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The revision of the UNCITRAL Arbitration Rules
by Pieter Sanders

Introduction

In 2006 UNCITRAL'S Commission decided that priority should be given to the revision of UNCITRAL's Arbitration Rules of 1976. In 1976 I assisted UNCITRAL with the drafting of these Rules. A difficulty that had to be overcome existed in respect of the appointment of the arbitrators. UNCITRAL is not an arbitral institution that comes to the rescue in case a party fails in the appointment of the arbitrators. An appointing authority (AA) had to be invented. By this AA the Arbitration Rules of UNCITRAL distinguish themselves from all other arbitration rules like those of ICC, LCIA and AAA.

The mandate of the Working Group, established in 2006, was "to maintain the original structure and spirit of the 1976 Rules". In August 2008 the Working Group produced a Draft for the revision of the 41 articles of the 1976 Rules. This Draft can be found in two reports of the Secretariat, both dated 6 August 2008 and numbered WP151 and WP151/Add 1, of A/CN9/WG II. In 2008 the Commission expressed the hope that the Rules could be adopted in 2009.

However, a second revision-round on the Draft of August 2008 has started. From this second round so far the Secretariat produced a note of 8 December 2008, WP 154 and a Note of 9 March 2009, A/CN 9/669. In the second round the WG arrived at article 25. It may be expected that the second round will be terminated end 2009 or beginning 2010. Also in this second round many of the articles still need further consideration.

In my comment on the present status of the revision, I will first of all deal with two major changes the Draft of August 2008 made. In **Part A** I will deal with the addition of a response to the notice of arbitration. In **Part B** with the changes made in respect of the procedure for the appointment of arbitrators will be dealt with. In **Part C** all 41 articles will be commented on from art. 1, the Scope of Application, to art. 41, Deposits for Costs.

Before commenting on the revision of the Rules I may refer to the "General Remarks" of the Secretariat, preceding its Note of 8 December 2008. As first General Remark the Secretariat states: "the Working Group may wish to consider whether the articles of the revised Rules should be renumbered as proposed in this Note". I do not know whether the WG agreed on the renumbering, but the renumbering started on 8 December 2008.

In my opinion a renumbering of these articles should be avoided for several reasons. In the more than 30 years of the 1976 Rules a wealth of arbitral awards has been rendered. When arbitrating under UNCITRAL Arbitration Rules the lawyers may look for precedents. These awards are reported by UNCITRAL in CLOUT. Consultation of these awards will be made difficult when the numbering has been changed. Or will UNCITRAL, when the revision is completed and a new version of the Rules has been adopted by the Commission, undertake the task of producing a new addition of CLOUT to facilitate the search for precedents? I do not aspect UNCITRAL will undertake this task.

In the more than 30 years of the Arbitration Rules many articles have appeared in legal journals, not only arbitration journals, in which UNCITRAL Arbitration Rules have been discussed or referred to. The consultation of these articles will be made difficult when the numbering has changed. The same applies to books, in particular books dealing with UNCITRAL Arbitration Rules.

Could renumbering be avoided? Only in few cases will a new article be inserted into the Rules. The August 2008 Draft proposes at the end two additional provisions. Will the provision on liability of arbitrators be numbered Add 1? Or would there be other solutions? In my opinion it is worthwhile to consider whether renumbering of the Arbitration Rules 1976 can be avoided.

Part A: First major change

As first major change the addition of a response to the Notice of Arbitration may be regarded. In the Draft of August 2008, Notice and Response, were dealt with in art. 3, the longest article of the Draft. At the Revision of December 2008, Notice and Response have been separated. The Notice is dealt with in art. 3 and the Response in art. 4.

Article 3: Notice of Arbitration

In the December 2008 Revision this article reads:

> '1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall give 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 contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
> (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 appointment of an appointing authority referred to in article 4 bis, 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 article 10 bis;
>
> 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. In the event of such a controversy, the arbitral tribunal shall proceed as it considers appropriate.

Paragraph 1 and 2

No comment.

Paragraph 3

This paragraph states under (a) to (g) what the Notice "*shall contain*". In my opinion (g) *should be deleted*. Why should proposals be made for the number of arbitrators, the language and place of arbitration, regulated in specific articles of the Rules? At this early stage of the proceedings, in my opinion both notice and response should abstain from entering in to what already has been regulated later on in the Rules.

Paragraph 4

This paragraph states what the notice of arbitration *may include*.
Under (a) is stated that a proposal for the appointment of an Appointing Authority (AA) may be made. The respondent may also include a proposal for the appointment of an AA in his response. See art. 4 (2) under (b).

In UNCITRAL arbitrations an AA has to be appointed as UNCITRAL is not an arbitral institution which comes to the rescue in case parties fail in the appointment of arbitrators. Parties may already have agreed on the AA in UNCITRAL's Model Arbitration Clause. If not, the AA will be appointed as provided in art. 6. Proposals in the Notice of Arbitration and Response do not constitute the appointment of an AA. In my opinion *(a) should be deleted*.

Under (b) is stated that the claimant may make a proposal for the appointment of a sole arbitrator according to art. 4 (2) under (c). In my opinion *these proposals may be deleted.* Even when the proposals would concur they do not constitute the appointment of the sole arbitrator.

Under (c) is stated that the Notice may contain claimant's appointment of "his" arbitrator in case an AT of three persons has to be appointed. This is also repeated in art. 4 (2) under (d). In my opinion, these appointments may be maintained, although a claimant or respondent will not in many cases appoint "their" arbitrator already at the very beginning of an arbitration.

Paragraph 5

The constitution of an AT shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration. In my opinion it *should be deleted that such controversy shall be finally resolved by the AT.* In case of sufficiency of the Notice it is enough that the AT shall proceed as it considers appropriate.

Article 4: The response to the notice

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which *shall* [to the extent possible,] 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, paragraph 3 (c), (d), (e), (f) and (g);

2. The response to the notice of arbitration *may* also include:
(a) any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;
(b) A proposal for the appointment 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 article 10;
(e) A brief description of counter-claims 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.

3. The constitution of the arbitral tribunal shall not be hindered by failure of the respondent to communicate a response to the notice of arbitration, or by an incomplete or late response to the notice of arbitration. In either event, the arbitral tribunal shall proceed as it considers appropriate.

Paragraph 1

This paragraph deals with what the response to the Notice *shall include*. Under (b) the respondent shall deal with what art. 3 (3) states under (c) to (g). In my comment on art. 3 (3), I proposed deletion of (g), proposals as to the number of arbitrators, language and place of arbitration. In my opinion, in para 1 *the reference to (g) should be deleted.*

Paragraph 2

This paragraph deals with what the response *may include.*
Under(a) the respondent may raise the plea that the AT – still to be appointed – will lack jurisdiction. The topic that the AT lacks jurisdiction has been regulated in art. 21, stating that this plea shall be raised no later than in the statement of defence. The AT may express its opinion on this plea in a preliminary ruling or in an award on the merits. In any case the court has the last word.

In the response the plea of lack of jurisdiction will not be argued as will be done in case the plea is raised in the statement of defence. What is the use of raising this plea already in the response? In any case I cannot see any advantage to include in para 2 the possibility of (a).

Under (b) and (c) the proposals for the appointment of an AA and the proposal for the appointment of a sole arbitrator have been mentioned, as done in art. 3 under (a) and (b). In my comment on art. 3 I already proposed *deletion of these proposals* in arts. 3 and 4.

Under (d) the appointment of "his" arbitrator by the claimant, in case an AT of three arbitrators has to be constituted, is repeated for the respondent. I refer to my comment in art. 3.

Under(e) of art. 4 is stated that the respondent may introduce a counterclaim or claim for set-off. This preludes what has been regulated in art. 19, the Statement of Defence. A brief description of the claims is required, including an indication of the amounts involved and the relief or remedy sought. In my opinion it goes too far for the respondent to introduce in his response a counterclaim or claim for the purpose of sett-off in this manner. Also *(e) may be deleted.*

Paragraph 3

Failure of the respondent to communicate a response to the notice or an incomplete response shall not hinder the constitution of the AT. A late response will also not hinder the constitution.
According to para 1, the response shall be made within 30 days of the receipt of the notice. *The reference to a late response may be deleted.*

Article 18 and Article 19

When commenting on art. 3 and 4 I should also deal with arts. 18 (1) and 19 (1) as claimant may elect to treat his notice as statement of claim and the respondent may elect to treat his response as statement of defence.

According to art. 3 of the 1976 Arbitration Rules the notice may include "a statement of claim" referred to in art. 18. Article 18 (1976) begins with "unless the statement of claim was contained in the notice of arbitration". This reference to the statement of claim differs essentially from the election of the notice as statement of claim. I cannot imagine an arbitration taking place on the basis of a notice of arbitration or, as the case may be on the basis of a notice of arbitration and a response without any substantiation of claim and defence.
In my opinion t*he last sentence of para 1 of arts. 18 and 19 should be deleted.*

Alternative proposal for the response

The response to the notice has been introduced with art. 4. The question may arise whether this could not be done in a much simpler way. As example I refer to art. 11 of the WIPO Arbitration Rules, stating:

> "Within 30 days from the date on which the Respondent received the Request for Arbitration from the Claimant, the Respondent shall address to the Center and to the Claimant an Answer to the Request which shall contain comments on any of the elements in the Request for Arbitration and may include indications of any counter-claim or claim of set-off".

