The Hague Rules
On Business and Human Rights Arbitration

DRAFT ARBITRATION RULES ON BUSINESS AND HUMAN RIGHTS

Prepared by the Drafting Team

of the Hague Rules on Business and Human Rights Arbitration[1]

Bruno Simma, Chair

Diane Desierto

Martin Doe Rodriguez

Jan Eijsbouts

Ursula Kriebaum

Pablo Lumerman

Abiola Makinwa

Richard Meeran

Sergio Puig

Steven Ratner

Giorgia Sangiuolo

Martijn Scheltema

Anne van Aaken

Katerina Yiannibas

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[1] For a description of the Project, the members of the Working Group, the Drafting Team and Project Management and relevant documents see: https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/

CILC
Center for International Legal Cooperation

Den Haag
VREDE EN RECHT

INTRODUCTORY NOTE

TO THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION

The Hague Rules on Business and Human Rights Arbitration provide a set of procedures for the arbitration of disputes related to the impact of business activities on human rights. The Hague Rules are based on the UNCITRAL Arbitration Rules, with modifications needed to address certain issues likely to arise in the context of business and human rights disputes. As with the UNCITRAL Arbitration Rules, the scope of the Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States and State entities and civil society organizations. Equally, the Hague Rules purposefully do not define the terms "business", "human rights", or "business and human rights." For the purposes of the Hague Rules, such terms should be thus understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. However, in the vast majority of cases, no definition of these terms should be necessary at all.

Like the UNCITRAL Rules, the Hague Rules do not address the modalities by which the parties to the arbitration may consent to it nor the content of that consent, which are matters for the parties. Consent remains the cornerstone of business and human rights arbitration, as with all arbitration, and it can be established before a dispute arises, e.g. in contractual clauses, or after a dispute arises, e.g. in a submission agreement (*compromis*). Model Clauses may provide potential parties with options for expressing their consent to arbitration. In addition, like the UNCITRAL Rules, the Hague Rules do not address enforcement of arbitral awards made under these Rules, which are governed by national law and various treaty obligations, including in most cases the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While these Rules have been conceived as a uniform set of rules, we acknowledge that the parties remain entitled to exercise their discretion in opting out of certain provisions that do not respond to their specific needs as arising out the dispute at issue. Certain other Model Clauses are being developed in this respect.

Note: The Drafting Team contemplates developing a series of model clauses in order to allow for the easy adaptation of certain provisions of these Rules for specific situations—e.g. to allow for one-way cost-shifting or no cost-shifting—where so agreed by the parties.

THE HAGUE RULES
ON BUSINESS AND HUMAN RIGHTS ARBITRATION

Preamble

1. The Hague Rules on Business and Human Rights Arbitration (hereinafter called the "Rules") provide a set of procedures for the arbitration of disputes related to the human rights impacts of business activities.

2. In particular, arbitration under the Rules can provide:

(a) For the possibility of a remedy for those affected by the human rights impacts of business activities, as set forth in Pillar III of the United Nations Guiding Principles on Business and Human Rights, serving as a non-State-based non-judicial grievance mechanism under Principle 31 of the UN Guiding Principles; and

(b) Businesses with a mechanism for addressing adverse human rights impacts with which they are involved, as set forth in Pillar II and Principles 11 and 13 of the UN Guiding Principles.

3. Arbitration under the Rules is not meant as a general substitute for:

(a) State-based judicial mechanisms, which should remain the primary form of remedy for those affected by the human rights impacts of business activities;

(b) State-based non-judicial mechanisms.

4. The settlement of disputes by non-adversarial dispute settlement mechanisms, such as mediation, conciliation, negotiation and facilitation is encouraged, including at any stage of an arbitration proceeding that has already been commenced.

5. Nothing in these Rules should be read as creating new international legal obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

6. These Rules are based on the 2013 UNCITRAL Arbitration Rules with changes in order to reflect:

(a) The particular characteristics of disputes related to the human rights impacts of business activities;

(b) The possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities;

(c) The potential imbalance of power that may arise in disputes under these Rules;

(d) The public interest in the resolution of such disputes, which requires among other things a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States;

(e) The importance of having arbitrators with expertise appropriate to such disputes and bound by high standards of conduct;

(f) The possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses;

(g) […]

Commentary

The preamble states certain purposes and overarching principles about the Hague Rules.

Paragraph 2 summarizes two key purposes of business and human rights arbitration.

First, it can provide a remedy for those affected by the human rights impacts of business activities in situations where more traditional remedies, such as judicial proceedings, are not available or effective. The possibility of a non-State-based non-judicial remedy is specifically contemplated in Principle 31 of the UN Guiding Principles on Business and Human Rights.

Second, arbitration can assist business in meeting their responsibilities under the UN Guiding Principles on Business and Human Rights to both respect human rights (Pillar II) and provide a remedy to victims (Pillar III). Business and human rights arbitration could be relied upon by corporations to enforce contractual human rights commitments vis-à-vis their business partners (e.g. in supply chains and development projects), and so prevent or resolve business and human rights violations.

Thus, the Rules intend to provide both a means for access to remedy for rights-holders affected by business activity and a human rights compliance and risk management strategy for companies themselves. It is also worth noting that for States, the encouragement, facilitation or even prescription to use business and human rights arbitration would also constitute an additional tool for them to fulfil their responsibilities under UN Guiding Principles on Business and Human Rights Pillars I and III.

Paragraphs 3 clarifies that arbitration under these Rules is meant to address a gap in access to remedy for the human rights impacts of business activities but is by no means a substitute for existing mechanisms. With respect to State-based judicial mechanisms (principally national courts), the gap in enforcement of business and human rights obligations may arise due to reasons that include issues of capacity in the national courts of the State where the underlying conduct took place; jurisdictional or substantive law restrictions on law suits in the courts of a State of nationality of a parent company; and costs of litigation. Ideally, such a gap in enforcement would be addressed through improvements in the functioning of national courts and development of private international law rules applicable to cross-border disputes involving multinational business enterprises. With respect to non-State-based mechanisms, arbitration under these Rules is not meant to displace or discourage resort to mechanisms such as the OECD National Contact Points. On the contrary, many provisions of these Rules seek to facilitate resort to such means of settling disputes, as well as other formal and informal means of amicable dispute resolution.

Paragraph 4 affirms the importance of other non-adversarial modes of resolving business and human rights disputes, which the parties can deploy instead of arbitration at any point during their dispute.

Paragraph 5, is based on the introduction to the PCA Environmental Rules and is in line with the UN Guiding Principles on Business and Human Rights, both of which clarify that an instrument such as these Rules cannot create new international legal obligations, but rather represents a set of Rules for dispute settlement that parties can choose to apply.

Paragraph 6 highlights [six] key features of business and human rights arbitration that necessitate modifications and additions to the UNCITRAL Arbitration Rules. Where those Rules offer adequate procedures for business and human rights arbitration, they have been left unchanged; but throughout the Hague Rules are changes justified by the nature of business and human rights arbitration. The result is that an arbitration that raises no particular issues relating to business and human rights may proceed in a manner largely akin to an arbitration under the UNCITRAL Arbitration Rules, while arbitrations dealing with business and human rights will benefit from specialized procedures.

Comments on Preamble:

Section I. Introductory rules

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may expressly agree upon in writing. The Rules include the Code of Conduct for Arbitrators (hereinafter called the "Code of Conduct"). The characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules.

2. The parties agree that any dispute that is submitted to arbitration under these Rules shall be considered to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter called the "New York Convention").

3. Agreement by a party to arbitration under these Rules constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.

4. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

5. The International Bureau of the Permanent Court of Arbitration (hereinafter called the "PCA") shall serve as the repository under Article 38. In addition, upon written request of any party, and subject to the agreement of the arbitral tribunal and the Secretary-General of the PCA, the PCA shall also provide secretariat services and serve as registry.

6. As far as possible and without prejudice to the right of any party to commence arbitration under these Rules, the parties shall endeavor to resolve any dispute amicably through negotiations, conciliation, mediation or facilitation. Such settlement may be agreed at any time, including after arbitration proceedings under these Rules have been commenced. A disputing party shall give favorable consideration to a request for negotiations, conciliation, mediation or facilitation by the other disputing party.

Commentary

- The modifications to the UNCITRAL Arbitration Rules made in paragraph 1 impose a formal requirement of an expression in written form for deviations from the Rules, which is taken from Article 1(1) of the PCA Environmental Rules. This approach reflects the general desire to avoid too many deviations from these Rules, which might upset the balance sought in various provisions of the Rules among the many varied legitimate interests at play in the resolution of business and human rights disputes. Arbitration rules cannot, of course, limit the parties' autonomy to derogate from these Rules as they choose (consistent with mandatory applicable law) as long as such derogations are made in the proper form.
- Although the stipulation of "commerciality" in paragraph 2 is not binding upon national courts tasked with deciding upon the enforcement of an award rendered under these Rules in accordance with the New York Convention, it can be expected that national courts will accord substantial weight to the expectations and intentions of the parties as expressed in this provision. The provision may therefore operate in many cases to preclude a party from making an objection to the enforcement of an award rendered under these Rules on the basis of a "commercial" reservation made by the relevant Contracting State(s) to the New York Convention. In any event, it is hoped that national courts will avail themselves of their discretion, both under the New York Convention and otherwise applicable law, to

enforce an award rendered under these Rules where they conclude that such award is rights-compatible and otherwise satisfies the requirements for recognition and enforcement.

