity to express their opinion on the report at the hearing of the experts. At this hearing they will be assisted by the experts they have appointed.

Paragraph 5: This paragraph deals with the presence at the hearing of party-appointed experts, called expert witnesses. Article 5 of the IBA Rules on Taking Evidence deals with these experts in six paragraphs. According to paragraph 3, the A.T. may order these experts to meet and confer on their different opinions and to record the result of this conference. A new paragraph 6 could be added to article 29, as follows: "Before the hearing as set out in paragraph 5 the arbitral tribunal may order the party-appointed experts to meet and confer on the same or related issues. At such meeting, these experts shall attempt to reach agreement on the issues as to which their opinions differ. A record in writing on which issues they reach agreement or remain in disagreement shall be communicated to the arbitral tribunal."

Article 33 (Decisions): According to article 7 the number of arbitrators shall be one or three. The number shall be uneven.

Paragraph 1: This paragraph states "when there is more than one arbitrator" the award shall be made by a majority of the arbitrators. "When there is more than one arbitrator" should be omitted. Only in case of an uneven number of arbitrators, the decision of the A.T. can be made by a majority. Or would the Draft have in mind an appointment of five arbitrators? In UNCITRAL arbitration this never occurs.

Paragraph 2: On questions of procedure, the presiding arbitrator may decide alone. In the first preparatory meeting of the A.T. with the parties and/or their lawyers the chairman will already be authorized to decide on questions of procedure such as extensions of time limits. It should be omitted that the decision of the chairman is subject to revision by the A.T.

Article 34 (Form and effect of the award), paragraph 2: All awards shall be in writing, final and binding on the parties and shall be carried out without delay. The second sentence provides that parties, in so far as they may validly do so, waive their right to any form of appeal, review or recourse against an award to any court or other competent authority. However, this is not a subject for the Rules but may have been provided in the applicable arbitration law as appears already from the exception made in paragraph 2 for requesting the setting aside.

Paragraph 4: The award shall be signed by arbitrators, shall contain the date on which the award was made and shall indicate the place of arbitration. In case of failure to meet these requirements, the award may be set aside. When commenting on article 38 the proposal will be made to bring these failures under the possibility of correction.

Article 35 (Applicable law, amiable compositeur), paragraph 1: The A.T. shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation, the A.T. shall apply the law which it determines appropriate. States, modernizing their arbitration law like Germany in 1998, provide "Failing any designation by the parties, the arbitral tribunal shall apply the law of the state with which the subject/matter of the proceedings is most closely connected." For article 35 of the Rules this may be considered.

Article 36 (Settlement or other grounds for termination): The Model Law deals with Settlement in article 30 and with Termination of the proceedings in article 32. Dealing separately with settlement and termination may be preferred.

Settlement: Before the award is made, parties may agree on the settlement of their dispute. If so, the A.T. may incorporate the parties' settlement in an award on agreed terms. No reasons for this award have to be given (para. 1). When an arbitral award on agreed terms is made, article 34 (2, 4 and 5) applies. The parties may abstain from requesting the A.T. to incorporate their settlement in an award on agreed terms and prefer to keep the settlement confidential. In that case, the parties will inform the A.T. that the dispute has been settled and request that the proceedings be terminated. Thereafter, the A.T. will request its remuneration for the work done.

Termination: Continuation of the arbitral proceedings may become unnecessary or impossible. In that case the A.T. informs the parties of its intention to issue an order for termination. The Model Law in article 32 provides for termination if the claimant withdraws his claim unless the respondent objects and the A.T. recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute (article 32 under (2) (a)). Under article 32 (2) (b), termination takes place when the parties agree on termination. Article 32 (2) (c) provides what the Draft states at the beginning of paragraph 2, i.e. that continuation of the arbitral proceedings becomes unnecessary or impossible. As a rule the Draft follows the Model Law when the same subject is dealt with in the Rules. In the case of article 36, this may also be done.