In my opinion, art. 4 may provide that *within 30 days from the receipt of the notice of arbitration the respondent may communicate to the claimant a response with comment on any of the elements of the notice.*

Instead of the "shall" a "may" is proposed. Arbitral proceedings may commence with the notice even without a response. To the "may" could be added: *in the response the respondent may announce his intention to make a counterclaim or claim for the purpose of set-off.* Instead of the substantiation required under (e) of art. 4 (1), an indication may be enough.

The notice of arbitration in art. 3 may remain with some modifications. For the response we may not need a separate article. What I suggested above could be added as a paragraph to art. 3.

Part B: Second major change

This second change concerns the appointment of the arbitrators. In the 1976 Rules this is regulated in arts. 6 to 8. The August 2008 Draft separates from art. 6 the designating and appointing authorities in art. 4bis and contains a new provision on multiple parties in art. 7bis. In December 2008 art. 4bis has become **Article 6** and art.7bis has become **Article 10**.

Article 6 – Designating and Appointing authorities

In the December 2008 Revision art. 4bis became **article 6**, reading:

> ‘1. Unless the appointing authority had already been agreed, a party may at any time propose the name or names of one or more institutions or persons including the Secretary-General of the Permanent Court of Arbitration, (hereinafter called “the PCA)”, one of whom would serve as appointing authority.
>
> 2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.
>
> 3. 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, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party´s request to do so under article 39, paragraph 4, any party request the Secretary-General of the PCA to make that decision.
>
> 4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and, to the extent it considers possible, it shall give the parties an opportunity to present their views. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.
>
> 5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 and 15 the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.
>
> 6. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.’

Paragraph 1

Parties may at any time propose the names of arbitral institutions or persons for the appointment of an appointing authority (AA). Expressis verbis is stated that persons include the S-G of the PCA. On the role of the S-G of the PCA I will come back at the end of my comment on art. 6.

Paragraph 2

Within 30 days after a proposal made for the appointment of an AA has been received by the parties, any party may request the S-G of the PCA to designate the AA in case parties did not agree already on the AA, for example in the model arbitration clause of UNCITRAL.

Instead of within 30 days after a proposal has been received, I propose to state that the request may be made within *30 days after receipt of the notice of arbitration.*

Paragraph 3

The first sentence states that in case the AA refuses to act or fails to appoint an arbitrator within 30 days after receipt of the request of a party to do so, any party may request the S-G of the PCA to "designate an AA". In my opinion this only applies in case the AA is an arbitral institution. In case the S-G of the PCA functions as AA *this should not apply.*

The second sentence of para 3 refers to art. 39 (4), the determination of the fees of the AT. If the AA refuses or fails to make a decision on the fees of the AT within 30 days after receipt of the request to do so, art. 39 (4) provides that any party may request the S-G of the PCA to make the decision. At the end of my comment on art. 6 I will comment on the "Role of the S-G of the PCA" including his function under art. 39 (4).

Paragraph 4

The AA may require from any party the *information* it deems necessary. This applies as well to the S-G of the PCA if appointed as AA. All *communications* between a party and the AA shall be sent to all other parties. These communications include letters. When letters are sent to all parties, a party may also be interested in the response. When a copy of a letter of the S-G of the PCA has been sent to all parties, any party may in my opinion also requests to be informed about the response.

When arriving at art. 24 (Evidence) I will deal with objections, when all communications are sent to all the parties, on the basis of confidentiality. Also in respect of the information the AA may require, this issue may arise. In my opinion, *para 4 of art. 6 may need further consideration*.

Paragraph 5

When the AA has been requested to appoint an arbitrator, copy of the notice of arbitration and, if it exists, a copy of the response shall be sent to the AA. The AA should know what the dispute is about. However, also without these copies the AA will be informed about the dispute for which arbitrators have to be appointed.

Paragraph 6

This paragraph has been transposed from article 25 (6) to art. 24 (4).

The role of the S-G of the PCA

The main function of an AA concerns the appointment of arbitrators. As a rule arbitral institutions are appointed as AA. However, also persons may be appointed as AA. See art. 6 (1) under (b) of the 1976 Rules. The December 2008 version states expressis verbis that persons include the S-G of the PCA. Also under the 1976 Rules the S-G functioned as AA.

When the AA is involved in the appointment of arbitrators, the AA has to submit under the list procedure at least three names for each arbitrator to be appointed. For an arbitral institution, disposing of extensive lists of candidates, this may not cause problems. The S-G of the PCA acting as AA may encounter difficulties. In that case the S-G may call upon third parties for assistance.

The S-G of the PCA may also, in case of challenge of an arbitrator, be called upon to decide on the challenge. Decision on the challenge may involve the hearing of the challenged arbitrator and the parties. The S-G may assume this task but in my opinion an arbitral institution as AA may be preferred.

However, in respect of the role, attributed to the S-G of the PCA according to para 3 of art. 6, doubts arise under art. 39 (4) reading:

> 4. Within 15 days from the date any proposal or decision on the fees of arbitrators is communicated by the arbitral tribunal to the parties, any party may refer the matter to the appointing authority, or if no appointing authority has been agreed upon or designated, to the Secretary-General of the PCA, for final determination in accordance with the criteria in paragraph (1). Any modification to the fees decided by the appointing authority or the Secretary-General of the PCA shall be deemed to be part of the award.

For final determination of the fees, any party may refer the matter to the AA (including already the S-G of the PCA if appointed as AA) or, if no AA has been agreed upon, to the S-G of the PCA. This reference should be made within 15 days from the date parties received any "proposal or decision" of the AT on the fees. Should the AT really, before rendering the award, send a proposal for the fees of arbitrators or its decision on the fees to the AA or the S-G of the PCA before rendering its award?

The AT will have to wait for the final determination of the fees until the AA or the S-G has expressed their opinion on the proposal or the decision of the AT. In case they agree with the proposal or the decision of the AT, the AT can render its award. However, in case a modification has been made, this shall be deemed part of the award.

Has the S-G of the PCA been consulted whether he is prepared to assume the task of determining the fees of arbitrators? In order to fulfill this task he must be fully informed about all the work, perhaps over several years, done by the arbitrators. I doubt whether in the context of art. 39 (4) he can refuse to assume this task, for which extensive hearings of the arbitrators and the parties and/or their lawyers will be necessary.

In any case I doubt whether it can validly be provided that a modification made by the AA or the S-G of the PCA can be made part of the award. An award has to be made and signed by the arbitrators. Arbitrators cannot delegate part of their decision to a third party. In my opinion *modifications deemed to be part of the award* s*hould be deleted.*

Article 10 (Article 7 bis)

This article reads in the December 2008 version:

> '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 paragraphs 1 and 2, 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 re-appoint each of the arbitrators and designate one of them as the presiding arbitrator. [The appointing authority may also decide, at the request of a party, to appoint a sole arbitrator pursuant to article 7, paragraph (2)].

Paragraph 1

In case three arbitrators are to be appointed and claimant or respondent would be multiple parties they will jointly appoint an arbitrator. Even if not provided, it has been generally accepted in practice that multiple parties act jointly. In my opinion *this specific statement is not needed.*

Paragraph 2

In UNCITRAL arbitrations the number of arbitrators will always be one or three. Para 2 referring to a number of arbitrators "*other than one or three*" *should be deleted.*

Paragraph 3

In case of failure to constitute an AT pursuant to paras 1 and 2, the AA shall constitute the AT. Why has been repeated what in any case applies? In case of failure, the AA comes to the rescue. In my opinion *art. 10 (*art 7bis*) may be deleted.*

Conclusion on Part B

In my opinion, article 6 (art. 4bis) on designating and appointing authorities could return to the Section dealing with the appointment of arbitrators, arts. 6 to 8 of the 1976 Rules. Article 10 (art. 7bis) on multiple parties could be deleted. The original structure of the Rules could be maintained in accordance with the mandate of the Commission of 2006.

When doing so some modifications will have to be made. Article 8, deleted in the revision as in substance dealt with in art. 4bis, should return to arts. 6 to 8. The reference in art. 10 (art. 7bis) that multiple parties act jointly in the appointment of arbitrators in case of a tribunal of three arbitrators, could in my opinion be included in art. 8.

Part C – Comment on Arts. 1 – 41

Introduction

After my comment on major changes, I will deal with all articles in the order of the 1976 Rules. The August 2008 Draft also deals with these articles in the order of the 1976 Rules. However, in December 2008 the articles have been renumbered. When commenting in Part C on articles 1-41 the new numbers will also be indicated.

After the Draft of August 2008 a second round of revision was started, as on many of the 41 articles no agreement had been reached. At the time of writing my comment on the actual status of the revision, a Note from the Secretariat had appeared on December 2008 and another one on March 2009. The second round of revision may be terminated end of 2009 or beginning of 2010. Also in this second round agreement has still to be reached in the Working Group before a final version of the complete revised Arbitration Rules 1976 can be submitted for approval to the Commission.