- The waiver-of-immunity provision in paragraph 3 is taken from the PCA Environmental Rules. The provision clarifies that, regardless of the general position under applicable law, an agreement to arbitrate under these Rules constitutes a waiver of sovereign or international organization immunity from arbitral jurisdiction but does not constitute a waiver of such immunity in respect of measures relating to the execution of an award (or other decision) rendered under these Rules. A separate and explicit waiver would be necessary in order to waive immunity from execution.

- Issues of proper and informed consent may be particularly sensitive in the business and human rights context, especially with regard to the agreement by natural persons to the arbitration of non-contractual matters. No express additional requirements are imposed for obtaining or proving such consent to arbitration under these Rules. Nevertheless, an arbitral tribunal under these Rules remains under a special duty to verify that natural persons have given proper and informed consent to arbitrate their claims under these Rules, in particular for non-contractual claims, without relying on unwarranted presumptions of knowledge and consent.

- Without prejudice to the parties' ability to agree on another institution to administer and support the arbitral proceedings, paragraph 5 foresees that the PCA will serve this role where needed and not agreed or decided otherwise in any particular case. Parties are encouraged not to derogate from the PCA's role as repository under Article 38 of the Rules, as this would defeat certain of the objectives of the transparency provisions under these Rules.

- Paragraph 6 is meant to highlight the importance of alternative dispute settlement mechanisms in business human rights disputes, acknowledging that such disputes should in principle be resolved amicably. The provision should be read in conjunction with Article 17(3), Article 42 (Settlement or other grounds for termination), Article 51 (Mediation) and paragraph 4 of the Preamble. These Rules have been elaborated in order to fill a gap in access to remedy by facilitating the settlement of disputes where alternative avenues are not available or adequate.

Comments on Article 1:

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

(a) Received if it is physically delivered to the addressee;

(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee, or through diplomatic channels in the case of a State.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Commentary

Paragraph 2(3)(b) clarifies the appropriate channel for service in the case of a State party. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 2:

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of or in relation to which the dispute arises;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the designation of an appointing authority referred to in Article 6, paragraph 1;

(b) A proposal for the appointment of a sole arbitrator referred to in Article 8, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in Article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Commentary

Given the broad scope of the Rules, the term "arbitration agreement" referred to under Article 3(3)(c) should be afforded the broadest possible meaning. In particular, the term is meant to include any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship in or from which consent to refer the dispute to arbitration under these Rules may be found, including with respect to third parties to the relevant instrument or relationship.

Comments on Article 3:

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, or such other period as may be set by the appointing authority, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to Article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in Article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in Article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in Article 9 or 10;

(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;

(f) A notice of arbitration in accordance with Article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. 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, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Commentary

Paragraph 1 grants the appointing authority the power to modify the deadline for the respondent to submit its response to the notice of arbitration. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 4:

Representation and assistance

Article 5

1. Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. The parties' communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

2. Where a party is unrepresented and has limited financial resources and legal knowledge, the arbitral tribunal shall endeavor, without compromising its independence and impartiality, to ensure that the unrepresented party is given an effective opportunity to present its case in fair and efficient proceedings.

Commentary

Paragraph 2 responds to a number of scenarios where inequality of arms among the disputing parties may negatively impact on the overall fairness of the arbitration proceedings, including in terms of legal representation. These scenarios may involve cases between rights-holders and businesses as well as, for instance, a claim started by a large multinational company against a small supplier by means of an arbitration clause included in the supply contract. Equally, counterclaims may impact on the value of an arbitration proceeding and impact on the initial decision by claimants to represent themselves. Thus, the tribunal should make efforts to ensure that an unrepresented party can present its case in a fair and efficient way.

Comments on Article 5:

Appointing authority

Article 6

1. Unless the parties have already agreed on the choice of another appointing authority, the appointing authority shall be the Secretary-General of the PCA.

2. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to serve as a substitute appointing authority.

3. In exercising their functions under these Rules, the appointing authority and the PCA may require from any party and the arbitrators the information they deem necessary and they shall 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 PCA shall also be provided by the sender to all other parties.

4. The appointing authority shall have regard to the qualifications of the arbitrators indicated under Article 10-*bis* below, as well as to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Commentary

Article 6 foresees that the PCA, given its intergovernmental nature and experience in business and human rights disputes, will serve as appointing authority unless otherwise agreed by the parties. Considering that the legitimacy of the arbitral proceedings is closely tied to the selection of suitable arbitrators, parties are encouraged to consider the matter carefully before proceeding to choose a different appointing authority.

Comments on Article 6:

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

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 have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph 1, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in Article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Commentary

Paragraph 2 grants the appointing authority the power to determine that it would be more appropriate to appoint a sole arbitrator instead of a tribunal of three arbitrators, if the parties

have not previously agreed on the number of arbitrators. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 7:

Appointment of arbitrators (Articles 8 to 10-*bis*)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, or such other period as may be set by the appointing authority, the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, or such other period as may be set by the appointing authority, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Commentary

As with other similar provisions in the Rules, paragraphs 1 and 2(b) grant the appointing authority the power to modify deadlines under the Rules. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 8:

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator, or such other period as may be set by the appointing authority, the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator, or such other period as may be set by the appointing authority, the two arbitrators have not agreed on the choice of the remaining arbitrators or the presiding arbitrator, the remaining arbitrators or the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under Article 8.

Commentary

As with other similar provisions in the Rules, paragraphs 2 and 3 grant the appointing authority the power to modify the deadline for the appointment of the second arbitrator. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 9:

Article 10

1. For the purposes of Article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Commentary

Article 10 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 10:

Article 10-*bis*

1. Unless otherwise agreed by the parties or unless the appointing authority determines in its discretion that it is not appropriate for the case, the appointment of arbitrators under these Rules shall be made in accordance with the following:

(a) No person who has previously been involved in the dispute in any capacity may be appointed as an arbitrator;

(b) Persons appointed to serve as arbitrators under these Rules shall be persons of high moral character, who may be relied upon to exercise independent and impartial judgment. Without prejudice to Articles 11 to 13, in assessing the impartiality, independence or qualifications of arbitrators, the parties, the arbitrators and the appointing authority shall apply the annexed Code of Conduct.

[2. Parties, arbitrators and the appointing authority shall take into account the advisability of forming a diverse tribunal.]

3. The presiding arbitrator shall have demonstrated expertise in international dispute resolution and in the subject matter of the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry.

[4. Unless the parties agree otherwise, the presiding arbitrator shall not be a national of States whose nationals are parties, or of any State that is a party. The nationality of a party shall be understood to include those of its affiliates and controlling shareholders or interests.]

5. The arbitrators shall comply with the annexed Code of Conduct.

Commentary

- Article 10-*bis* is a wholly new article as compared to the UNCITRAL Arbitration Rules. In the light of the special characteristics of business and human rights disputes, as well as the importance of impartiality, independence and expertise to the legitimacy of business and human rights arbitration under these Rules, specific provisions have been developed to address these issues in the selection of the arbitrators under these Rules.

- Paragraph 1 states the general principle that no arbitrator should have had any prior involvement in the dispute. It also makes the annexed Code of Conduct applicable to all appointments and challenges. The Code of Conduct provides further guidance on the application of the standards of impartiality and independence set forth in Articles 11 to 13 in the context of arbitration under these Rules.

- Paragraph 2 encourages the parties, the arbitrators and the appointing authority to seek the formation of a diverse tribunal. The relevant grounds of diversity may vary depending on the circumstances of the case.

- Paragraph 3 preserves the autonomy of the parties in the selection of their party-appointed arbitrators. However, the presiding arbitrator is required to have demonstrated expertise

in international dispute resolution and in the subject matter of the dispute (e.g. business and human rights law and practice, relevant national and international law, or knowledge of the relevant field or industry). The breadth of the qualifications potentially included under paragraph 3 for the presiding arbitrator privileges effective decision-making in the particular case.

- **Question:** The Drafting Team has opted for the Code of Conduct annexed to these Rules over reference to the IBA Guidelines. While the IBA Guidelines may in many cases reflect best practices, they were adopted by a private organization and in certain cases privilege the interests of private practitioners over the highest international standards in international dispute resolution. Do you agree with this decision?

Comments on Article 10-*bis:*

Disclosures by and challenge of arbitrators (Articles 11 to 13)

Article 11

When a person is approached in connection with her or his possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence. An arbitrator, from the time of her or his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by her or him of these circumstances. In assessing the circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence a person approached in connection with her or his possible appointment as an arbitrator shall be guided by the highest international standards as reflected in the Code of Conduct.

Commentary

The last sentence of Article 11 incorporates the Code of Conduct as part of the standards for arbitrator disclosures. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 11:

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any qualifications agreed to by the parties in their arbitration agreement.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of her or his performing her or his functions, the procedure in respect of the challenge of an arbitrator as provided in Article 13 shall apply.

Commentary

Paragraph 1 envisages the possibility that the parties may agree to further qualifications that the arbitrators must possess in order to serve under these Rules. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 12:

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within [15] [30] days after it has been notified of the appointment of the challenged arbitrator, or within [15] [30] days after the circumstances mentioned in Articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from her or his office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within [15] [30] days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

5. Unless otherwise agreed by the parties, the appointing authority shall give reasons for the decision on the challenge.

Commentary

- Under paragraph 5, the default rule is that the appointing authority will issue a reasoned decision on any arbitrator challenge. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.
- **Question:** The Drafting Team envisages two possible sets of time frames for arbitrator challenges under paragraphs 1 and 4. Which set of time frames would you opt for and why?