Article 37 (Interpretation), paragraphs 1 and 2: Within 30 days after receipt of the award, a party may request the A.T. to give an interpretation (para. 1). The A.T. shall give its interpretation in writing within 45 days after the receipt of this request. Its interpretation shall form part of the award (para. 2). At the Iran/US Claims Tribunal in The Hague, arbitrating under the UNCITRAL arbitration rules, requests for interpretation have regularly been made. However, so far all requests have been rejected. In fact the requests attempt to obtain a modification of the award. Could a remedy against abuse of interpretation be introduced? Perhaps the A.T. could determine extra remuneration for the time and work caused by a completely unfounded request.

Article 38 (Correction of the award), paragraph 1: Within 30 days after receipt of the award a party may request the A.T. for correction of errors in computation, clerical errors, typographical errors or any error of a similar nature. The failures of a

signature, date or place of the arbitration do not fall under these errors. However, these failures could very simply be rectified when they are discovered and prevent the award from being set aside on the basis of such failures. The failure of a signature, the failure of date of the award and the failure of place where the award has been made should be added to paragraph 1.

Section V — Costs: The costs of arbitration are part of the award and dealt with in Section IV. However, in Section V costs could be dealt with separately as costs are a very special feature of the arbitral proceedings.

Article 40 (Definition of costs): Paragraph 2 states that only the costs referred to in (a) and (f) are included. Under (a) and (b) the fees and expenses of the arbitrators have been mentioned. Article 41 deals with these fees and expenses in detail.

Article 41 (Fees and expenses of the arbitrators), paragraph 1: The fees and expenses of the arbitrators should be reasonable in amount.

Paragraph 2 refers to a schedule of fees that will be available in case an arbitral institute has been appointed as A.A. In case a person, including the Secretary-General of the PCA, has been appointed, a particular method for determining the fees for arbitrators in international cases applies. Paragraph 2 states that the A.T. shall take the particular method into account to the extent it considers appropriate in the circumstances of the case. However, on this particular method paragraph 2 is further silent.

Paragraph 3: Promptly after its constitution the A.T. shall submit to the parties a proposal. This proposal will contain the particular method. Will this proposal be in writing? In the first meeting of the A.T. with the parties this proposal will be therefore discussed. At the discussion of this proposal with the parties the remuneration of the arbitrators will also be discussed. This may be regarded as an unpleasant beginning of the arbitration. This becomes still more unpleasant when there is no agreement on the proposal. In that case any party may, within 15 days of receiving the proposal of the A.T., refer the proposal to the A.A. for review. In case the A.A. finds that the proposal of the A.T. is inconsistent with paragraph 1 (reasonable), the A.T. shall make the necessary adjustments. The adjustments of the A.A. are binding on the A.T. No time limit has been given for the decision of the A.A. on the review.

Paragraph 4 deals with the determination of the fees in the award and provides a review in case the fees and expenses would be manifestly excessive. The request for review shall be made by a party within 15 days of receiving the A.T.'s determination. In case there would be no A.A., the request should be made to the Secretary-General of the PCA. This reference to the Secretary-General of the PCA should be omitted. In UNCITRAL arbitration there always will be an A.A. UNCITRAL is not an arbitral institute with a schedule. The A.A. shall within 45 days make any necessary adjustments to the A.T.'s determination. The adjustments are binding on the parties and shall be included by the A.T. in its award and implemented in a correction to the award pursuant to article 38. If it would be regarded as a correction, this should be mentioned in article 38. However, an adjustment cannot be made part of the award. An award cannot be made by others than the arbitrators.

Paragraph 5: Throughout the procedure the A.T. shall proceed with the arbitration. This applies to the procedure under paragraph 3 and paragraph 4. However, it should only apply to the procedure of paragraph 3 (the proposal). Proceeding with the arbitration should not apply to paragraph 4 when an award is rendered.

Remark: To article 41 the Draft adds a remark. In the Remark is stated that the Working Group agreed on the principle of providing a more transparent procedure for the determination of the fees and expenses of the A.T. This may even be regarded as a principle for the entire revision of the Rules. However, whether article 41 is an example of transparency may be doubted.

Article 43 (Deposit), paragraph 1: On its establishment, i.e. at the first meeting of the A.T. with the parties, the A.T. may request the parties to deposit an equal amount as advance for the costs, referred to in article 40 (2) (a) to (c). This includes a deposit for the remuneration of the tribunal's expert (c). However, at that time it will not be known whether the tribunal will appoint an expert of its own. For the remuneration of the A.T. a deposit may be established in the first meeting with the parties.