Article 1 – Scope of Application

In the revision of December 2008 this article reads:

> 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 the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree.
>
> 2. Unless the parties have agreed to apply a particular version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply, where the arbitration agreement has been concluded by accepting after (date of adoption by UNCITRAL of the revised version of the Rules) an offer made before that date.
>
> 3. 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.

Paragraph 1

This paragraph repeats Article 1 of the 1976 Rules. It seldom happens that parties modify the Rules. As an example I may refer to the Rules of the Iran/US Claims Tribunal in The Hague, arbitrating under slightly modified UNCITRAL Arbitration Rules 1976. Also the Arbitration Rules of the PCA are based on the 1976 Rules.

The 1976 Rules state in paragraph 1 that modifications by the parties should be "in writing". Why has in "writing" been deleted? In my opinion it should remain that modifications should be in writing.

Paragraph 2

This paragraph had to be added, as after the adoption of the revision there will be two sets of arbitration rules, the 1976 version and the new version. With regard to the second sentence of para 2, parties are assumed to arbitrate under the version applicable at the time they concluded the arbitration agreement. In my opinion it should be stated: *at the time they concluded a contract, referring to UNCITRAL Arbitrations Rules.*

Paragraph 2 contains the exception that this presumption will not apply when an offer to conclude an *arbitration agreement* has been made before the adoption of the revised version of the rules, but accepted after that date. In my opinion it should be stated that the exception applies in case an offer for a *contract,* referring disputes to UNCITRAL arbitration, has been made before the adoption but accepted after the adoption. It is not, as stated in remark 2 on Article 1 in the Draft of August 2008, an "open offer to arbitrate" but an offer to conclude a contract.

The question may be raised whether this exception "offer made before adoption but accepted after adoption" should be maintained. As such it is an exceptional situation but why should parties in that case be obliged to arbitrate under the 1976 Rules? They may very well prefer to arbitrate under the revised edition. In my opinion *paragraph 2 may be deleted.*

Paragraph 3

This paragraph repeats paragraph 2 of the 1976 Rules.

Model Arbitration Clause

The 1976 Arbitration Rules added this clause with an asterisk to para 1. A proposal has been made to state *"parties should consider"* adding (a) to (d) instead of "parties may wish to consider" adding (a) to (d). In my opinion this should be done. See for example addition (a): The appointing authority will be …… (name of institution or person).

Article 2 – Notice and Calculation of periods of time

1. Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provide a record of its transmission.
2. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
3. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal 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.

Paras 1 and 2

According to *remark 11* para 1 seeks to include language which authorizes delivery of notice by any means of communication that provides a record of transmission. Receipt of notice delivered through such means of communications is dealt with in para 2.

Remark 12 states that the WG may wish to consider whether additional language should be included in para 2 to provide more guidance to parties, in particular to limit the risk of communication made through E-mail addresses.

Paragraph 3

This paragraph deals with calculation of time periods. This has been borrowed from the 1976 Rules and was adopted in substance by the WG.

Article 3 - Notice of arbitration and response

This article has been commented upon **in PART A** as the first major change made in the revision of the Rules in the August 2008 Draft. In my conclusion on art. 3, a much simpler form for the insertion of a response to the notice of arbitration has been proposed.

Article 4 – Representation and Assistance

In the revision of December 2008 this article has become art.5. It reads:

> 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 members of the arbitral tribunal. Such 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, itself 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.

No comment.

Article 5 – Number of arbitrators

In the revision of December 2008, Art. 5 has become **Article 7**, reading:

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), if no party has responded to a proposal to appoint a sole arbitrator within the time limit provided for in paragraph (1) and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or article 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8 if it determines that, in view of the circumstances of the case, this is more appropriate.

Paragraph 1

Paragraph 1 repeats art. 5 of the 1976 version. It only omits “i.e. one or three” as stated in art. 5 of 1976. This may be omitted, but if maintained it emphasizes that the number of arbitrators in UNCITRAL arbitrations will always be one or three.

Paragraph 2

This paragraph has been added at the December 2008 Revision. Why should be added that the AA could at the request of a party appoint a sole arbitrator if it determines this is more appropriate in case a party, when three arbitrators should be appointed, fails in the appointment of “his” arbitrator. In case of failure, the AA comes to the rescue for constitution of a tribunal of three. A direct appointment by the AA would deprive a party from his right to appoint the arbitrators.

Articles 6 to 8 – Appointment of arbitrators

In **Part B** I concluded that arts. 6 to 8 of the 1976 Rules should be maintained.

Articles 9 to 12 - Challenge of the arbitrators

Article 9

In the revision of December 2008, this article reads:

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

Model statements of independence

> *No circumstances to disclose:* I am independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstance that may subsequently come to my attention during this arbitration.
>
> *Circumstances to disclose:* I am impartial and independent of each of the parties and intend to remain so. Attached is a statement pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstance. (Include statement). I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationships or circumstance that may subsequently come to my attention during this arbitration.

The Draft adopts art. 9 of the Arbitration Rules 1976 but adds to article 9 *Model Statements of Independence.* According to Remark 23, the purpose of including these statements is to provide guidance on the required contents of the disclosure (second sentence of art. (9)).

In my opinion, the addition of Model Statements of Independence should be omitted. No other Arbitration Rules contain such Models. In practice arbitral institutes submit a statement of independence for signature by arbitrators who are to be appointed. In my opinion there is guidance enough and no need for insertion of Model Statements of independence in the Rules.

Revision December 2008

Art. 9 has become **Article 11.** Art, 9 has been maintained, although the first sentence became para 1 and the second sentence para 2. Also the Model Statements have been maintained with some modifications like the addition of "impartial" to "independent".

Article 10 - Reasons for challenges

In the Draft this article reads:

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators' impartiality or independence.
2. A party may challenge the arbitrator appointed by its only for reasons of which it becomes aware after the appointment has been made.

No comment and no modification at the revision of December 2008.

Article 11 – Notice of challenge

In the Draft this article reads:

> 1. A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.
> 2. The challenge shall be notified to all parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification [shall be in writing and] shall state the reasons for the challenge.
> 3. When an arbitrator has been challenged by a party, [all other parties][the party or parties that appointed the challenged arbitrator] may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6, 7 or 7 bis shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment.

Paragraph 1

This paragraph repeats para 1 of the 1976 Rules.

Paragraph 2

In the 1976 version of the Rules the notice of challenge shall be in writing and shall state the reasons for challenge. *In my opinion this should be maintained.*
Remark 26 on the Draft states:

> 26. The Working Group might wish to consider deleting 'shall be in writing' as the manner in which the information should be exchanged is already dealt with under article 2.

I cannot find in art 2 that notices shall be in writing, but in any case it should be clearly provided that the notice of challenge, containing the reasons for a challenge shall be in writing. When the AA has to decide on the challenge it should find the reasons for challenge in the Notice.

Paragraph 3

Should article 11 deal with the issue whether all parties may agree to the challenge or only the party who appointed the challenged arbitrator? The same question arises in respect of Article 12 regulating which party may pursue the challenge.

Remark 27 on article 11 reads:

> 27. The Working Group might wish to consider under paragraph (3) whether, when an arbitrator has been challenged by a party, all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator. The same question arises in relation to article 12 paragraph (1) see below paragraph 28.

In this remark reference is made to art.12 (1). In my opinion the right place to raise the question whether all parties should be given a right to agree to the challenge should be dealt with in art. 12 (decision on the challenge) and not in art. 11 (notice of arbitration).

In my opinion para 3 of art. 11 should only state:

> 3. *When an arbitrator has been challenged by a party, the party who appointed the arbitrator may agree to the challenge or the challenged arbitrator may withdraw from its office. In neither case this applies acceptance of the validity of the grounds of the challenge.*

Revision December 2008

In this revision, art. 11 becomes **Article 13**, which reads:

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to challenging party or within 15 days after the circumstances mentioned in arts. 11 and 12 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 members of arbitral tribunal. The notice of challenged 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 his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the replacement of the arbitrator shall be made in accordance with the procedure provided in Article 15.

Paragraph 1

No comment.

Paragraph 2

From this paragraph has been deleted that the notice of challenge, containing the reasons for the challenge, shall be in writing. In my opinion *in writing should be maintained.*

Paragraph 3

The 1976 Rules states in Article 11 (3): when an arbitrator has been challenged by one party, the other party may agree to the challenge. In my opinion this should be maintained instead of “all parties” may agree to the challenge.

Article 12 – Decision on the challenge

In the Draft this article reads:

> 1. If, within 15 days from the date of notice of challenge, [other party] [the party or parties that appointed the challenged arbitrator] does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority.
> 2. The appointing authority may reject the challenge, if the challenging party ought reasonably to have known the grounds for challenge at an earlier stage of the procedure.

Paragraph 1

The question raised in art. 11 whether all parties may agree on the challenge is repeated in art. 12 in respect of the decision on the challenge. In my opinion only the party who appointed the challenged arbitrator may pursue the challenge.