Comments on Article 13:

Replacement of an arbitrator

Article 14

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 even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views:

(a) Appoint the substitute arbitrator; or

(b) Authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Commentary

Article 14 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 14:

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform her or his functions, unless the arbitral tribunal decides otherwise.

Commentary

Article 15 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 15:

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Commentary

Article 16 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 16:

Section III. Arbitral proceedings

General provisions

Article 17

1. 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 a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair and efficient process for resolving the parties' dispute, including in particular by giving due regard to the urgency of the alleged human rights impacts.

2. As soon as practicable after its constitution, and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, modify any period of time prescribed under these Rules or agreed by the parties.

3. The arbitral tribunal may take steps to facilitate the settlement of the dispute before it. The parties agree that the arbitral tribunal's facilitation of settlement in accordance with this paragraph will not be asserted by any party as grounds for the challenge of any of the arbitrators or for the set aside or refusal of enforcement of any award rendered by the arbitral tribunal.

4. The arbitral tribunal shall decide whether to hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

5. The arbitral tribunal may designate specific representatives of parties who may be informed of the identity of another party if the latter has a legitimate interest in such a designation. All representatives so designated shall observe confidentiality in connection with this identity.

6. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

Commentary

- Article 17 delineates the general principles underlying business and human rights arbitration proceedings. The Rules provide the arbitral tribunal with the broadest procedural powers to organize the proceeding in the most fair and efficient way based on the circumstances of each case. The second sentence of Article 17(1) provides guidance to the tribunal regarding particular issues associated with business and human rights arbitration. Among the powers afforded to the tribunal are facilitating settlement (see paragraph 3), imposing limits on document production requests (see Article 27) or written submissions (see Article 24), managing the organization of hearings through technological means (see Article 28), conducting oral hearings or documents-only procedures (see paragraph 4) and joining or separating parties, proceedings and issues (see Articles 17-*bis* and 23). These powers shall be understood as only limited by the agreement of the parties and the mandatory law or rules of law applicable to the arbitration.

- Paragraph 3 provides that, as is the case in many national court systems, arbitral tribunals are encouraged to facilitate to the greatest possible extent and at any point during the proceedings the amicable resolution of the disputes before them. Processes for such resolution include facilitation, mediation, negotiation and any other mean of alternative dispute resolution of which the parties may choose to avail themselves. This provision should be read in conjunction with the preamble (paragraph 4), Article 1(6) and Article 51 on mediation.

Comments on Article 17

Multiparty claims

Article 17-*bis*

1**.** In so far as possible, claims with significant common legal and factual issues shall be heard together. The arbitral tribunal may adopt special procedures appropriate to the number, character, amount and subject-matter of the particular claims under consideration.

2. The arbitral tribunal may, at the request of any party, allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument of which the relevant arbitration agreement forms part, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted. Third persons so joined shall become parties to the arbitration agreement for the purposes of the arbitration. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

3. Notwithstanding paragraph 2, where a third person is a party to or a relevant third party beneficiary of the arbitration agreement, the arbitral tribunal shall not deny the joinder solely on the basis that such joinder might prejudice other parties.

Commentary

- Whereas the UNCITRAL Arbitration Rules provide a single paragraph on joinder within Article 17 (General provisions), a separate Article 17-*bis* has been created to govern multiparty claims in these Rules in light of the likelihood of such claims.

- Paragraph 1 expresses the general principle of efficiency that claims with significant common issues should be heard together. This provision does not expand the jurisdiction of the arbitral tribunal, which remains subject to the requirement of the consent of the parties and the rules on joinder set forth in paragraphs 2 and 3. The second sentence does, however, empower the arbitral tribunal to adopt special procedures (such as those envisaged under other arbitration rules – e.g. the AAA and JAMS class arbitration rules) where appropriate in order to efficiently handle large numbers of parties and claims which fall within the jurisdiction of the arbitral tribunal. In this vein, this provision intends to set aside the presumption that exists in certain jurisdictions whereby an agreement to arbitrate is construed as a waiver of the right to proceed with a class, mass, collective or multi-party action in any forum, including in an arbitration brought under that very arbitration agreement. The question of whether class, mass, collective or multi-party procedures are available and appropriate for the particular arbitration is instead left to be determined by the arbitral tribunal taking into account the particular facts and circumstances of the case, including in particular the terms of the arbitration agreement and the context in which it was concluded. Notwithstanding the foregoing, given that in some jurisdictions consent to class arbitration will not be inferred and must be explicit, parties are advised to address this matter expressly in their arbitration agreement [(e.g. by using the model clause provided for this purpose in the annex to these Rules)].

- Paragraphs 2 and 3 cover two different situations, namely that of third persons identified as parties or third party beneficiaries of the underlying *legal instrument* of which the arbitration clause forms part (paragraph 2) and that of parties to or third party beneficiaries of the *arbitration agreement* itself (paragraph 3):

  i. In the first scenario, the underlying legal instrument in which the arbitration clause is contained grants certain rights to third persons – for instance by providing that the parties to the agreement commit themselves to the protection of the rights of third parties – who are thus recognized as having an interest in the enforcement of such rights through arbitration proceedings. In that case, it will be for the arbitral tribunal to balance the interest of such third persons in joining the proceedings against the possible competing interests of the existing parties to the arbitration proceedings that such third persons should not be allowed to participate.

  ii. In the second scenario, the arbitration agreement itself foresees the right of certain third persons to join the arbitration proceedings. In that case, the arbitral tribunal would not have the discretion to negate such rights solely on account of ostensible prejudice to the parties to the proceeding, but would need to justify such a decision to disallow joinder on the basis of compelling reasons such as serious prejudice to the arbitral proceedings (e.g. in terms of witnesses who may be intimidated by the intervention of certain parties or the disruption caused by an untimely application for joinder that could have been made earlier).

Comments on Article 17-*bis*:

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Commentary

As set forth in the preamble to these Rules, one of the overall objectives of business and human rights arbitration is to enhance access to remedy. The parties and the arbitral tribunal should therefore take care to select a legal place (or "seat") of the arbitration where business and human rights disputes are arbitrable (i.e. legally allowed to be settled by arbitration), so as not to frustrate the agreement of the parties to submit such disputes to arbitration.

At the same time, an award that is not rights-compatible does not further the objective of access to remedy. [Although Article 40(4) already requires the arbitral tribunal to [ensure] [satisfy itself] that its award is human rights-compatible,] it is desirable for the arbitral tribunal to fix the place of the arbitration in a jurisdiction whose arbitration law allows for the review and set aside of awards on grounds of public policy where such awards do not conform to fundamental human rights.

The above considerations should therefore be taken into account by the arbitral tribunal when fixing the legal place of the arbitration, alongside other relevant circumstances of the case (such as those listed in paragraphs 28 to 30 of the UNCITRAL Notes on Organizing Arbitral Proceedings).

Comments on Article 18:

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further

written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Commentary

Language is a significant factor in both access to justice and costs. In the business and human rights context, the arbitral tribunal should pay particular attention to how to enhance access and reduce costs through the use of multiple languages, translation and interpretation, while at the same time resorting to such tools only where needed in order not to increase costs unduly.

Comments on Article 19:

Statement of claim

Article 20

1. The claimant shall communicate 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. The claimant may elect to treat its notice of arbitration referred to in Article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this Article.

2. The statement of claim shall include the following particulars:

(a) The names and contact details of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

3. A copy of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or a description of any relationship out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant or contain references to them.

Commentary

The expression "as far as possible" in paragraph 4 allows the arbitral tribunal to take into account the possible imbalance in power and access to evidence of the parties in the arbitration proceedings, including both situations of *economic* imbalance – e.g. where the cost of obtaining the documents is prohibitive – and situations of *power* imbalance – e.g. where a party is aware of the existence of certain documents, but it is unable to obtain them because they are in possession of the other party or of third parties. In these instances, the arbitral tribunal may admit a statement of claim even if it is not accompanied by certain evidence that would otherwise be necessary, and address this issue subsequently through its power to order the production of evidence or other means of organizing the taking of evidence in the particular proceedings.

Comments on Article 20:

Statement of defence

Article 21

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in Article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this Article.

2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (Article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of Article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under Article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Commentary

Article 21 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 21:

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Commentary

Article 22 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 22:

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have 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 that 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.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence 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. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Commentary

Article 23 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 23:

Pleas as to claims or defences manifestly without merit

Article 23-*bis*

1. The arbitral tribunal shall have the power to rule on an objection that a claim or defence, including a counterclaim, a claim for the purpose of a set-off or any point of law or fact supporting such claims or defences, is manifestly without merit. The objection may relate to the jurisdiction of the arbitral tribunal or the substance of the dispute, including any relief or remedy sought.

2. An objection that a claim, defence or point of law or fact is manifestly without merit shall be made as promptly as possible after the relevant claim, defence or point of law or fact is raised, unless the arbitral tribunal directs otherwise.

3. The arbitral tribunal shall rule on a plea made in accordance with paragraph 1 as soon as practicable after inviting the parties to express their views on the objection. The requirements in Article 17 shall apply only to the extent the arbitral tribunal considers appropriate.

4. A decision by the arbitral tribunal that a claim or defence is not manifestly without merit shall not preclude a party from raising a plea that the arbitral tribunal does not have jurisdiction under Article 23 or to include such grounds in its claims or defences raised in the course of the arbitral proceedings under Articles 20 to 22.

5. The arbitral tribunal may continue the arbitral proceedings as it considers appropriate, notwithstanding any plea made under this Article.