Paragraph 3: The A.T. shall fix the amounts of any deposits or supplementary deposits only after consultation with the A.A. The A.A. may make comments on these amounts. Whether the A.T., upon receipt of the comments, will modify its amounts is left to the decision of the A.T. In this case there is no review.

Second set of comments

1. Article 2, paragraph 4: "Attempted to be delivered under paragraph 2" makes it unclear as to the date on which the notice is deemed to have been received since paragraph 2 refers of "reasonable efforts" made prior to sending the notice "to the addressee's last known place of business or address". The wording of the corresponding paragraph in article 2 of the 1976 version is clearer when mentioning: "on the day it is so delivered".

2. Article 17, paragraph 5 (Joinder of third persons): rather than "prejudice to any of those parties" (in lines 5-6), it would be preferable to say: "prejudice to any of the parties to the proceedings" to make clear that the prejudice has regard to those that are already parties to the proceedings.

3. Article 21, paragraph 3: The wording "or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances" might be deleted since this point is covered in a more comprehensive way in draft article 22.

4. Article 26, paragraph 1: It should be provided that before issuing an interim measure the other party shall be heard, *ex parte* measures being excluded.

5. Article 26, paragraph 2: Does the non-exhaustive list of cases under this paragraph allow for the granting of a security for costs? This has been an open issue under the 1976 version of article 26, made part of interim measures by other arbitration rules (LCIA, art. 25.1 (a)).

6. Article 26, paragraph 7: The disclosure provided by this paragraph should not be made dependent on the arbitral tribunal requiring it. It should be a duty of any party to make such disclosure.

7. Article 27, paragraph 2: If not otherwise directed by the arbitral tribunal, statements by fact witnesses and reports by expert witnesses "shall" (not just "may") be presented in writing and signed by them.

8. Article 28, paragraph 1: The date of the oral hearing should be part of the "provisional timetable of the arbitration" established after consulting the parties pursuant to article 17, paragraph 2, so that no "adequate advance notice" is needed.

9. Article 28, paragraph 4: Examining a witness through telecommunication rather than in the physical presence at the hearing makes a significant difference, particularly for the party intending to cross-examine it. The paragraph should provide that this manner of witness examination may be directed by the arbitral tribunal "after consultation with the parties".

10. Article 31: Rather than the "hearings" (which has the meaning given by article 28), what should be declared closed is the "proceedings" (see ICC Rules, art. 22.1).

11. Article 31, paragraph 1: Rather than inquiring of the parties, thus offering a way of reopening the debate, it should be for the arbitral tribunal to establish whether the parties have been given the opportunity of presenting their case, as contemplated by article 17, paragraph 1.

12. Article 33, paragraph 1: Provision may be added to the effect that, failing a majority, the President of the arbitral tribunal shall decide alone.

13. Article 35, paragraph 1: In the absence of choice by the parties, the arbitral tribunal should be authorized to apply "rules of law", rather than a "law". Although the draft reflects (but only partially) the Model Law (art. 28.2), the suggested amendment would better reflect the prevailing trend (ICC Rules, art. 17.1; LCIA Rules, art. 22.3; SCC Rules, art. 22.1).

14. Article 41: The draft being still under consideration, only few comments are made on substantive aspects.

The principle of providing a more transparent procedure for the determination of the arbitral tribunal's fees and expenses is shared.

No mention is made by the draft of the most common practice, a direct agreement between the parties and the arbitrators regarding the latter's fees and expenses.

The procedure envisaged by the draft (in paras. 3 and 4, to a large extent repetitive), should provide for: (a) the need to determine the arbitral tribunal's fees and expenses as soon as practicable after its constitution (para. 4, at the end, assumes that "adjustments" to the arbitral tribunal's determination of fees and expenses may intervene also when "the award has already been issued"), also in light of (b) below; (b) the right of an arbitrator to withdraw, should the third party's (be it the appointing authority or the PCA) adjustments to the arbitral tribunal's determination be held unacceptable.

15. Article 43, paragraphs 1 and 3: The advance for costs should cover also the costs under article 40, paragraph 2 (f). This is not clear under either paragraph 1 or paragraph 3.