Paragraph 2

Even if not added, the AA will in my opinion reject a challenge already known at the appointment.

Revision December 2008

In this revision, art. 12 has become **article 14,** reading:

> 1. If, within 15 days from the date of the notice of challenge, any party does not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from the date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority. In case of the successful challenge, the replacement of the arbitrator shall be made in accordance with the procedure provided in article 15.
> 2. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge of an arbitrator as provided in the preceding articles and in paragraph 1 shall apply.

In my opinion, only the party whose arbitrator has been challenged may agree to the challenge and not any party. Within 15 days from the notice of challenge the challenged arbitrator himself may also withdraw. In case this does not occur within 30 days from the date of the notice of challenge, the challenge will be pursued and a decision on the challenge by the AA will be sought.

What has been stated in Paragraph of the 1976 Rules – the AA may reject the challenge if the challenging party ought reasonably to have known the grounds for challenge – could indeed been omitted.

Article 13 – Replacement of the arbitrator

In the Draft this article reads:

1. Subject to paragraphs 2 and 3, in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 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. In the event that an arbitrator has resigned for invalid reasons or refuses or fails to act, the appointing authority may, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award.
3. In the event of successful challenge under article 12 or replacement of an arbitrator according to paragraph 2, the appointing authority shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced or to proceed itself to the appointment of the substitute arbitrator.

Paragraph 1

In case of a successful challenge, a substitute arbitrator shall be appointed pursuant to the rules for the appointment of arbitrators. The second sentence states that this procedure shall apply even if a party failed to participate in the appointment procedure. In case a party fails to participate in the appointment, the AA comes to the rescue. The AA will appoint the substitute arbitrator under application of the List-procedure. In my opinion *the second sentence of para 1 should be deleted.*

Paragraph 2

In the event the arbitrator has resigned, refuses or fails to act, the AA may, if so requested by a party, either replace the arbitrator or authorize the other arbitrators to proceed and make an award instead of appointing a substitute arbitrator. Authorizing the other arbitrators to proceed and render an award means the rendering of an award by an even number of arbitrators. In UNCITRAL arbitration the number of arbitrators shall be one or three; an even number of arbitrators is not permitted. If ever it would be considered to permit the rendering of an award by an even number of arbitrators, it would require a provision in case no agreement can be reached and a deadlock has arisen. *Authorizing the other arbitrators to proceed and render the award should be deleted.*

Paragraph 3

In case of a successful challenge and in case of replacement according to para 2, the AA should in my opinion not be authorized to a direct appointment of an arbitrator. This would deprive a party of its right to appoint an arbitrator. In my opinion *this direct appointment should be deleted.*

A substitute arbitrator will not only be appointed in case of a successful challenge but also in the cases mentioned in para 2. However, replacement may also take place *in case of death* and *de jure* or *de facto* impossibility to perform his functions. I refer to art 13 of the 1976 Rules.

Proposal

I propose to insert in art 13 a paragraph stating all events in which a substitute arbitrator may be appointed. In any case *the omission in the Draft of death should be repaired.*

Revision December 2008

In the revision, art. 13 becomes **Article 15**, reading:

1. Subject to paragraph (2), in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in article 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, the arbitrators, and the arbitrator being replaced to express their views: (a) appoint the substitute arbitrator; or (b) if the same occurs after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Paragraph 1

The second sentence, stating that the procedure shall even apply if a party failed to participate in the appointment *should in my opinion be deleted.* In case of failure the AA comes to the rescue in application of the list procedure.

Paragraph 2

This paragraph provides under (b) that the other arbitrators may be authorized by the AA to proceed with the arbitration and make an award. *This authorization should be deleted*. See my comment on the Draft. On para 2 remark 35 states:

> 35. Paragraph (2) corresponds to a proposal made in the Working Group to address the situation where a party, in exceptional circumstances, has to be deprived of its right to appoint the substitute arbitrator. The Working Group agreed to give further consideration to that proposal.

This further consideration should be expected.

Article 14 – Repetition of hearings in the event of replacement.

In the revision of December 2008 has become Article 16, reading

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

No comment.

Section III – Arbitral Proceedings

Article 15 – General provisions

This article has grown up during the revision process. In the Arbitration Rules 1976 it contained three paragraphs, in the Draft of August 2008 four paragraphs and in the Revision of December five paragraphs. Article 15 has become in the December 2008 revision **Article 17**, reading:

> 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 an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
>
> 2. The arbitral tribunal may, after inviting the parties to express their views, extend or abridge any period of time prescribed under the Rules or agreed by the parties.
>
> 3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
>
> 4.All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except for communication under article [26, paragraph (5)]
>
> 5. The arbitral tribunal may, on the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, 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 because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Paragraph 1

This paragraph refers to *principles* governing the arbitral proceedings. The other paragraphs are of a different character.

Paragraph 2

The AT may extend or abridge any period of time prescribed under the Rules or agreed by the parties. When Rules prescribe a period of time, this may be modified by the parties as has been stated in art. 1. In my opinion, *a modification of the Rules by the AT should not be provided.*

The AT may also modify time periods agreed by the parties. Which time periods parties may have agreed upon? Time periods may have been determined by the AT. At the beginning of an arbitration the AT will determine time periods for the submission of a statement of claim and a statement of defence. *In my opinion para 2 may be deleted.*

Paragraph 3

In this paragraph reference is made to hearings the AT shall hold for the presentation of evidence by witnesses including expert witnesses or for oral arguments. The hearing for oral arguments has not found a regulation, neither in the Arbitration Rules nor in the August 2008 Draft. The hearing of witnesses is regulated in art. 25, including the witness statements. The hearing of expert witnesses refers to the party-appointed experts. The hearing of the party-appointed experts will be dealt with when arriving at art. 27, the appointment of an expert by the AT.

The second sentence provides that the AT shall decide whether such hearings shall be hold or whether the proceedings shall be conducted on the basis of documents. Production of documents has been in extenso regulated in art. 3 (12 paragraphs) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration. When arriving at art. 24, the second occasion on which the rules refer to the production of documents, I will deal with the problems that may arise in case production of documents is ordered.

In my opinion Article 15 (General Provisions) should not prelude on what has been dealt with in arts. 25, 27 and 24.

Paragraph 4

With the exception of art. 26 (5) on Interim Measures, all communications by a party to the AT shall be communicated to all other parties. In art. 2 (1) the communications to the AT have been dealt with. In my opinion it may be considered whether *para 4 should be dealt with in art. 2.*

Paragraph 5

According to this paragraph, the AT may, on application of any party, allow one or more third parties to be joined in the arbitration. The Rules do not contain a provision on joinder. Should para 5 be regarded as proposal of the text on joinder, to be inserted somewhere in the revised Rules? In any case it is not a general provision.

In the Note of the Secretariat on the August 2008 Draft, Remark 37 states that the WG agreed that the provision on joinder should be inserted. The WG requested the Secretariat to consult arbitral institutions. As such the Secretariat consulted the ICC, the LCIA and the Swiss Arbitration Association (ASA). The information it received from these institutions is reported in Remark 37.

Paragraph 5 however may not be regarded as the final version of a provision on joinder. In Remark 41 in the note on the revision of December 2008 the Secretariat states that the WG may wish to consider further the language in para 5 on joinder.

"Article 15 has become a mixture of subjects dealt with in 5 paragraphs. In my opinion, art. 15, the first article of Section III on Arbitral Proceedings, may be an introduction to this Section. Para 1 of art. 15 could serve as such. Art. 15 should be entitled General Principles.

* * *

Alternative proposal for Article 15

I propose to deal in art. 15 only with principles governing the arbitral proceedings (art. 15 para 1). The other paras of art. 15 could be omitted or dealt with elsewhere. See my comment on art. 15 of the Draft. In case art. 15 is limited to the principles governing the proceedings, art. 15 may serve as introduction to Section III.

The new English Arbitration Act of 1996 refers in its first article to the principles governing the arbitration law. Of course these principles differ from the principles governing the arbitral proceedings, but also in this case a provision on principles introduces what follows.

In the English Arbitration Act 1996 the following principles have been mentioned:

- The object of the arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- The parties should be free to agree how their disputes are resolved, subject only to such as are necessary in the public interest.
- In matters governed by the Arbitration Act the court should not intervene except as provided in the arbitration act.

The principles referred to in para 1 of art. 15 are:

- Parties should be treated with equality.
- Each party shall be given an opportunity of presenting its case
- The arbitral tribunal shall in the conduct of the proceedings avoid unnecessary delay and expense.
- A fair and efficient process for resolving the parties' dispute shall be provided.

In respect of the fair and efficient process for resolving the parties' dispute it may be considered whether the fair and efficient conduct of the arbitral proceedings has not become a joint responsibility of the AT and the parties and/or their lawyers.

I refer to the *preparatory meetings* of the AT with the parties and/or their lawyers. On several occasions these meetings may take place. Immediately after its constitution the AT may convene such meeting in which inter alia the chairman of the AT will be authorized by the parties to decide alone on questions of procedure. At this meeting it may also be decided, in case the jurisdiction of the AT is disputed, that the AT will first of all express its opinion in a preliminary award. Also in case the law applicable to the dispute is disputed it may be agreed that a preliminary award will be made by the AT.