6. Notwithstanding Articles 34 to 36, unless such materials or information have already been made public, no materials or information regarding the arbitration shall be made public until the arbitral tribunal has ruled on a plea made in accordance with paragraph 1, except with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

Commentary

- This is a new Article as compared to the UNCITRAL Arbitration Rules which seeks to provide for an expedited procedure to dispose of claims or defences manifestly without merit at a preliminary stage of an arbitration. Whereas the general procedural powers of an arbitral tribunal under these Rules already allow for the preliminary and expedited disposal of manifestly unfounded claims, various sets of arbitration rules include specific provisions on the subject. Given that the potential for unfounded claims in business and human rights arbitration is of particular concern to the business community, this Article has been developed on the basis of, among other sources, the relevant provisions of the ICSID, SIAC, SCC and HKIAC Arbitration Rules.

- Paragraph 1 clarifies that the Article applies to legal as well as factual matters, and jurisdictional objections as well as issue of the merits. The word 'manifest' means that the lack of merit must be clear and obvious upon a preliminary review. This high standard serves to protect due process and the efficacy of the dispute resolution process. Preliminary objections that involve a consideration of complex legal and factual issues should be dismissed.

- The arbitral tribunal should also take account of the possible inequality of arms and of access to evidence among the parties, as well as a party's ability to request document production under these Rules. The arbitral tribunal should be careful not to dismiss a claim in preliminary fashion on the basis of a lack of evidence where there is a reasonable possibility that a party will be able to address such evidentiary deficiencies through document production requests that such party is entitled to make under Article 27.

- Paragraph 6 establishes a delay in publication of materials according to the transparency provisions of the Rules during the pendency of an application for early dismissal for manifest lack of merit, as little legitimate interest exists in the immediate transparency of frivolous or abusive claims.

Comments on Article 23-*bis*:

Further written statements

Article 24

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements. The arbitral tribunal may also set requirements concerning the length and form of such statements in order to provide a fair and efficient process for resolving the parties' dispute

Commentary

- The second sentence of Article 24 provides that the arbitral tribunal shall have the power to set requirements in terms of length and form of the parties' additional written submissions. Such requirements respond to the principles of efficiency and fairness that, under Article 17(1) of the Rules, inform the entire proceedings. Similar considerations are reflected in Article 27(2) on the rules on evidence.
- Although the arbitral tribunal already possesses the power to order such measures under Article 17(1) of the Rules, the addition encourages tribunals to manage the written proceedings proactively so as to ensure efficiency and equality of arms without compromising due process.

Comments on Article 24:

Submission by a third person

Article 24-*bis*

1. After consultation with the parties, the arbitral tribunal may invite or allow a person or entity that is not a party ("third person(s)") to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any party;

(c) Provide information on any government, person or organization that has provided to the third person

i. any financial or other assistance in preparing the submission; or

ii. substantial assistance in either of the two years preceding the application by the third person under this Article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the parties.

4. Notwithstanding paragraphs 1 to 3, the arbitral tribunal shall allow written submissions from the State(s) of nationality of the parties, the State(s) on whose territory the conduct that gave rise to the dispute occurred and the State(s) parties to any treaties applicable to the arbitration.

5. The submission filed by the third person or entity shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person’s position on issues; and

(d) Address only matters within the scope of the dispute.

6. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any party. If the arbitral tribunal deems it appropriate to do so, the arbitral tribunal may condition the participation of the third person or entity to the deposit of a reasonable sum to cover the costs of such participation.

7. The arbitral tribunal shall ensure that the parties are given a reasonable opportunity to present their observations on any submission by the third person or entity.

Commentary

Article 24-*bis* is taken largely from Article 4 of the UNCITRAL Transparency Rules, with the addition in paragraph 4 of a specific right to make written submissions granted to the State(s) of nationality of the parties, the State(s) on whose territory the conduct that gave rise to the dispute occurred and the State(s) parties to any treaties applicable to the arbitration.

Comments on Article 24-*bis:*

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Commentary

Article 25 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 25:

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, take any interim measures it deems necessary, including any measure to prevent [irreparable] [serious] harm to human rights falling within the subject-matter of the dispute.

2. Such interim measures may be established in any form the arbitral tribunal considers appropriate, including the form of an award.

3. Subject to Article 1, paragraph 4, the arbitral tribunal may, at the request of a party, stipulate any monetary penalty it deems appropriate for non-compliance with its interim measures.

4. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

5. The arbitral tribunal may require the party requesting an interim measure to provide appropriate [undertakings] or [security] in connection with the measure.

6. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

7. Subject to Article 1, paragraph 4, and notwithstanding Article 17, paragraph 6, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure. The arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then

prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Commentary

- Article 26 represents a much simpler provision as compared to the equivalent Article in the current version of the UNCITRAL Arbitration Rules. The changes made do not intend to depart from the commonly accepted standards for interim measures. Rather, this simplified provision attempts to recapture maximum flexibility for the arbitral tribunal in handling requests for interim measures, thereby allowing greater space for practice to develop in the context of business and human rights arbitration. The arbitral tribunal should be understood to have the widest possible discretion in adopting any interim measures that it deems necessary to protect the rights of the parties, limited only by mandatory provisions applicable to the proceedings. This entails the power to adopt measures that are in whole or in part different from those requested.

- Flexibility is also enhanced in paragraphs 2 and 3. Paragraph 2 empowers arbitral tribunals to render interim measures in the form of arbitral awards (even if this does not necessarily guarantee that national courts will treat them as such for the purposes of enforcement).

- Paragraph 3 empowers the arbitral tribunal to order penalties for non-compliance with its interim measures in order to give more teeth to interim measures, which may be particularly important in business and human rights arbitration in order to mitigate the potential for ongoing harm or prejudice to the arbitral process. Such powers are subject to mandatory applicable law through the inclusion of a reference to Article 1(4), which already makes the entirety of the arbitration rules subject to mandatory applicable law. Although in some measure redundant, this reference should serve as an important reminder to arbitral tribunals to verify whether applicable law permits use of penalties before potentially exceeding their powers in this regard. This provision does not apply to emergency arbitrator orders under Article 26-*bis*, where the expedited procedures make penalties for noncompliance inappropriate, and such penalties would be potentially unlawful in many jurisdictions.

- The definition of what is "appropriate" [security] or [undertakings] under paragraph 5 rests with the arbitral tribunal, whose duty it is to evaluate what is appropriate in all the circumstances (including fairness, efficiency and cultural appropriateness) so as not to unduly favor or disfavor any party – be they claimants or respondents, businesses or natural persons, or parties of any other kind or circumstances.

- Paragraph 7 addresses *ex parte* interim measures, which may be appropriate where prior notice of the measure may allow the affected party to preempt the measure and frustrate its purpose – or where the urgency for the adoption of an *interim* measures is so compelling that any delay, including even that associated with notice to a counterparty,

may compromise the usefulness of interim protection. Such exceptional powers, which exist already under the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration, may be particularly important in business and human rights proceedings. The language of the provision is largely taken from the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration, and in particular from its Articles 17(b) and 17(c)(2).

- While robust interim measures are provided for under this Article, various safety valves prevent abusive resort to interim measures, including [security] [undertakings] and the early dismissal mechanism in Article 23-*bis*. The usual requirements of a *prima facie* case on the merits (*fumus boni iuris*) (see Article 26(3)(b) of the UNCITRAL Arbitration Rules) and proportionality between the burdens of the interim measure and the harm sought to be avoided (see Article 26(3)(a) of the UNCITRAL Arbitration Rules), should also prevent parties from being able to leverage frivolous claims into justifying burdensome interim measures in order to extort an undue settlement from a counterparty. The deletion of these elements of the UNCITRAL Arbitration Rules is not intended to render them inapplicable, but simply to grant maximum flexibility to the arbitral tribunal to decide upon the most appropriate interim measures for the particular context.

Question: The two choices that the Drafting Team has in mind in designing Article 26(1) and (5) are:

a) The arbitral tribunal may adopt measures to prevent *irreparable* harm (paragraph 1) and require that the party provides appropriate *undertakings* (paragraph 5). The concept of "undertakings" is intended to be a lesser standard than "security", and in particular to refer to a legally binding commitment—such as promises given by a party or counsel to do or abstain from doing something—but one which would have to be enforced (e.g. by a national court seizing funds or property on the basis of the legally binding commitment undertaken) rather than being immediately and independently enforceable against funds, property or documents held in escrow (i.e. the security);

b) The arbitral tribunal may adopt measures to prevent *serious* harm (paragraph 1) and require that the party provides appropriate *security* (paragraph 5). The language of "serious harm" may (but need not) be read in connection with the precautionary principle. The language is taken from PCA Environmental Rules, where it was intended to allude to that concept in international environmental law.

The former formulation confirms the current standard of necessity currently required under the UNCITRAL Arbitration Rules, whereas the latter formulation lowers that bar. Each is then counter-balanced by a lower or higher requirement on the requesting party, i.e., undertakings vs. security. Which position do you favor?

Comments on Article 26:

Emergency arbitrator

Article 26-*bis*

1. A party that needs urgent interim measures that cannot await the constitution of an arbitral tribunal may submit a request for such measures to the appointing authority, provided that such request is received by the appointing authority prior to the constitution of the arbitral tribunal. The request shall also be provided at the same time to all other parties.