When witnesses are to be heard (art. 25), a preparatory meeting may also take place for the discussion and settlement of several issues arising at the hearing. When arriving at art. 25, I will come back in detail on this meeting. Also in case the AT appoints an expert, a preparatory meeting may be useful. When arriving at art. 27 I will refer to the issues that may be dealt with in such meeting.

Should it be concluded from the use of preparatory meetings that the efficient conduct of the arbitral proceedings has become a principle, applicable as well to the parties? I would not propose to state expressis verbis that the efficient conduct of the arbitral proceedings has become a common responsibility of the AT and the parties. However, it may be considered to add to the principle, applicable to the AT, that the AT in the fair and efficient process of the arbitral proceedings will apply this principle "*where appropriate in consultation with the parties"*.

Article 16 - Place of Arbitration

In the December 2008 Revision this article has become **Article 18** reading:

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, including the convenience of the parties. The award shall be deemed to be 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 meet at any location it considers appropriate for hearings and meetings.

Paragraph 1

Parties may have previously agreed on the place of arbitration by inserting UNCITRAL's Model Arbitration Clause stating "(c) the place of arbitration shall be …. (town or country)". The place of arbitration, also called the seat of arbitration, has as legal consequence the application of the arbitration law of the country where the arbitration takes place.

Article 17 – Languages

In the December 2008 Revision this article becomes **Article 19,** reading:

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.

No comment.

Article 18 – Statement of claim

In the Draft this article reads:

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 in article 3, paragraph 3 as a statement of claim.
2. The statement of claim shall include the following particulars:
   (a) The names and contacts 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 contract, or other legal instrument, and of the arbitration agreement shall be annexed to the statement of claim. The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant, or contain references to them.

Paragraph 1

In Part A I proposed in my comment on art. 3 *deletion of the last sentence of para 1*. In my opinion an arbitration should not be based on a notice of arbitration which does not contain the legal arguments supporting the claim. In art. 19 the last sentence of para 1 provides that the respondent may elect its response to the notice as statement of defence. Also in **Article 19** the last sentence should be deleted. I cannot imagine an arbitral procedure without a statement of claim or statement of defence.

Revision March 2009

Remark 19 provides that the purpose of the last sentence of para 1 was to postpone the election of the notice as statement of claim to the time the AT requires the claimant to submit its statement of claim, but the election of the notice as statement of claim, has been maintained.

Remark 20 proposes an addition to the last sentence: “provided that it meets the requirements of paragraph 2”. The Notice should therefore contain the legal arguments or arguments supporting the claim. Remark 20 states at the end that the Notice of Arbitration should also meet the requirements contained in art. 18, para 3, i.e. copy of the contract and copy of the arbitration agreement, accompanied by all documents relied upon by the claimant.

When doing so it will constitute a complete change of article 3. The Notice will become a statement of claim.

Remark 22 states that the WG generally agreed that a notice of arbitration treated as statement of claim should comply with the provisions of Article 18 and requested the Secretariat to revise the last sentence of paragraph 1 to reflect that decision.

Article 19 - Statement of Defence

In the Draft this article reads:

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 in article 3, paragraph 5 as a statement of defence.
2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 18, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidentiary material 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 counter-claim or rely on a claim for the purpose of a set-off [*option 1:* arising out of the same legal relationship, whether contractual or not]. [*option 2*: provided that it falls within the scope of the arbitration agreement.]
4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Paragraph 1

The last sentence of paragraph 1 should be deleted. See my comment on art. 18 (1).

Paragraph 3

The respondent may make a counter-claim or claim for the purpose of set-off. The Draft rejects that these claims should ‘arise out of the same contract’ as stated in the 1976 version. This may indeed be too restrictive. From the options mentioned in para 3 I prefer option 1: claims arising out of the same legal relationship whether contractual or not.

Revision March 2009

Paragraph 1

Remark 25 states that the WG agreed that the last sentence of para 1 should be revised *to parallel* the modifications adopted (sic) in respect of the last sentence of art. 18 (1). Reference is made to the remarks 19-22 referred to in my comment on Article 18. Will this parallel make the response to the Notice of Arbitration a statement of defence?

Paragraph 2

No comment.

Paragraph 3

On the counterclaim and the claim for the purpose of set-off there has been a long discussion reported in remarks 27-32. Remark 32 concludes:

> 32. After discussion, the WG agreed that paragraph (3) should be amended along the following lines: "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 counter-claim or rely on a claim for the purpose of set-off *provided that the tribunal has jurisdiction over it.*

Instead of a choice between the options presented in the Draft, the WG agreed on a freedom of the AT to decide on the counter-claim or claim for set-off 'provided that the AT has jurisdiction over it'. In my opinion this does not give guidance to the parties on the well-known issue under which conditions a counter-claim or a claim of set-off may be made. Also under the options, the AT should have jurisdiction.

Article 20 – Amendments to Claim and Defence

The Draft of December 2008 repeats article 20 of the 1976 version.

Article 21 – Pleas as to the Jurisdiction of the Arbitral Tribunal

In the Draft of December 2008 this article reads:

1. The arbitral tribunal may 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 which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail of itself 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 counter-claim or a claim for the purpose of a set-off, in the reply to the counter-claim or to a claim for the purpose of 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.

Comment on para 3

The AT may rule on the plea of lack of jurisdiction either as a preliminary question or in the award on the merits. The court has the last word on the jurisdiction of the AT. However, the sooner the AT expresses its opinion on its jurisdiction the better this is. The 1976 version states that the AT should "in general" rule on the plea in concerning its jurisdiction as a preliminary question. In my opinion in para 3 "*in general" should be maintained.*

The Model Law provides that any party may, within 30 days upon receipt of the tribunal's opinion, request the court to decide on the jurisdiction of the AT *without appeal.* This quick decision by a court is to be welcomed. However, this provision applies only in case the arbitration takes places in a Model Law country.

Revision March 2009

The last sentence of *paragraph 1* stating that the decision of the AT that the contract is "null and void" does not entail the invalidity of the arbitration clause has been the subject of extensive discussions reported in remarks 40-43 of the Secretariat's Note. From this Note I quote:

> *Remark 41*
>
> The words "null and "void" did not cause any problem in practice and are also found in Article II (3) of the New York Convention and Article 8 (I) of the UNCITRAL Arbitration Model Law.
>
> *Remark 43*
>
> After discussion, the WG agreed that the words "and void" in the third sentence of para 1 should be deleted from "null and void".

In my opinion "null and void" should be maintained. Why should something that did not cause problems and can be found also in the NYC and UNCITRAL's Model Law be modified when in the more than 30 years of experience with 'null and void', no problems have arisen? In my opinion "*null and void should remain*" in the last sentence of art. 21.

Article 22 - Further written statements

In the Draft of August 2008 this article reads:

> 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 maybe presented by them and shall fix the periods of time for communicating such statements.

Article 22 is reproduced without modification from the 1976 version. Also in March 2009 art. 22 did not give rise to modification.

Article 23 – Periods of Time

In the Draft of August 2008 this article reads:

> 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.

Article 23 is also borrowed from the 1976 version of the Rules and has not been modified in March 2009. In practice, the chairman of the A.T. will be authorised to decide on a request for extension of time limits. This is one of the topics that maybe discussed at the first preparatory meeting of the A.T. with the parties and/or their lawyers.

Article 24 – Evidence

In the Draft of August 2008 this article reads:

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. [Deleted]
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Paragraph 1

No comment.

Paragraph 2

In this provision, paragraph 2 of the 1976 Rules on the summary of documents has been deleted. Remark 8 states that it is not common practice for the AT to require parties to produce a summary of documents. Even when deleted, the AT may require such summary if it deems such summary to be appropriate.

Paragraph 3

At any time during the arbitral proceedings the AT may order the parties to produce documents. In my opinion, the Rules should pay more attention to the role documents may play in the arbitral proceedings.

The role of documents in the arbitral proceedings

It should be considered to refer in the revision to the decision the AT has to make when objections are made to the production of documents. It is a function of the AT on which the Rules are silent. Objections can be made on the basis of irrelevance or on the basis of confidentiality.

The IBA Rules on the Taking of Evidence deal with the production of documents in Article 3 (12 paragraphs), including the objections I refer to. I do not suggest dealing in the revision of the rules with the difficult issue of confidentiality in arbitral proceedings. In UNCITRAL's Note of 1996 on "Possible Future Work", this confidentiality is one of the topics but, so far, it has not been dealt with. When the objection of confidentiality has been made, in my opinion, the AT may be guided by the IBA Rules, which deal with this topic in art. 3 and art. 9 (2).

The arbitration rules of certain Product Associations deal with arbitration on documents only. Art. 15 (art. 17) on General Provisions refers in para 3 to this type of arbitration. In my opinion, it does not need a regulation in the revision of the Rules. Only the function of the AT to decide on objections when the production of a document has been ordered should be mentioned.

Revision March 2009

Article 24 should read:

1. Unchanged.
2. Unless otherwise directed by the arbitral tribunal, statements by witnesses and experts may be presented in writing and signed by them.
3. Unchanged.
4. Paragraph 6 of article 25 is transposed to article 24 (4).

Paras 1 and 3

No modification.

Paragraph 2

Witness statements are dealt with in art. 25, the hearing of witnesses. Experts appointed by the AT and the experts appointed by the parties do not produce a statement but a report. In my opinion, witnesses and experts should be dealt with in art. 25 and experts in art. 27.

Article 25 – Hearing, Witnesses and Experts

In the Draft this article reads:

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.
   1bis. Witnesses and experts presented by the parties may be heard under conditions set by the arbitral tribunal. For the purposes of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact, whether or not that individual is a party to the arbitration.
2. If witnesses and experts are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to all other parties the names and addresses of the witnesses and experts it intends to the present, the subject upon and the languages in which such witnesses and experts will present their statements.
3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing for a record of the hearing it either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.
4. Hearings shall be held in *camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses, save when the witness is a party to the arbitration. The arbitral tribunal is free to determine the manner in which witnesses and experts are examined.
5. Evidence of witnesses and experts may also be presented in the form of written statements signed by them and oral statements by means that do not require their presence at the hearing.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Paragraph 1

No comment.

Paragraph 1bis

Experts presented by the parties are ‘party appointed experts’. In art. 5 of the IBA Rules on the Taking of Evidence they are regulated in extenso.

Paragraph 2

In my opinion para 2 should be limited to the hearing of witnesses. On party-appointed-experts I will come back in my comment on article 27. The title of art. 25 should in my opinion be: Hearing of Witnesses.

Paragraph 3

No comment.

Paragraph 4

The AT may request the retirement of any witness during the hearing of other witnesses. Exception has been made for the retirement in case the witness is a party to the arbitration. This exception for the witness who is a party is explained in remark 12: ‘as it might influence the party’s ability to present its case’.

Paragraph 5 - Witness statements

In this paragraph, reference is made to the use of witness statements, practiced in international commercial arbitration. These statements shall be signed and affirm the truth of what the witness has stated. However, the question may arise whether the presence of the witness who presented a witness statement should not be required at the hearing.

In practice, a witness statement is drawn up by the lawyer who presents the witness. Should this statement exclude the hearing of the witness? The IBA Rules on the Taking of Evidence state in para 7 of art. 4 that each witness who has submitted a witness statement 'shall appear for testimony at the Evidentiary Hearing unless the parties agreed otherwise'. In my opinion *this may also be provided in para 5 of art. 25.*

Paragraph 6

This paragraph has been transposed to article 24.

Revision March 2009

On page 16 of the Secretariat's Report of this Session of the WG is stated

> - Article 25 would be titled "hearings".
> - Paragraph (1) would remain unchanged.
> - Paragraph (1bis) would read: "Witnesses and party appointed experts may be heard under the conditions and examined in the manner set by the arbitral tribunal. Any individual admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules, notwithstanding that the individual is a party to the arbitration or in any way related to a party".
> - Paragraph (2) would read: "At least 15 days before the hearing, the arbitral tribunal, after having invited the parties´ views, shall draw up a list of persons, if any, who are to be examined at the hearing and the languages in which they are to do so".
> - Paragraph (3) would omitted.
> - Paragraph (4) would read: "Hearings shall be held in camera unless the parties agree otherwise".
> - Paragraph (5) would read: The arbitral tribunal may direct that witnesses and experts be examined through means that do not require their physical presence at the hearing, such as videoconferencing".
> - Paragraph (6) would be omitted and its content be placed as a fourth paragraph under art. 24.

The Title

This title should in my opinion be: Hearing of Witnesses. Experts, including party-appointed experts, will be dealt with in art. 27.

Paragraph 1bis

No reference to party appointed experts should be made in the proposed new text.

Paragraph 2

A list of witnesses to be heard and the languages in which they testify could in my opinion be discussed and settled in a preparatory meeting.

Paragraph 3

This paragraph could indeed be omitted as the arrangements for translation and record of the hearing are issues to be discussed and settled in a preparatory meeting.

Paragraph 4

No comment.

Paragraph 5

Videoconferencing of witnesses may in my opinion be considered, but I doubt whether this should also apply to experts appointed by the tribunal and party appointed experts.

Paragraph 6

This paragraph will be transposed to art. 24.

Preparatory meeting

In practice, a preparatory meeting for the organization of the hearing of witnesses will take place. In such a meeting, the fixing of the dates on which the arbitrators, the parties and their lawyers and the witnesses should be present may be agreed upon. Arbitration Rules may refer to this and other issues, but settlement can only be reached in a meeting with the parties and/or their lawyers. There is, however, more to be discussed and settled at the preparatory meeting.

Should an arrangement be made in case the witness is not familiar with the language of the arbitration? Which witnesses will be presented and on which subjects will they testify? Who will start the interrogation of the witness, the AT or the lawyer who presented the witness? Should a record be made of the hearing? Will there be an exchange of post-hearing briefs by the parties after the hearing? If so, should these briefs be submitted to the AT at the same time in order to avoid further discussions between the parties? Will cross-examination be permitted?

In my opinion, a preparatory meeting may be regarded as useful and even necessary for an efficient organization of the hearing of witnesses. Perhaps it might be considered to add to article 25:

> For the efficient organisation of the hearing of witnesses the arbitral tribunal may convene a preparatory meeting to settle issues which may arise in respect of the hearing of witnesses.

Article 26 – Interim measures

In the Draft this article reads:

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decide, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) or a temporary order referred to under paragraph 5 shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result it the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion to the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraph 3 (a) and (b) shall apply only the extent the arbitral tribunal considers appropriate.
5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the earliest practicable opportunity to present its case and then determine whether to grant the requested measure.
6. The arbitral tribunal may modify, suspend or terminate an interim measure or an order referred to in paragraph 5 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.
7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.

8. The arbitral tribunal may require any party promptly to disclosure any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.
9. The party requesting an interim measure or applying for an order referred to in paragraph 5 may be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
10. A request for interim measure or an application for an order referred to in paragraph 5 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.

Comment

Paras 1 to 4 and paras 6 to 9 are modelled on the new Chapter IV A of the Model Law on interim measures. Paragraph 5 deals with the consequences of a temporary order and para 10 with the possibility to approach a judicial authority for an Interim Measure. This paragraph is borrowed from article 26 (3) of the 1976 version.

Article 26 is the last article so far dealt with in the second round of the revision. Art. 26 has been discussed in extenso in the WG as reported on pages 19 to 26 of the Report. On page 26 remark 118 states:

> 118. After discussion the WG requested the Secretariat to prepare a note to assist further discussion on how the different leges arbitri dealt with the matters of liability for damages that might result from the granting of interim measures.

This note still has to be produced.

Article 27 - Experts appointed by the A.T.

In the Draft this article reads:

> 1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
> 2. The parties shall give the expert any relevant information or produce for his or her 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.
> 3. 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 his or her report.
> 4. 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 witness in order to testify on the points at issue. The provision of the article 25 shall be applicable to such proceedings.

Paragraph 1

The AT shall draft the Terms of Reference (ToR) for the tribunal's expert. Should the AT consult the parties on its draft? See hereafter my proposal for a preparatory meeting.

Paragraph 2

The experts may require from the parties any relevant information or the production of a relevant document. To this has been added that any dispute between a party and the expert as to the relevance of the required information or production shall be referred to the AT for decision. This function of the AT has been referred to in art. 27 (2). However, objection may also be made on the basis of confidentiality. See my comment in art. 24 on the production of documents.

Paragraph 3

Why should the parties upon receipt of the experts' report be given the opportunity to express, in writing, their opinion on the report? At the hearing of the expert, parties will have a full opportunity to express their opinion on the report. Also at the hearing, the party-appointed experts will be present who may have dealt in their reports with the same issues as the tribunal's expert.

In my opinion *the possibility of the parties to express their opinion in writing on the report before the hearing on the report should be deleted.*

Paragraph 4

At the hearing the parties shall have the opportunity to interrogate the expert. The second sentence states that at this hearing any party may present expert "witnesses" in order to testify at the points of issue. In my opinion *reference should be made to the party appointed experts* and not to expert witnesses.

Party-appointed experts

In my opinion, article 27 should also deal with reports produced by party appointed experts. In arbitration, these experts appear more frequently than an expert appointed by the AT. Their reports will contradict each other. These different opinions may even be a reason for the AT to appoint an expert of its own, in case it has not enough experience of itself.

In the IBA Rules on the Taking of Evidence Party-Appointed Experts are dealt separately in art. 5. The expert appointed by the AT is dealt with in art. 6.

It is in particular para 3 of article 5 of the IBA Rules to which attention may be drawn. This paragraph reads:

> 3.The Arbitral Tribunal is its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Report, and they shall record in writing any such issues on which they reach agreement.

In my opinion it is useful when the AT, before the hearing of its own expert orders the party-appointed experts to meet and to report to the AT the result of this meeting. However, differing from art. 5 (para 3) this should in my opinion also include on which issues the party-appointed experts remain disagreed.