2. The request shall include the following:

(a) The names and contact details of the parties and their representatives;

(b) Identification of the arbitration agreement that is invoked;

(c) Identification of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of or in relation to which the dispute arises;

(d) A description of the circumstances giving rise to the request and of the underlying dispute referred or to be referred to arbitration;

(e) A statement of the urgent interim measures sought;

(f) The reasons why the applicant needs urgent interim measures that cannot await the constitution of an arbitral tribunal;

(g) Any agreement as to the place of arbitration, the applicable rules of law or the language of the arbitration;

(h) Any notice of arbitration and any other submissions in connection with the underlying dispute made prior to the request;

(i) Such other documents or information as the requesting party considers appropriate.

3. The request shall be made in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

4. The appointing authority shall terminate the proceedings if a notice of arbitration has not been received from the requesting party within 10 days of the receipt of the request, unless the emergency arbitrator determines that a longer period of time is necessary.

5. The appointing authority shall appoint an emergency arbitrator within as short a time as possible, normally within two days from receipt of the request.

6. The emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute. The emergency arbitrator shall without delay disclose to the appointing authority and the parties any circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence, unless they have already been informed of these circumstances. The emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the request. The emergency arbitrator shall comply with the requirements set out in Article 10-*bis* of the Rules.

7. An emergency arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the emergency arbitrator's impartiality or independence. A party that intends to challenge an emergency arbitrator shall send notice of its challenge within three days after it has been notified of the appointment of the emergency arbitrator or within three days after the circumstances on which the challenge is based became known to that party. The challenge shall be decided by the appointing authority after affording an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

8. If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the appointing authority shall determine the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18 of the Rules. Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by videoconference, telephone or similar means of communication.

9. The emergency arbitrator's decision shall take the form of an order. The order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator and it shall contain the date on which the order was made and indicate the place of the emergency arbitrator proceedings. The emergency arbitrator may make the order subject to such conditions as the emergency arbitrator considers appropriate, [including requiring the provision of appropriate security or undertakings.] The order shall fix and apportion the costs of the proceedings. The parties shall carry out any order made by the emergency arbitrator without delay.

10. The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order. The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

11. This Article shall not apply if the parties have agreed to another pre-arbitral procedure that provides for the granting of interim or similar measures. Where this Article does not apply, any party may request the appointing authority to establish a schedule for submissions on interim measures until the constitution of the arbitral tribunal has been completed.

12. Any party may seek urgent interim measures from a competent judicial authority at any time prior to making a request for such measures, and in appropriate circumstances even thereafter, pursuant to these Rules. A request for such measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. Any such request and any measures taken by the judicial authority must be notified without delay to the appointing authority.

Commentary

- The current UNCITRAL Arbitration Rules do not contain any "emergency arbitrator" provisions. However, business and human rights arbitration may have a particular need for urgent interim relief. A new Article as compared to the UNCITRAL Arbitration Rules has been elaborated, drawing on various sources including Article 29 and Annex V of the ICC Arbitration Rules as well as to a lesser degree from Appendix II of the SCC Arbitration Rules, and adapting these to the structure, content and style of the UNCITRAL Arbitration Rules.

Question: The Drafting Team discussed three options in terms of remuneration of emergency arbitrators:

i. the parties are requested to remunerate the emergency arbitrator by making payment at the time of the appointment. This option may however prejudice the right of access to this form of redress of parties with limited financial means;

ii. the parties are requested to remunerate the emergency arbitrator but only make payment after the emergency proceedings have concluded. This would shift the risk of not being remunerated onto the emergency arbitrator, who would have no guarantee of being remunerated for her or his work if a party later proved unable or unwilling to pay; or

iii. the emergency arbitrator acts *pro bono*. The lack of any remuneration may negatively impact on the quality of the work of the emergency arbitrator, and may be unsustainable in the long term. This option therefore seems unadvisable.

In the business and human rights context, access to justice takes on particular importance. In addition, the risk of not being remunerated for emergency proceedings is not expected to reduce the availability of suitable emergency arbitrators beyond acceptable limits, especially given the limited and circumscribed task of emergency arbitrators (and the consequent limited scope of the risk of non-payment that they are asked to assume). The current draft therefore proposes to adopt option (ii) above. Do you agree?

Comments on Article 26-*bis:*

Evidence

Article 27

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

2. The arbitral tribunal may organize the taking of evidence in the manner that it deems appropriate to enable each party to effectively present its case, taking into account relevant best practices in the taking of evidence in international dispute resolution and the circumstances of the case, including considerations of fairness, efficiency and cultural appropriateness. In organizing the taking of evidence, the arbitral tribunal may limit the scope of the evidence that may be produced by the parties. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

3. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

4. At any time during the arbitral proceedings the arbitral tribunal may, on its own motion or at the request of a party, require any party to produce documents, exhibits, witness statements or other evidence, within such a period of time as the arbitral tribunal shall determine. The arbitral tribunal shall order the production of documents to the extent necessary to enable each party to have a reasonable opportunity of presenting its case, taking into account considerations of fairness, efficiency and cultural appropriateness. If a party fails to produce documents required by the arbitral tribunal, the arbitral tribunal may draw the consequences it deems appropriate, including an inference that such evidence would be adverse to the interests of that party or a reversal of the burden of proof.

5. A request by a party for another party to produce documents shall contain:

(a) (i) A description of each requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific

requested category of documents that are reasonably believed to exist; in the case of documents maintained in electronic form, the requesting party may, or the arbitral tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner;

(b) A statement as to how the documents requested are relevant to the case and material to its outcome; and

(c) (i) A statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.

6. After inviting the parties to express their views on the request, the arbitral tribunal shall rule on the request. The arbitral tribunal may order the party to whom such request is addressed to produce any requested document in its possession, custody or control as to which the arbitral tribunal determines that:

(a) The issues that the requesting party wishes to prove are relevant to the case and material to its outcome;

(b) No compelling grounds of inadmissibility apply to such document; and

(c) The requirements of paragraph 5 of this Article have been satisfied.

Any such document shall be produced to the other parties and, if the arbitral tribunal so orders, to it.

Commentary

- Paragraph 2 includes a broad, general and flexible power to organize the taking of evidence in the manner deemed most appropriate for the circumstances of the case. As with other provisions of the Rules (e.g. Articles 17, 20 and 24), Article 27 attempts to strike a balance among a number of factors with respect to the taking of evidence, notably fairness, efficiency and cultural appropriateness. The last of these terms reflects the realities that certain modes of gathering evidence that are accepted in certain legal systems or cultures may be inappropriate with respect to some parties, claims, or situations.
- Paragraph 2 also allows the tribunal to respond to the possible inequality of arms and of access to evidence among the parties. Among the tools at the disposal of the arbitral tribunal to address such issues are document production procedures, the ability to limit the scope of evidence produced, and the power to sanction non-compliance with orders to produce evidence through adverse inferences and reversal of the burden of proof.
- Tribunals may, for instance, encourage the use of electronic means of communication for the taking of witness evidence, including the live testimony by means of audio or video-link technology and the prior recorded testimony suggested by Articles 67 and 68

of the Rules of Procedure and Evidence of the International Criminal Court. In addition, the arbitral tribunal may at its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, set limits to written and oral statement and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

- In exercising its general discretion, the arbitral tribunal should be guided by relevant best practices in the taking of evidence in international dispute resolution, including those relating to international arbitration (e.g. the IBA Rules on the Taking of Evidence in International Arbitration) as well as those relating to human rights contexts (e.g. the Dutch Garment Rules, the Wallenberg Rules and the Rules of Procedure and Evidence of the International Criminal Court).
- **Question:** Is the second sentence of Article 27(4) necessary or is the remainder of the Article sufficient?

Comments on Article 27:

Hearings

Article 28

1. In the event of an oral hearing, the arbitral tribunal shall give the parties and the public adequate advance notice of the date, time and place thereof.

2. The arbitral tribunal may organize the hearing in the manner that it deems most appropriate to enable each party to effectively present its case, taking into account relevant best practices in the conduct of hearings in international dispute resolution and the circumstances of the case, including considerations of fairness, efficiency and cultural appropriateness.

3. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal. If the legitimate interest of a witness based on a genuine demonstrated fear requires restriction of the representatives of the parties who are informed of the identity of the witness, the arbitral tribunal may order such restriction.

4. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses. A witness, including an expert witness, who is also a party to the arbitration shall not, in principle, be asked to retire.

5. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through any means of telecommunication that do not require their physical presence at the hearing.

Commentary

- As with Article 27, in relations to hearings, arbitral tribunals have broad discretion to conduct hearings as they deem appropriate. In this vein, the arbitral tribunal may limit the oral and written presentation of the parties at the hearing to what is adequate for the presentation of that party's case. The arbitral tribunal may also indicate any points or issues it wishes the parties specially to address or put specific questions to the parties during the hearing. In addition, the arbitral tribunal may allow for the presentation of evidence by alternative means including web conferencing, internet communication, telephonic conferences and other means that do not require an in-person presentation of evidence.

- In exercising its general discretion to organize hearings, the arbitral tribunal should be guided by best practices in international dispute resolution, including those relating to international arbitration (e.g. the UNCITRAL Notes on Organizing Arbitral Proceedings and the IBA Rules on the Taking of Evidence in International Arbitration) as well as those relating to human rights contexts (e.g. the Dutch Garment Rules, the Wallenberg Rules and Rules of Procedure and Evidence of the International Criminal Court).

- The arbitral tribunal may adopt specific measures for the protection of witnesses under paragraph 3. These may include the non-disclosure to the public or the other party of the identity or whereabouts of a witness, or of persons related to or associated with a witness by such means as: (a) expunging names and identifying information from the public record; (b) non-disclosure to the public of any records identifying the victim or witness; (c) giving of testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym. The arbitral tribunal may also opt for closed hearings under Article 36 and adopt any appropriate measures to facilitate the testimony of vulnerable witnesses, such as one-way closed-circuit television.

- The possibility to conceal the identity of witnesses provided in paragraph 3 may entail complete anonymity of the witness or a limitation to specific party representatives who are informed of the identity of the witnesses. The burden of proof of demonstrating a "genuine fear" rests on the person or party seeking it, who will have to show how the witness would be prejudiced by publicity, which may also depend on what information is already in the public domain. The concept of "genuine fear" should be understood as a subjective fear of harm to the person or her or his livelihood. A witness may have a

"genuine fear" even if similarly placed witnesses have testified without retaliation against them.

Comments on Article 28:

Experts appointed by the arbitral tribunal

Article 29

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of her or his qualifications and a statement of her or his impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for her or his inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in her or his report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of Article 28 shall be applicable to such proceedings.

Commentary

Article 29 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 29:

Default

Article 30

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

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause

for such failure, the arbitral tribunal may draw the consequences it deems appropriate and make the award on the evidence before it.

Commentary

The last sentence of paragraph 3 adds that the arbitral tribunal may "draw the consequences it deems appropriate" from a failure to produce documents. This is intended to reinforce the similar provision in the last sentence of Article 27(4). The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 30:

Closure of hearings

Article 31

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Commentary

Article 31 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 31:

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Commentary

Article 32 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 32:

Section IV. Transparency

Scope of application of transparency provisions

Article 33

1. In addition to its discretionary authority under certain provisions of these Rules, the arbitral tribunal shall have the power to adapt the requirements of any provision of these Rules to the particular circumstances of the case, after consultation with the parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of Articles 33 to 38.

2. Where Articles 33 to 38 provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in arbitration under these Rules and in the particular arbitral proceedings;

(b) The parties' interest in a fair and efficient resolution of their dispute; and

(c) The security, privacy and confidentiality concerns of the parties, witnesses, counsel and others involved in or affected by the arbitration proceedings.

3. Articles 33 to 38 shall not affect any authority that the arbitral tribunal may otherwise have to conduct the arbitration in such a manner as to promote transparency.

4. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of Articles 33 to 38, the arbitral tribunal shall ensure that those objectives prevail.

Commentary

Article 33 is taken largely from Article 1 of the UNCITRAL Transparency Rules and adapted to the business and human rights arbitration context. In taking decisions on how to adapt the transparency regime to the cases before them, arbitration tribunals have wide flexibility and may, for instance, allow the disclosure of information to the public after a certain period of time has elapsed.

As noted under Article 1(1) above, it is not desirable for parties to make too many deviations from these Rules as it might upset the balance sought in various provisions of the Rules between the many varied legitimate interests at play in the resolution of business and human rights disputes. However, arbitration rules cannot limit the parties' autonomy to derogate from these Rules as they choose (consistent with mandatory applicable law) as long as such derogations are made in the proper written form. Therefore, while transparency forms an important part of arbitration under these Rules, the parties remain entitled to exercise their discretion to opt out of certain provisions that do not respond to their specific needs as arising out the dispute at issue.

Comments on Article 33:

Publication of information at the commencement of arbitral proceedings

Article 34

Once the response to the notice of arbitration has been received or the deadline for such has elapsed, each of the disputing parties shall promptly communicate a copy of the notice of arbitration and the response to the notice of arbitration to the repository referred to under Article 38. Unless a party has made a request under Article 23-*bis* or indicated an intention to make an application to the arbitral tribunal under Article 17, paragraph 5, or Article 28, paragraph 3, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the legal instrument under which the claim is being made.

Commentary

Article 34 is taken largely from Article 2 of the UNCITRAL Transparency Rules, with the exceptions to transparency provided for under Articles 17, 23-*bis* and 28.

Comments on Article 34:

Publication of documents

Article 35

1. Subject to Article 37, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table was produced in the proceedings; the orders, decisions and awards of the arbitral tribunal.

2. Subject to Article 37, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 above.

3. Subject to Article 37, the documents to be made available to the public pursuant to paragraphs 1 and 2 shall be transmitted by the arbitral tribunal to the repository referred to under Article 38 as soon as possible. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

4. A person granted access to documents under paragraph 2 shall bear any administrative costs of such access, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Commentary

- Article 35 is taken largely from Article 3 of the UNCITRAL Transparency Rules and adapted to the business and human rights arbitration context.
- Paragraph 1 lists documents that must be made public. At the same time, given the direct costs of access and publication or reputational costs for the parties, that list is limited to documents needed to make business and human rights arbitrations known to the public and to nurture a culture of protection of human rights by promoting awareness and legal certainty. For example, further written submissions made by the parties, the transcripts of hearings and submissions by third persons under Article 24-*bis* are not included in paragraph 1. Such information is not universally available in national court proceedings, even those of a constitutional or public law character.
- The arbitral tribunal may nevertheless consider whether, in view of the objectives of business and human rights proceedings and the particular circumstances of the case, further documents should be made available under paragraph 2. Indeed, in case of doubt, paragraph 2 should be interpreted by arbitral tribunals as meaning that they should render available to the public any material information not subject to a legitimate confidentiality claim, including in particular whatever is necessary to understand the tribunal's reasoning in its award.

Comments on Article 35:

Public Hearings

Article 36

1. Subject to paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

2. Where there is a need to protect confidential or restricted information or the integrity of the arbitral process pursuant to Articles 17, 28 and 37, the arbitral tribunal shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings by the means as it deems most appropriate. However, the arbitral tribunal may decide, after consultation with the parties [and third persons making submissions in accordance with Article 24-*bis*], to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Commentary

- Article 36 is taken largely from Article 6 of the UNCITRAL Transparency Rules.
- The arbitral tribunal has broad flexibility to organize the arrangements under paragraph 3, which may include, for instance, video links or such other technological instruments that best attain the outcome sought by the tribunal.

Comments on Article 36:

Exceptions to transparency

Article 37

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to Articles 34 to 36.

2. Confidential or protected information consists of:

(a) Names and addresses of the parties and their counsel protected by an order of the arbitral tribunal pursuant to Article 17, paragraph 5, as well as of witnesses protected by an order of the arbitral tribunal pursuant to Article 28, paragraph 3;

(b) Confidential business information, information that has been classified as secret by a Government or a public international institution and any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal determines to be compelling;

(c) Information that is protected against being made available to the public under the arbitration agreement;

(d) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(e) Information the disclosure of which would impede law enforcement.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the parties.

3. The arbitral tribunal, after consultation with the parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a party or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by Article 37, paragraph 2.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any party or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. The arbitral tribunal may, on its own initiative or upon the application of a party, after consultation with the parties where practicable, take appropriate measures to restrain or delay the publication of information pursuant to Articles 34 to 36 where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Commentary

- Article 37 is taken largely from Article 7 of the UNCITRAL Transparency Rules and adapted to the context business and human rights arbitration under these Rules.
- In paragraph 2(b), the phrase "any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal determines to be compelling" intends to cover confidentiality obligations that are not imposed directly by law in accordance with paragraph 2(d) (e.g. confidentiality provisions in contracts or other agreements or the duties of discretion in a code of conduct promulgated by a professional association), but which the arbitral tribunal nevertheless considers provide compelling grounds for non-disclosure.

Comments on Article 37:

Repository of published information

Article 38

The repository of published information under these Rules shall be the PCA. The repository shall regularly publish general information about arbitration under these Rules as a source of continuous learning, including industry sector, names of arbitrators, outcome of cases and costs.

Commentary

Article 38 is taken largely from Article 8 of the UNCITRAL Transparency Rules, with the addition that the repository is to publish general information about arbitration under these Rules as a source of continuous learning in keeping with Principle 31(g) of the UN Guiding Principles on Business and Human Rights.

Comments on Article 38:

Section V. The award

Decisions

Article 39

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Commentary

Article 39 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 39:

Form and effect of the award

Article 40

1. The arbitral tribunal may make separate awards on different issues at different times.

2. An award may order monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition. An award may also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm, which shall be binding only if agreed by the parties. The arbitral tribunal shall take into account the proportionality and cultural appropriateness of its awards.

3. 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. Subject to Article 1, paragraph 4, the arbitral tribunal may, at the request of a party, stipulate any penalty, monetary or otherwise, it deems appropriate for non-compliance with any non-monetary relief contained in its award.

4. The arbitral tribunal shall state the reasons upon which the award is based, and shall [ensure] [satisfy itself] that the award is human rights-compatible.

5. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.

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

Commentary

- Paragraph 2's illustrative list of the kinds of relief is based on the commentary to Principle 25 of the UN Guiding Principles on Business and Human Rights, which is the "Foundation Principle" of access to remedy under Pillar III of the same text. This list serves to confirm that arbitral tribunals may grant any monetary or non-monetary relief available under

applicable law and should seek to appropriately tailor remedies to the needs of the case. In addition, this paragraph empowers the arbitral tribunal to make non-binding recommendations, including additional options for satisfaction and moral redress. The concept of proportionality included in the last sentence of this paragraph refers to the relationship between the harm and the remedy.