The party-appointed experts will as a rule deal with the same or related issues as the tribunal's expert, but also in case these experts have expressed an opinion on other issues, it should be reported whether agreement could be reached or not.

My proposal for art. 27 is the inclusion of a provision along the following lines:

> *Before the hearing of the tribunal's expert, the AT may order the party-appointed experts to meet and report to the AT on which issues they could reach agreement or remained in disagreement.*

Preparatory meeting

A preparatory meeting may be useful also when a tribunal's expert has to be appointed. The AT may even inform the parties about the expert it has in view. Also this expert should be independent and impartial. Parties may know more about him than the AT. Also the draft of the ToR, made by the AT, may be submitted to the parties. Of course the ToR shall be made by the AT, but different interpretations on the ToR should be avoided. At this meeting the deposit parties will have to make, in equal parts, for the remuneration of the tribunal's expert may also be settled.

Article 28 – Default

In the Draft this article reads:

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 the respondent has submitted a counter-claim;

(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 failure to submit a defence to a counter-claim 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 make the award on the evidence before it.

Comment

Article 28 may be compared with Article 25 of the Model Law. In para 1 the words "unless the respondent has submitted a counterclaim" have been added to (a). Para 3 corresponds with the (c) of art. 25.

Article 29 - Closure of the Hearings

This article is reproduces from the 1976 version without modification.

Article 30 – Waiver of Right to Object

In the Draft this article reads:

> 30. A party which knows that any provision of these Rules or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating this objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deeded to have waived to object.

Some modifications have been made to bring article 30 of the 1976 Rules more in line with article 4 of the Model Law.

Section IV - The Award
Article 31 – Decisions

In the Draft this article reads:

> 1. Option 1: when there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of the arbitrators.
>
> Option 2, Variant 1: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award of other decision shall be made by the presiding arbitrator alone. Variant 2: When there is more than one arbitrator an the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made, if previously agreed by the parties, by the presiding arbitrator alone.
>
> 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.

Paragraph 1

The WG requested the Secretariat to prepare alternative drafts for article 31 (1) of the 1976 version. In the 1976 version of the Rules article 31 (1) read "when there are 3 arbitrators any award or other decision of the A.T. shall be made by majority of the arbitrators".

Quid Juris in case no majority can be reached? *In my opinion, the President of the A.T. should in that case make the decision alone*. See variant 1 of option 2.

Paragraph 2

In practice, the presiding arbitrator will already be authorised by the parties in the first preparatory meeting between the AT and the parties and/or their lawyers to decide on questions of procedure, mostly an extension of the time limit for the production of a statement of claim or statement of defence. In my opinion, *the President's decision on questions of procedure should not be subject to revision by the AT.* Why should an arbitrator create a conflict with the chairman by submitting his decision to a revision by the AT? In my opinion, the revision of the President's decision on a question of procedure will never be requested by a party.

Article 32 - Form and effect of the award

In the Draft this article reads:

> 1. The arbitral tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the arbitral tribunal.
> 2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree.
> 3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
> 4. 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.
> 5. An award may be made public 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.
> 6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
> 7. [Deleted]

Paragraph 1

No comment.

Paragraph 2

The first two sentences of paragraph 2 are borrowed from paragraph 2 of the 1976 version. What follows provides that parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court. Can this waiver validly be made in arbitration rules?

I doubt whether arbitration rules can validly provide a waiver of remedies contained in the applicable Arbitration Act. The Arbitration Act itself may authorize to abstain from a remedy. For example for the setting aside of an award a few modern Arbitration Acts permit the exclusion, whole or in part by excluding specific grounds for the setting aside. In the last sentence of paragraph 2 the Draft refers to the waiver of setting aside of an award “if the parties so expressly agree”. Otherwise this will not be permitted.

Article 30 contains the waiver in case a party did not object to the non-compliance with the Rules. The waiver of recourse to a court etc. should be deleted.

Paragraph 3

This paragraph repeats paragraph 3 of the 1976 Version.

Paragraph 4

In this paragraph, the Draft repeats paragraph 4 of the 1976 version. An award shall be signed by the arbitrators and shall contain the date on which the award was made and indicate the place of arbitration. These are requirements which, in case of failure, can easily be repaired. When arriving at article 36, I will propose to bring these failures under the possible corrections of the award.

Paragraph 5

No comment.

Paragraph 6

Of course all parties should receive a copy of the award made by the AT. However, should this copy be signed by all the arbitrators as stated in para. 6? In my opinion the signature of the presiding arbitrator may be enough.

Paragraph 7

Paragraph 7 of the 1976 version has been deleted. Remark 29 states that the WG agreed on this deletion for the reason as it was unnecessary to provide that the AT should comply with mandatory revisions contained in the relevant national law. In art. 1 (2) this has also been stated.

Article 33 – Applicable law, amiable compositeurs

In the Draft this article reads:

> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [variant 1: with which the case has the closest connection] [variant 2: which it determines to be appropriate].
> 2. 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 and if the law applicable to the arbitral procedure permits such arbitration.
> 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of any applicable contract and shall take into account any usage of the trade applicable to the transaction.

Paragraph 1

The AT shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the AT shall in my opinion apply the law with which the case has the closest connection. I prefer variant 1. This corresponds with the Rome Convention 1980 on the Law Applicable to Contractual Obligations, the German Arbitration Act 1988 and the English Arbitration Act 1996.

Paragraphs 2 and 3

No comments on these paragraphs, which have been borrowed from the 1976 version of the Rules.

Article 34 – Settlement or other grounds for termination

In the Draft this article reads:

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 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.
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 a party raises justifiable grounds for objection.
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 32, paragraphs 2 and 4 to 6, shall apply.

Comment

The award on agreed terms may in my opinion be dealt with in paragraph 1. The last sentence of paragraph 3 should be added to paragraph 1. In paragraph 2, termination of the arbitral proceedings should be dealt with. Paragraph 3 may remain without the last sentence. In the Model Law, the settlement (award on agreed terms) is dealt with in article 30, termination of proceedings in article 32. When dealing with both in one article, a similar distinction between the two can be reached.

Award on agreed terms

In practice, when entering into settlement negotiations, parties may request the AT to assist them in these negotiations, as the AT is fully informed about the case. In my opinion the AT should refuse to do so as, in case no settlement could be reached, the arbitral proceedings continue. In view of this possibility parties may not feel free to make proposals for settlement or acknowledgements. Instead the AT may recommend the parties to assume the assistance of a mediator under application of a set of Mediation Rules that guarantee the confidentiality of the settlement negotiations.

Should this be added to para 1, for example along the following lines:

> In case during the arbitral proceedings the parties enter into settlement negotiations, the AT may recommend the parties to assume the assistance of a mediator under a set of Mediation Rules that guarantee the confidentiality of the settlement negotiations.

In view of the authority of the AT it may be expected that the parties will accept this invitation.

Termination of the arbitral proceedings

Under the Model Law (article 32 (2)) arbitral proceedings terminate in cases (a) (b) (c). From these cases only (c) – continuation becomes unnecessary or impossible - is referred to in Article 4. The withdrawal by the claimant of his claim (a) and the agreement of the parties to terminate the proceedings (b) could be added.

Article 35 – Interpretation of the Award

In the Draft this article reads:

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 32, paragraphs 2 to 6, shall apply.

Comment

Within 30 days after receipt of the award, a party may request the A.T. to give an interpretation of the award within 45 days after receipt of the request.

In practice of the Iran-US Claims Tribunal in The Hague, many requests for interpretation have been made but, so far, not a single one has led to an interpretation by the A.T. The request has been made to obtain postponement of rendering the award which was expected to be unfavourable.

Could the Rules contain a remedy against this abuse? I could imagine, for instance, an extra remuneration of the arbitrators for the work done in case interpretation has been requested without any reasonable ground.

Article 36 – Correction of the award

In the Draft this article reads:

1. Within 30 days after the receipt of the award, any party, with notice to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors or omissions of a similar nature. The arbitral tribunal may within 30 days after the communication of the award make such correction on its own initiative.
2. Such corrections shall be in writing, and the provisions of Article 32, paragraphs 2 to 6 shall apply.

Paragraph 1

Within 30 days after receipt of the award, any party may request the AT to correct in the award any errors in computation, any clerical or typographical errors, omissions or any errors or omissions of a similar nature. The AT may also, within 30 days after communication of the award, make such corrections on its own initiative.

In my opinion, the possibility of corrections may be extended to the failures mentioned in art 32 (4): the award shall be signed by the arbitrators, shall contain the date on which the award was made and shall indicate the place of arbitration. In case one of these fails, there is no valid award.

However, these failures can easily be repaired. In my opinion it would be an improvement of the Rules if *these failures would be adde*d.

Article 37 - Additional award

In the Draft this article reads:

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified, it shall 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 an additional award.
3. When an additional award is made, the provisions of article 32, paragraphs 2 to 6, shall apply.

Comment

In case the A.T. omitted to deal with a claim presented in the arbitral proceedings, an additional award will be made. In the Draft, the requirement contained in para 2 of the 1976 Rules that the omission may only be considered if made without any further hearings or evidence is deleted.

Section V – Costs

Article 38 – What "Costs" includes

In the Draft this article reads:

The arbitral tribunal shall fix the costs of arbitration in its award. 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 tribunal itself in accordance with Article 39.

(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 costs for representation and assistance of the parties if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that amount of such costs is reasonable.

(f) Any fees and expenses of the appointing authority as well as the expenses of the S.G. of the PCA.

Comment

According to para (a) the A.T. shall fix the fees of each arbitrator separately. In case of an A.T. of three arbitrators the chairman as a rule receives 40% and his two co-arbitrators each 30%. Fees of arbitrators is further regulated in Article 39.

Under para (f) is stated that the A.T. shall fix "the fees and the expenses" of the A.A.. For the S.G. of the PCA the draft only refers to "expenses".

Article 39 – The fees of the Arbitral Tribunal

In the Draft this article reads:

> 1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
>
> 2. If an appointing authority has been agreed upon by the parties or designated by the Secretary General of the PCA, and if that authority has issued or endorsed a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
>
> 3. Promptly after its constitution, the arbitral tribunal shall communicate to the parties the methodology, which it proposes to follow for the determination of the fees of its members. In its decisions on the costs of arbitration pursuant to Article 38, the arbitral tribunal shall set forth the computation of the amounts due, consistent with that methodology.
>
> 4. Within 15 days from the date any proposal or decision communicated by the arbitral tribunal to the parties, any party may refer the matter to the appointing authority, or if no appointing authority has been agreed upon or designated, to the Secretary General of the PCA, for final determination in accordance with the criteria in Paragraph 1. Any modification to the fees decided by the appointing authority or the Secretary General of the PCA shall be deemed to be part of the award.

Comment

Paragraph 1

No comment.

Paragraph 2

In fixing its fees the AT shall, when an AA has been agreed upon by the parties or designated by the S-G of the PCA, take into account the schedule of fees of the AA. Para 2 repeats para 2 of the 1976 Rules.

Paragraph 3

Under the 1976 Rules, para 2 provides that in case the AA has not issued a schedule of fees, any party may at any time request the AA to furnish a statement setting forth the basis for establishing fees, customarily followed in international cases when appointing arbitrators. If the AA consents to provide such statement, the AT shall take this information into account. The furnishing of the statement depends on a request of a party and consent of the AA to do so.

The Draft provides in para 3 that the AT, promptly after its constitution, shall communicate to the parties the methodology it proposes to follow for the determination of the fees. Will an AT ever, promptly after its constitution, draft a methodology replacing a schedule of fees and send this to the parties? In that case, parties will receive, after the arbitral proceedings have commenced, information about the fixing of fees made by the AT itself.

In my opinion *para 3 should be deleted*. Under the 1976 Rules arbitration has taken place without a schedule of fees and the same in my opinion, will occur after the revised Rules have been adopted.

Paragraph 4

This paragraph introduces the provision that the AT, before rendering its award, sends a proposal or decision on the fees to the parties. Any party may within 15 days after receipt of the proposal or decision refer the matter to the AA or, if no AA has been agreed upon or designated, to the S-G of the PCA for final determination. Submitting the matter to these authorities will be done in case the proposal or decision is deemed unreasonable. The authorities will have to hear the party as well as the arbitrators before its final determination of the fees. When the proposal or decision has been modified by the authorities, this modification shall be deemed to be part of the award.

In my opinion, *paragraph 4 should be deleted.* No other arbitration rules contain that a proposal or decision on the fees should and may be referred by a party to an authority for final decision on the fees. It will cause considerable delay in the rendering of the award. In any case a *modification of the fees, made by the authority, cannot be deemed part of the award*. An award shall be made by the arbitrators and signed by them. Arbitrators cannot delegate a decision they have to make to a third party.

Article 40

In the draft this article reads:

> 1. The costs of 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 appointment is reasonable, taking into account the circumstances of the case.
> 2. Deleted.
> 3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in Article 38 and Article 39, Paragraph 1, in the text of that order or award.
> 4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37 [The arbitral tribunal may charge the costs referred to in Articles 38 (b) to (f) relating to interpretation or correction or completion of its award under Article 35 to 37].

Paragraph 1

In principle, the costs of arbitration shall be borne by the unsuccessful party. This is the principle of costs of arbitration follow the event.

Paragraph 2

Para 2 of the 1976 Rules has been deleted. In this paragraph for legal representation and assistance the AT does not need to follow para 1. An unsuccessful party may also, under special circumstances, be entitled to receive compensation for legal representation.

Paragraph 3

According to this para, the AT shall fix the costs of arbitration when it issues an order for the termination of the arbitral proceedings or makes an award on agreed terms. In both cases, arbitral proceedings have preceded and work, sometimes considerable work, has been done. In practice, an AT has always in these cases has fixed the costs of arbitration. In my opinion, *paragraph 3 may be deleted as superfluous.*

Paragraph 4

No additional fees may be charged in case of interpretation, correction or completion of the award. In my comment on Art 35, I referred to the abuse made of requests for interpretation and raised the question whether an extra remuneration of the AT may be considered in case interpretation would have been requested without any reasonable ground.

Article 41 – Deposit of Costs

This article reads as follows:

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in Article 38, paragraphs (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within 30 days after the receipt of the request, 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 the award had been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpected balance to the parties.

Paragraph 1

The AT may, on its establishment, request the parties to deposit an equal amount as advance for the costs referred to in art. 38 under (a-c). In my opinion, (c) should be deleted. At the commencement of the arbitration, it will not be known whether the AT will appoint an expert.

Paragraph 2

No comment

Paragraph 3

If a party so requests and if the AA consents to perform this function, the AT shall fix the amount of any deposit only after consultation with the AA, which may make comments. The AA does not determine the amount but only makes comments which it deems appropriate to the AT.

Will a party ever request that the AT to consult the AA? When done, it expresses doubts about the reasonableness of the AT in fixing the amounts for deposits. Should this request not be made by both parties, as the deposit has to be paid in equal amounts by both parties? However, in my opinion *para 3 may be deleted*. In practice the amounts for a deposit are, instead of unreasonably high, regularly too low and supplementary deposits are often made.

Paragraphs 4 and 5

No comment.

Additional provisions

After the 41 articles, the Draft proposes two additions.

General principles

> Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Comment

The Draft refers in this way to a gap-filling provision as some arbitration rules indeed contain. As an example, I refer to Article 35 of the ICC Arbitration Rules, stating: "In all matters not expressly provided for in these Rules, the Court (of the ICC) and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law". In my opinion, a gap-filling provision could be added but, if not, an arbitral tribunal will in any case as indicated.

Liability of arbitrators

> The members of the arbitral tribunal, the appointing authority, the Secretary General of the PCA and experts appointed by the tribunal shall not be liable for any act or omission in connection with the arbitration, to the fullest extent permitted under the applicable law.

Comment

An additional provision on liability may be welcomed. At the adoption of the Model Law, several states added a provision excluding liability "for any act or omission in connection with the arbitration". The same wording is used in the Draft.

Conclusion

In 2006, priority was given to the revision of the 1976 Arbitration Rules. In August 2008, a Draft for the revision of all 41 articles appeared. However, a second reading started on this Draft. From this second reading the Secretariat of UNCITRAL has produced so far two Notes, one of December 2008 and the other of March 2009, arriving at art. 25. My comment deals with the Draft of August 2008 and the beginning of the second reading.

In my comment on the Draft I have dealt in Part A with the addition of the detailed response to the Notice of Arbitration in the new Article 4. I proposed a much simpler manner for the addition of a response, avoiding this new article. In Part B I proposed to maintain Articles 6-8 on the appointment of arbitrators in accordance with the mandate the Working Group received from the Commission when starting on the revision to maintain the original structure of the Rules. Articles 4bis and 7bis could be deleted. In Part C I dealt with all articles and suggested several changes. However, none of my proposals required a new article.

When the first revision of the Draft has been terminated, at the end of 2009 or beginning of 2010, a second round will be started on those of the 41 articles on which still no agreement has been reached. Also the final version of the few new articles on joinder and liability has still to be determined.

In my opinion, it may be useful if the Secretariat, before the second round of revision begins, would provide a Note stating the present status of the revision. Per article could be indicated whether agreement has been reached and, if not, which issues still have to be discussed. Such a Note may greatly facilitate the discussion on the second round.

A problem has been created by the renumbering introduced in the revision of December 2008. In my comment I referred to the consequences of renumbering. If done, it will complicate consultation of awards and literature that has appeared during the 30 years the 1976 Rules were practiced. Could renumbering be avoided? Only a very few new articles will be added. When printed in italics they would be clearly distinguished, but what about the numbering in case reference has to be made? Could this be new 1 and new 2?

In 1976 the Arbitration Rules were established in a 3 weeks' session in New York on the basis of a draft made by UNCITRAL and myself as consultant. Having being involved in the drafting of the Arbitration Rules, I must apologize for expressing my views on the revision so far.