- The specification "monetary or otherwise" under paragraph 3 intends to allow the arbitral tribunal to adopt a wide range of sanctions, such as those affecting the reputation of the non-complying party, to ensure compliance with its decisions.
- The duty of the arbitral tribunal to ensure rights-compatibility in paragraph 4 flows from Principle 31 of the UN Guiding Principles on Business and Human Rights. The arbitral tribunal will have broad discretion to interpret this term and what is required in order for its award to be rights-compatible. Nevertheless, it would be appropriate to include some discussion of the issue of rights-compatibility in the reasoning of any award. This is also part of the motivation for linking the requirement of rights-compatibility to the general requirement of reasons for the award. It should be noted, however, that this requirement is one of form, as part of the general requirement of reasons, and not of applicable law. It serves to encourage the arbitral tribunal to consider this issue within the ambit of its discretion in crafting remedies under its award, but does not authorize the arbitral tribunal to disregard or alter the result required by the applicable law as determined in accordance with Article 41.
- **Question:** Should the arbitral tribunal carry out a rights-compatibility control of the award as proposed in paragraph 4? Should there be a follow up mechanism to ensure implementation of the award (e.g. put on the website the fact that the losing party did not comply)?

Comments on Article 40:

Applicable law, amiable compositeur

Article 41

1. The arbitral tribunal shall apply the law, rules of law or standards designated by the parties as applicable to the substance of the dispute.

2. Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate.

3. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.

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

[5. The arbitral tribunal shall have special regard for any business and human rights norms, standards, or instruments that have become part of trade usage or the applicable law, [and to the international human rights obligations of any States involved in the dispute either as parties or as the States of nationality of any of the parties.]]

Commentary

- The term "rules of law" in paragraphs 1 and 2 refers to the possibility for the parties to designate and the arbitral tribunal to apply rules emanating from different legal systems or even from non-national sources (e.g. the UNIDROIT Principles of International Commercial Contracts) rather than only being able to apply one legal system in its entirety as national conflict of law rules often require.
- The use of the complete phrase "law, rules of law or standards" in paragraph 1 intends to provide the parties and the arbitral tribunal with the broadest possible flexibility in choosing the normative sources from which the applicable law is drawn, including, for example, industry or supply chain codes of conduct or other relevant business and human rights norms.
- **Question:** The Drafting Team has considered 4 drafting options with regard to paragraphs 4 and 5 of Article 41.

  (*i*) 4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

  5. The tribunal shall have special regard to any business and human rights norms, standards, or instruments that have become part of trade usage or the applicable law.

  (*ii*) 4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

5. The tribunal shall have special regard to any business and human rights norms, standards, or instruments that have become part of trade usage or the applicable law, and to the international human rights obligations of any States involved in the dispute either as parties or as the States of nationality of any of the parties.

(*iii*) 4. In all cases, the arbitral tribunal shall (a) decide in accordance with the terms of the contract, if any; (b) take into account any usage of trade applicable to the transaction; (c) have special regard to any business and human rights norms, standards, or instruments that have become part of trade usage or the applicable law, and to the international human rights obligations of any States involved in the dispute either as parties or as the States of nationality of any of the parties.

(*iv*) 4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction. [paragraph 5 would be deleted].

Which of these options, if any, do you favor?

Comments on Article 41:

Settlement or other grounds for termination

Article 42

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award, but must be unanimously satisfied that such an award is human rights-compatible.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings.

The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 40, paragraphs 3, 5 and 6, shall apply.

Commentary

- Paragraph 1 requires the arbitral to be unanimously satisfied of the rights-compatibility of any award on agreed terms. Under this provision as under the UNCITRAL Arbitration Rules, an award on agreed terms can be issued only if the arbitral tribunal agrees to do so. An arbitral tribunal may therefore refuse to render an award on agreed terms for any reason whatsoever, even if such a refusal by the arbitral tribunal to issue an award on agreed terms in no way prevents the parties from concluding a settlement or impedes the legal effect of any such settlement.
- As compared to the UNCITRAL Arbitration Rules, however, this paragraph requires that the arbitral tribunal's agreement to render an award on agreed terms be unanimous in respect of the rights-compatibility of such award. Whereas in a regular award, any arbitrator may issue a dissenting opinion—including on the question of the rights-compatibility of the award—there is little, if any, possibility for a dissent in respect of an award on agreed terms which may lack any reasons from which to dissent. An arbitral tribunal should therefore not assist the parties to enshrine a settlement in an award on agreed terms where any of its members harbors doubts as to the rights-compatibility of such settlement. By requiring unanimous endorsement by the arbitral tribunal of the rights-compatibility of an award on agreed terms, the provision provides a guarantee to the public at large that, whatever the content of a settlement may have been, it was ruled rights-compatible by an arbitral tribunal of business and human rights experts.
- The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 42:

Interpretation of the award

Article 43

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

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 40, paragraphs 3 to 6, shall apply.

Commentary

Article 43 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 43:

Correction of the award

Article 44

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of Article 40, paragraphs 3 to 6, shall apply.

Commentary

Article 44 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 44:

Additional award

Article 45

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of Article 40, paragraphs 3 to 6, shall apply.

Commentary

Article 45 reflects the text of the UNCITRAL Arbitration Rules without any changes.

Comments on Article 45:

Definition of costs

Article 46

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the arbitral tribunal itself in accordance with Article 47;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other 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;

(f) Any fees and expenses of the appointing authority and the PCA.

3. In relation to interpretation, correction or completion of any award under Articles 43 to 45, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Commentary

Article 46 reflects the text of the UNCITRAL Arbitration Rules, with the clarification that paragraph 2(f) covers the costs of the PCA in all its functions under these Rules.

Comments on Article 46:

Fees and expenses of arbitrators

Article 47

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, the cost burden on each party and any other relevant circumstances of the case, including any agreements by the parties, such as those on controlling costs and financing options.

2. If the appointing authority applies or has stated that it will apply a schedule or particular method for determining the fees and expenses for arbitrators in international cases, the arbitral tribunal shall take that schedule or method into account in determining its fees and expenses.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraphs 1 or 2, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to Article 46, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

   (b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority;

   (c) If the appointing authority finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

   (d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of Article 44, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with Article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Commentary

- The additions to the UNCITRAL Arbitration Rules in paragraph 1 seek to make explicit that in charging fees and incurring expenses the arbitral tribunal should take into account any relevant agreements of the parties as well as the possible burden on a party of certain means of conducting the arbitration. These additions also add to the tools available for parties and the appointing authority to control the costs of the arbitration, such as the cost review mechanisms under paragraphs 2 to 4 of this Article, under Article 49(3) and otherwise. For example, it would be inappropriate for an arbitral tribunal to choose an unreasonably expensive hearing venue where cheaper and equally suitable options were available, one of the parties is of limited financial means and the costs of such venue exceed the parties' agreed budget for the costs of the hearing.
- Paragraph 2 has also been modified from the UNCITRAL Arbitration Rules to clarify that the appointing authority may adopt a schedule or method in respect of the arbitrators' expenses as well as their fees, and that such schedule or method is binding upon the arbitral tribunal.

Comments on Article 47:

Allocation of costs

Article 48

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, [including the conduct of the parties in the arbitration, the cost burdens on each party and the public interest, if any.]

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Commentary

The principle of loser pays as the default method of allocation of the costs of the arbitration constitutes both an incentive to arbitrate for the economically weaker party that has a strong case and a safety shield for respondents from unfounded actions. Nonetheless, the second sentence of paragraph 1 affords the arbitral tribunal the discretion to deviate from the loser pays principle and adopt the apportionment of costs that it considers reasonable considering all circumstances. An illustrative list has been added to the end of that second sentence in order to guide arbitral tribunals as to some of the relevant circumstances that they may wish to consider when contemplating a departure from the loser pays principle, namely the conduct of the parties, the fact that a party may be particularly burdened by a costs award and any public interest implicated. The Article otherwise reflects the text of the UNCITRAL Arbitration Rules.

Comments on Article 48:

Deposit of costs

Article 49

1. The arbitral tribunal, on its establishment, may request the parties to deposit an advance for the costs referred to in Article 46, paragraphs 2 (a) to (c). During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

2. The amount of the deposit requested from each party may differ and should in any case be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, the cost burden on each party and any other relevant circumstances of the case, including any agreements by the parties such as those on controlling costs and financing options. The arbitral tribunal shall ensure that the amount of the deposit does not constitute an undue obstacle to any party's participation in the proceedings.

3. The arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only upon approval of the appointing authority.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, or such other period as may be set by the arbitral tribunal, 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.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Commentary

Paragraph 2 requires that the amount of deposits be reasonable in amount and includes the same illustrative list of factors as found in Article 47(1). This serves to prevent the amount of the deposits requested from the parties from unduly impairing access to arbitration of parties of limited financial means. This paragraph also notes that the amount of the deposit requested may also differ for each party. The third sentence sets the overarching principle that the payment of deposits should not create an insurmountable impediment for a party to commence or continue an arbitration proceeding under these Rules. In particular, this general principle, coupled with the notion that the obstacle is "undue" means that the arbitral tribunal can only dismiss a case under paragraph 4 if the parties fail to pay a requested deposit that is reasonable in accordance with the criteria set out in paragraph 2.

Comments on Article 49:

Section VI. Miscellaneous provisions

[Third party funding

Article 50

1. Where a party or third person making submissions in accordance with Article 24-*bis* benefits from any form of funding or financial assistance for the participation in the proceedings, such party or third person shall promptly disclose to all other parties and to the tribunal the name and

address of the source of the funding or financial assistance. Upon request of the funded party, the tribunal may determine that such information shall not be disclosed.

2. The arbitral tribunal may take into account any such funding when making its determinations on costs and deposits in the arbitration.]

Commentary

Considering the high potential for external funding in business and human rights disputes, the legitimacy of arbitration under the Rules depends on transparency of the interests underlying the proceedings. A new provision to regulate third party funding is therefore included as compared to the UNCITRAL Arbitration Rules. The arbitral tribunal is empowered to decide whether or not such information must be disclosed, including to third persons and the public at large. Paragraph 2 also clarifies that any third party funding may also be taken into account in decisions on costs and deposits.

Comments on Article 50:

Mediation

Article 51

1. At any time during the course of the arbitral proceedings, parties may agree in writing to mediate their dispute. If the parties agree to mediation, upon the joint request of the parties, the arbitral tribunal shall stay the arbitral proceedings.

2. No arbitrator shall be appointed as mediator. No mediator may subsequently participate in the arbitral proceedings in any capacity, including as arbitrator, expert, counsel, adviser or otherwise.

3. All offers, admissions, or other statements by the parties, or recommendations by the mediator, made during the course of the mediation proceedings shall be inadmissible as evidence in the arbitral proceedings, unless otherwise agreed by the parties.

4. If the mediation proceedings are terminated without the parties having reached a settlement, the arbitral tribunal, at the request of any party, shall resume the arbitral proceedings.

Commentary

In keeping with various other provisions in the Rules concerning the promotion of settlement through alternative dispute settlement mechanisms, Article 51 establishes a framework for mediation that takes place in parallel to or in conjunction with arbitration under these Rules. Its provisions are largely taken from or inspired by the CEDR Rules for the Facilitation of Settlement in International Arbitration and the UNCITRAL Conciliation Rules. This Article should be read in conjunction with preamble, paragraph 4, Article 1(6) and Article 17(3).

Comments on Article 51:

Expedited Arbitration

Article 52

1. Unless the appointing authority or the arbitral tribunal, as applicable, determines otherwise, the following expedited procedures shall apply where only monetary compensation is sought and the amount in dispute is below [EUR 500,000]:

(a) All time limits under the Rules shall in principle be [halved];

(b) The case shall be referred to a sole arbitrator;

(c) The proceeding shall be decided on the basis of documents without an oral hearing;

(d) The final award shall be made within [six months] from the date of the constitution of the arbitral tribunal; and

(e) The arbitral tribunal may state only summary reasons upon which the award is based.

2. The provisions of these Rules shall apply without modification to all other aspects of the arbitral proceedings.

Commentary

The expedited procedure under these Rules is designed to accommodate the need for the efficient resolution of disputes of a simpler nature and with a modest amount in dispute. All of the adjustments to the regular procedure envisaged in paragraphs 1 (a) to (e) may already be carried out by the appointing authority or the arbitral tribunal according to the discretion conferred upon them by the existing provisions of these Rules:

i. the appointing authority and the arbitral tribunal already have the authority to modify time limits;

ii. the appointing authority already enjoys the power to decide to appoint a sole arbitrator under Article 7(2);

iii. the arbitral tribunal already enjoys the power to decide whether to hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument under Article 17(4); and

iv. the arbitral tribunal already holds full control over the timing of issuance of its award and its reasoning under Article 40.

This Article merely changes the default starting position on these procedural issues. In the exercise of their discretion under the abovementioned provisions, the appointing authority and the arbitral tribunal may still decide in due course that the expedited procedures set forth in this Article are not appropriate for the particular dispute, notwithstanding the fact that only monetary compensation is sought and the amount in dispute falls below [EUR 500,000].

Comments on Article 52:

CODE OF CONDUCT

Definitions

(a) ‘Affiliate’ encompasses all companies in a group of companies, including the parent company.

(b) ‘Close family member’ refers to a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.

[Further definitions to be inserted]

1. General Duties

At all times, arbitrators shall:

(a) Be, and reasonably appear to be, independent and impartial;

(b) Avoid impropriety as well as reasonable appearance of impropriety;

(c) Avoid direct and indirect conflicts of interests;

(d) Respect the confidentiality of the arbitral proceedings;

(e) Observe high standards of conduct that preserve in all respects the integrity of the arbitral proceedings; and

(f) Act diligently, fairly and in a timely manner.

2. Duty of Disclosure

1. Prior to appointment as an arbitrator under these Rules, a person approached in connection with her or his possible appointment as an arbitrator (the “candidate”) shall disclose any interest, relationship or matter that could reasonably be considered as affecting her or his independence or impartiality or that might otherwise give rise to a reasonable appearance of impropriety. An arbitrator, from the time of her or his appointment and throughout the arbitral proceedings shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances. To this end, a candidate or arbitrator shall make all reasonable efforts to become aware of such interests, relationships and matters. The disclosure obligations of candidates and arbitrators shall conform to international best practices.

2. Without limiting the generality of the foregoing, candidates shall disclose the following interests, relationships and matters:

(a) Any financial interest of the candidate or arbitrator:

i. in the proceeding or in its outcome; and

ii. in any other administrative, judicial or arbitral proceeding that involves any of the same issues that may be decided in the arbitral proceedings under these Rules;

(b) Any financial interest of the candidate's or arbitrator's employer, partner, business associate or close family member:

i. in the proceeding or in its outcome; and

ii. in any other administrative, judicial or arbitral proceeding that involves any of the same issues that may be decided in the arbitral proceedings under these Rules;

(c) Any past or existing financial, business, professional, close family or close personal relationship with the parties or their affiliates or counsel, or any such relationship involving a candidate's or arbitrator's employer, partner, business associate or close family member;

(d) Public advocacy or legal or other representation concerning issues closely related to the dispute in the proceeding or involving the same matters;

(e) All past and pending arbitral appointments made by any of the parties or their affiliates or close family members;

(f) All pending appointments made by any of the counsel and law firms involved in the dispute, as well as any such appointments made in the previous five years;

(g) All pending work as counsel, expert or in any other role in any matter for or adverse to any of the parties involved in the arbitration, including counsel, law firms, expert companies and financial institutions, as well as any such work performed in the previous five years; and

(h) The nature and content of any pre-appointment contact between a party or their counsel and a candidate.

3. If a candidate or arbitrator is bound by a confidentiality agreement in relation to a disclosure requirement, he or she will be permitted to confirm the absence of conflict by signed statement.

4. The disclosure obligations set out in paragraphs 1 and 2 above shall not be construed such that the burden of detailed disclosure makes it impractical for qualified individuals to serve as arbitrators. Candidates and arbitrators are not required to disclose interests, relationships or matters whose bearing on their role in the arbitral proceedings would be trivial.

3. Independence and Impartiality of Arbitrators

1. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or reasonably appear to interfere, with the proper performance of her or his duties.

2. An arbitrator shall not use her or his position on the arbitral tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him in respect of the arbitration.

3. An arbitrator shall not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgement in respect of the arbitration.

4. An arbitrator shall avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his independence and impartiality or give rise to a reasonable appearance thereof, or that might otherwise give rise to a reasonable appearance of impropriety.

4. Duties of Arbitrators, Candidates and Former Arbitrators

1. An arbitrator shall not delegate the duty to decide the dispute to any other person. An arbitrator shall ensure that her or his assistants and staff, as well as any tribunal secretaries, comply with the provisions of this code.

2. An arbitrator shall not act as counsel [or party-appointed expert] in any other administrative, judicial or arbitral proceeding that [involves any of the same issues that may be decided in the arbitral proceedings under these Rules][concerns business and human rights].

3. Under no circumstance shall a candidate or arbitrator discuss with any party any jurisdictional, substantive or procedural issue relevant to the dispute except in the presence of all other parties.

4. All former arbitrators shall avoid actions that may create the reasonable appearance that they lacked independence or impartiality in carrying out their duties or derived advantage from the decisions of the arbitration panel. [In particular, former arbitrators shall not accept [another] appointment from one of the parties or any person or entity closely connected to any of them, in the subsequent [two] years from the end of such arbitral proceedings.]

Questions:

- The options included under paragraphs 2 and 4 intend to address a number of concerns around the ethics of arbitrators in investment arbitration. It may be argued that these concerns pertain to investment arbitration and do not fully apply to business and human rights disputes. From this perspective, these paragraphs may be seen as an undue limitation on the potential candidates that the parties may appoint. On the other hand, it could be argued that the same concerns might undermine the legitimacy of the Hague Rules in the eyes of users and civil society, especially considering that business and human rights disputes may also deal with sensitive matters of public interest. This would justify some limitations on party appointment such as those proposed to be included under paragraphs 2 and 4. We would welcome views on all these issues.

- Paragraph 2 contains a prohibition of double-hatting. Two options are put forward for consideration. The first, potentially less restrictive, option foresees a prohibition for arbitrators to act as counsel in disputes involving the "same issues" as arise in a given

proceeding (whether or not such issues concern "business and human rights"). The second option is potentially broader and extends to all proceedings that concern "business and human rights" (but would not address overlap in respect of other issues). The second option is likely to restrict much more the number of potential candidates who may sit on business human rights disputes. Paragraph 2 also contemplates the option of including as addressees of the double-hatting prohibition party-appointed experts. Which of these options, if any, would you favor?

- Paragraph 4 provides for a blanket ban on reappointment of an arbitrator by the same party for a 2-year period. Such a blanket ban has the downside of being not only arbitrary in its duration, but also a potential barrier to the appointment of the same arbitrators on connected cases, which is often a cost-saving and efficient measure for parties in connected cases. What is your view on this point?

5. Confidentiality

1. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for the purposes of that proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.

2. An arbitrator or former arbitrator shall not at any time disclose the deliberations of the arbitral tribunal, or any member's view.

Comments on Code of Conduct:

General comments: