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REVISION OF THE UNCITRAL ARBITRATION RULES

A REPORT BY

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TABLE OF FREQUENTLY USED TERMS

AAA Rules	American Arbitration Association (AAA) International Arbitration Rules (adopted in 1997, revised in 2003)
BIT	Bilateral Investment Treaty
<i>Caron/Caplan/Pellonpää</i>	Caron, Caplan and Pellonpää, <i>The UNCITRAL Arbitration Rules: A Commentary</i> (2006)
CEPANI Rules	Belgian Centre for the Study and Practice of National and International Arbitration (CEPANI) Rules of Arbitration (adopted in 1988; last revised in 2005)
Claims Settlement Declaration	Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981, (1981) 20 ILM 257
<i>Derains & Schwartz</i>	Derains and Schwartz, <i>A Guide to the New ICC Rules of Arbitration</i> (2 nd edn, 2005)
<i>Holtzmann & Neuhaus</i>	Holtzmann and Neuhaus, <i>A Guide to the UNCITRAL Model Law</i> (1989, reprinted in 1994)
IACAC Rules	Inter-American Commercial Arbitration Commission Rules (adopted in 1982; revised in 1988 and 2002: Annex to 22 Code of Federal Regulations 194.1)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999)
ICC Rules	International Chamber of Commerce (ICC) Arbitration Rules (adopted in 1975; amended in 1988; fully revised in 1998)
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington (1965)

ICSID Rules	International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (adopted in 1966; revised in 1984, 1999 and 2002)
ILC Model Rules	International Law Commission Model Rules on Arbitral Procedure (endorsed by General Assembly Resolution 1262 (XIII) 1958), reprinted in [1958-II] ILCYB 83
Iran-US CTR Rules	Iran-US Claims Tribunal Final Rules of Procedure (1983), (1983) 2 Iran-US CTR 403
LCIA Rules	London Court of International Arbitration (LCIA) Rules (adopted in 1981; revised in 1985 and 1998)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), reprinted in (1985) 24 ILM 1302
NAFTA	North American Free Trade Agreement (1992)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958)
Report of UNCITRAL Committee of the Whole II	Report of UNCITRAL Committee of the Whole II, Annex II to Report on the Work of its 9th Session, UN Doc A/31/17, (1976) 7 UNCITRAL YB 9, 66
Report of UNCITRAL Secretary General on Preliminary Draft Rules	Report of UNCITRAL Secretary General: preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade, UN Doc A/CN.9/97 (1975) 6 UNCITRAL YB 163
Report of UNCITRAL Secretary General on Revised Draft Rules	Report of UNCITRAL Secretary General on Revised Set of Draft Rules, UN Doc A/CN.9/112/Add.1 (1976) 7 UNCITRAL YB 166
<i>Sanders</i> (1977)	Sanders, "Commentary on UNCITRAL Arbitration Rules", (1977) 2 YCA 172
<i>Sanders</i> (2004)	Sanders, "Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?", (2004) 20 Arb Int 243
SCC Rules	Institute of Arbitration of the Stockholm Chamber of Commerce (SCC) Rules of Arbitration (adopted in 1976; revised in 1988 and 1999)

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Swiss Rules	Swiss Rules of International Arbitration (2004)
UNCITRAL Discussions on Preliminary Draft Rules	UNCITRAL Discussions on Preliminary Draft Rules, Annex I to Report on the Work of its 8 th Session, UN Doc A/10017 (1975) 6 UNCITRAL YB 9, 24
UNCITRAL Notes	UNCITRAL Notes on organizing Arbitral Proceedings, (1996) 27 UNCITRAL YB 45
UNCITRAL Report on the Work of its 9th Session	UNCITRAL Report on the Work of its 9th Session, UN Doc A/31/17, (1976) 7 UNCITRAL YB 9
WIPO Rules	World Intellectual Property Organization (WIPO) Arbitration Rules (1994)

INTRODUCTION

1. This report has been commissioned by the Secretariat as part of an initiative to spur discussion on the revision of the UNCITRAL Arbitration Rules,¹ which were adopted by the UNCITRAL and the UN General Assembly in 1976 (the *UNCITRAL Rules* or, where the context permits, simply the *Rules*).²
2. In 1976, the UN General Assembly felt able to “recommend[] the use of the [UNCITRAL Rules]” chiefly because it was:

Convinced that the establishment of rules for *ad hoc* arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.³

The Rules have never been revised, notwithstanding the fact that the prospect of revisions was clearly envisaged in 1976: the text of the model arbitration clause accompanying article 1 of the Rules refers to the “UNCITRAL Arbitration Rules *as at present in force*” (emphasis added).

I. THE CASE FOR REVISION

3. The challenge is to ensure that the Rules continue to meet the needs of their users, reflecting best practice in the field of international arbitration. In the authors’ view, a revision of the Rules is overdue and indispensable. This view is shared by the principal draftsman of the original Rules,⁴ Professor Sanders, who has written that: “UNCITRAL’s Arbitration Rules were born in 1976 and grew up to everybody’s satisfaction. However, after 30 years they are ready for their first facelift.” Four principal reasons support this conclusion, in our view.
4. First, since 1976, there have been great advances in arbitral practice. This is unsurprising. The volume of international arbitrations has reached di-

¹ See the Annotated Provisional Agenda for the 44th Session of Working Group II (23-27 January 2006), UN Doc A/CN.9/WG.II/WP.140 (14 November 2005) para 31; and Note by the Secretariat: Settlement of Commercial Disputes – Possible Future Work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules, UN Doc A/CN.9/610/Add.1 (3 April 2006).

² See General Assembly Resolution 31/98 (15 December 1976), UN Doc A/RES/31/98 (1976). The UNCITRAL Rules are reprinted at (1977) 8 UNCITRAL YB 7 and (1976) 15 ILM 701, together with GA Res 31/98.

³ GA Res 31/98 (note 2 above), third preambular paragraph (emphasis in the original).

⁴ See *Sanders* (2004) 243, with references to the author’s earlier works; and id, “Arbitration Rules of UNCITRAL: 30 Years”, UNCITRAL/VIAC colloquium paper (April 2006).

mensions unknown prior to 1976; major international arbitration rules have emerged or been extensively revised; and UNCITRAL itself has adopted a Model Law on International Commercial Arbitration in 1985, after a long gestation process.⁵ While some of the advances in international arbitration may be traced to the Rules themselves,⁶ their drafters could not have anticipated all of the difficulties that have emerged in the international arbitral process, nor the responsive innovations that have appeared in contemporary arbitration statutes and rules.

5. Secondly, the Rules were largely inspired by arbitration rules that are no longer current.⁷ Similarly, several recent sets of arbitration rules which were initially inspired by the UNCITRAL Rules have now departed substantially from them.⁸ Naturally, the evolution of such other arbitration rules must be noted and analysed on its merits, and not out of a blind desire to “compete” against those texts.
6. Thirdly, the intrinsic merit of the Rules and the *imprimatur* they have received from the UN General Assembly have commended them to states for investment disputes (notably under Bilateral Investment Treaties (*BITs*),⁹ Chapter 11 of the North American Free Trade Agreement (*NAFTA*), of 1992¹⁰ and the Energy Charter Treaty of 1994¹¹), the Iran-

⁵ Currently adopted in 57 jurisdictions; see www.uncitral.org (3 September 2006).

⁶ See, eg, the clear statements of principle on *compétence de la compétence* and the separability of the arbitration agreement in articles 21(1)-(2) of the Rules.

⁷ Principally the 1966 UN Economic Commission for Europe Rules (1966: UN Doc E/ECE/Trade 81 (1967)), and the former United Nations Economic Commission for Asia and the Far East (now the United Nations Economic and Social Commission for Asia and the Pacific) Rules (1966) amongst other provision of various arbitration rules; see Report of UNCITRAL Secretary General: Preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (Terms of Reference), UN Doc A/CN.9/97 (1975) 164.

⁸ See notably the LCIA Rules (adopted in 1981; revised in 1985 and 1998); the Inter-American Commercial Arbitration Commission (IACAC) Rules (adopted in 1982; revised in 1988 and 2002: Annex to 22 Code of Federal Regulations 194.1); the Stockholm Chamber of Commerce (SCC) Rules (adopted in 1988; revised in 1999; with a revision currently under consideration); the World Intellectual Property Organization (WIPO) Rules (1994); and the Singapore International Arbitration Centre (SIAC) Rules (1997).

⁹ By November 2005, the cumulative number of treaty-based arbitrations launched since 1987 grew to approximately 219 cases, 132 of which were brought before the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) and 65 pursuant to the UNCITRAL Rules: Latest Developments in Investor-State Dispute Settlement, UNCTAD IIA MONITOR No 4 (2005) 1. By contrast, ICC arbitration is a rather uncommon feature of BITs: the few available examples include the France-Syria BIT of 1978, the US-Haiti BIT of 1983 (not in force), the Greece-Hungary BIT of 1989, the Switzerland-South Africa BIT of 1995, and the Portugal-Cuba BIT of 1998.

¹⁰ (1993) 32 ILM 605, Articles 1101-1138, in particular 1120(1)(c).

¹¹ (1995) 34 ILM 381, Article 26(4).

US Claims Tribunal (adjudicating claims both under contracts and under international law¹²), and mass-claims settlement procedures.¹³ While many claims brought under those instruments involve contracts,¹⁴ claims for breach of customary or conventional international law are legally distinct from contractual claims.¹⁵ Thus, claims asserting causes of action under international law will not always fit comfortably within the narrow language of article 1(1) of the Rules, which refers to “disputes in relation to [a] contract”. More importantly from a procedural perspective, disputes under those instruments often raise questions of law or public interest calling for particular procedural arrangements, such as separate phases on jurisdiction and admissibility before the submission of a Statement of Claim, *amicus curiae* briefs, and consolidation of claims and hearings. Some of the international instruments mentioned above empower arbitral tribunals to amend the Rules as necessary,¹⁶ or directly set forth particular procedural arrangements derogating from or supplementing the Rules.¹⁷ But under the vast majority of BITs, parties and tribunals have to look for guidance outside the text of the Rules in relation to those issues.

7. The fact that the Rules have been effective in such varied circumstances attests not only to their malleability but also, and more importantly, to the forethought of parties who detected and corrected their shortcomings in various contexts,¹⁸ and to the adroitness of a number of arbitrators (including in particular those of the Iran-US Claims Tribunal). There is thus

¹² See the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981 (or “Claims Settlement Declaration”), (1981) 20 ILM 257, Articles II and III(2).

¹³ As in the United Nations Compensation Commission (UNCC) established in 1991 pursuant to United Nations Security Council Resolution 692 to process claims and pay compensation stemming from the Gulf War; see UN Doc S/RES/692 (20 May 1991). The Provisional Rules for Claims Procedure adopted by the Governing Council of the UNCC in June 1992 (UN Doc S/AC.26/1992/10) provide in Article 43 that: “Subject to the provisions of these procedures, Commissioners may make such additional procedural rulings as may be necessary to complete work on particular cases or categories of cases. In so doing, the Commissioners may rely on the relevant UNCITRAL Rules for guidance.”

¹⁴ Cf *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentina (ARB/97/3)* Decision on Annulment of 3 July 2002, (2002) 41 ILM 1135, para 60: “A particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contract”.

¹⁵ See, eg, *ibid*, paras 112-113.

¹⁶ See Article III(1) of the Claims Settlement Declaration (note 12 above) and the Iran-US Claims Tribunal Final Rules of Procedure (1983), (1983) 2 Iran-US CTR 403.

¹⁷ See NAFTA Articles 1220 *et seq*.

¹⁸ See the *Brcko Area* arbitration discussed at paragraph 240 below.

no reason to be complacent about the need to revise the Rules. To the contrary, a revision would extend the benefit of accumulated experience to the widest possible audience of parties, arbitrators, and counsel.

8. A final consideration is the development of sets of guidelines on specific procedural matters. UNCITRAL itself has issued, in 1996, Notes on Organizing Arbitral Proceedings. These were initially conceived as practical guidelines on procedural matters to be decided by the tribunal in consultation with the parties in a pre-hearing conference,¹⁹ but do have wider relevance in respect of significant procedural matters. The IBA Rules (1999) and the IBA Guidelines on Conflicts of Interest (2004) also reflect sound, generally accepted practices in the field. The UNCITRAL Rules ought to be consistent with the basic premises of these texts.

II. THE PURPOSE AND METHODOLOGY OF THIS REPORT

9. This report concludes unhesitatingly that a revision is necessary and urgent in order for the Rules to continue “significantly contribut[ing] to the development of harmonious international economic relations”.²⁰ This demonstration may best be made by examining each of the provisions of the Rules in light of contemporary practice. The main body of this report (paragraphs 21 *et seq*) is devoted to that task. Given the magnitude of the task, we have endeavoured to set out our analysis succinctly. References to materials and works relevant to our analysis are, for the same reason, illustrative rather than exhaustive.
10. We would welcome that our conclusions and suggestions be subjected to scrutiny and discussion with the widest possible audience (including the Permanent Court of Arbitration (*PCA*) and other arbitral institutions that administer UNCITRAL proceedings).
11. Our premise is that the Rules should provide for an efficient process: leaving room for – and encouraging – specific arrangements to suit the circumstances of each case; and being able to deploy their effect as widely as possible under a variety of arbitration laws (including public international law). The Rules aim to help resolve difficult cases and provide guidance to parties and tribunals. There is clearly a balance to be drawn as to the degree of specificity required of the Rules in the various con-

¹⁹ UNCITRAL Notes on organizing Arbitral Proceedings (1996) para 1: “The stated purpose of the Notes is to “assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful.”

²⁰ GA Res 31/98 (note 2 above), second preambular paragraph.

texts in which they operate. This, too, is a matter for debate, on which views may legitimately differ.²¹

12. Yet two particular considerations suggest that the Rules should offer comprehensive guidance. First, the Rules are primarily designed for *ad hoc* proceedings without institutional guidance. Gaps or uncertainty tend to strengthen the existing impression that *ad hoc* arbitration is suitable for experienced parties only.²² Secondly, the Rules are a universal text that should produce consistent and predictable outcomes in the hands of a wide spectrum of arbitrators and parties. Thus, while it is certainly true that experienced arbitrators are able to devise bespoke solutions for particular circumstances, this does not speak against comprehensive coverage in the Rules. Experienced and confident arbitrators would not be stifled by comprehensive guidance.
13. On the other hand, we are bound to recognize that the line between comprehensiveness and over-complication is not bright. Some questions arise more frequently than others. Concise texts can be user-friendly. We trust that informed and focused debate will reveal the right balance to be drawn.

III. MAIN LINES OF REVISION

14. It is useful to outline at the outset the principal suggestions for revision contained in this report. They are as follows:
 - (a) **Both parties to file opening submissions before the constitution of the arbitral tribunal:** Article 3 requires the claimant's Notice of Arbitration to indicate the "general nature" of its claim as well as the "remedy or relief sought." The next event is that the arbitral tribunal is constituted, without the respondent having an opportunity (or being required) to state its position with respect to (i) jurisdiction, (ii) the claim, or (iii) any counterclaim. The first occasion for the respondent to take a position on these matters is only after the arbitral tribunal has been constituted, and after a further Statement of Claim (or determination that its equivalent was "contained" in the Notice of

²¹ By way of illustration, compare the few curt provisions that the French *Nouveau Code de Procédure Civile* of 1981 devotes on the arbitration proceedings proper (Articles 1492-1497) with the corresponding sections (ss 1-65) of the Arbitration Act 1996 (England & Wales). For an in-depth discussion of the policy issues involved see Park, "The 2002 Freshfields Lecture — Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", (2003) 19 Arb Int 279.

²² This is the conclusion of empirical research conducted by the School of International Arbitration at Queen Mary, University of London; see *International arbitration: Corporate attitudes and practices* (2006) 12 (only 24% of the corporations interviewed opt for *ad hoc* arbitration, which is perceived as appropriate for "primarily larger corporations with more experience of international arbitration").

Arbitration) which must include the factual basis of the claim as well as “all documents [the claimant] deems relevant”.²³ Not to determine the respondent’s position – perhaps for six months – is wasteful. It does not promote reciprocal understanding of the dispute, and therefore impedes efficient preparation for both litigation and amicable settlement. Moreover, it is not good practice to constitute an arbitral tribunal without having any indication of the kind of case that will be mounted in defence, as this may bear on the required attributes of arbitrators, especially if any appointment is to be made by an Appointing Authority; this goes for *both* of the co-arbitrators as well as the presiding arbitrator. Furthermore, giving the respondent an opportunity to submit a Response to the claimant’s Notice of Arbitration permits the inclusion of a requirement that the Response should contain any counterclaims that the respondent intends to raise. This would, in turn, permit the claimant to articulate in its Statement of Claim both its positive case (on its claim) and its defensive case (on the respondent’s counterclaim). Finally, the exchange of a Notice of Arbitration and Response will permit the tribunal meaningfully to exercise its power under the proposed article 15(1) to issue the appropriate procedural directions for the conduct of the proceedings. Thus, the claimant’s Notice of Arbitration and the respondent’s Response are in principle not envisaged as substantive pleadings: they are to delineate the contours and complexion of the case, rather than fully articulate it.²⁴ In simpler cases, however, the parties may wish to submit a more substantial Notice of Arbitration and Response, and treat them as a Statement of Claim and a Statement of Defence respectively. Articles 18(1) and 19(1) are to preserve that option.

- (b) **The claimant’s Statement of Claim to follow the respondent’s Response:** The present articles 3(4)(c) and 18(1) permit the claimant to include its Statement of Claim in its Notice of Arbitration. This option would serve no useful purpose. Indeed, it would be inconsistent with the requirement that the respondent submit a Response to the claimant’s Notice of Arbitration. Further, in cases where the tribunal decides to devote a preliminary phase of the proceedings to its jurisdiction or to issues of admissibility, the claimant’s notice/statement may well have been superseded by events that occurred during that preliminary phase (which may be lengthy). While the inclusion of the Statement of Claim in the Notice of Arbitration may expedite the proceedings, this may also be achieved in other ways, notably by an accelerated timetable and by giving both parties the option of treating their opening pleadings as their first memorials.

²³ See article 18(2) of the Rules.

²⁴ Contrast, for example, ss 6 and 9 of the DIS Rules, under which the proceedings are commenced by a “statement of claim” followed by a “statement of defence”.

- (c) **Composition of tribunal:** The present provisions (articles 5-7) are designed to give an opportunity to the parties to agree on (a) the number of arbitrators, (b) the identity of the Appointing Authority, and (c) the identity of the arbitrators. While this is laudable, it may be exploited by recalcitrant litigants. One improvement would be to allow any party to request the PCA to designate an Appointing Authority at any time. This would, further, permit an amendment to the present rule according to which the default number of arbitrators is three. While the rule is in principle sound, it has the potential to deter small claims from being brought to arbitration on considerations of cost. If an Appointing Authority can be designated at any time, as we propose, the decision on the number of arbitrators may be taken by that Authority in light of the nature and circumstances of the case. Finally, the provisions relating to the appointment of arbitrators may be grouped under a single article (rather than two, as is now the case under articles 6 and 7), for simplicity and consistency.
- (d) **Multiparty arbitration:** Commercial agreements in the international sphere increasingly involve a multitude of contracting parties. The ICC's statistics indicate that multiparty cases, involving more than one claimant or respondent, have steadily increased from 20% in 1991-1998 and 25% in 1999 to 30% of the cases registered in 2001. This trend was consolidated in 2002-2005: in each of those years approximately one-third of the cases registered by the ICC were multiparty cases.²⁵ The implications of the landmark judgment of the French *Cour de cassation* in *Dutco* appears now to have been fully assimilated in principle and in practice.²⁶ The English Arbitration Act 1996 (s 16 and s 18), the ICC Rules (Article 10), the LCIA Rules (Article 8.1), and the WIPO Rules (Article 18) indicate the solution to be adopted: an external Appointing Authority is to appoint the entire tribunal when parties on the same side are unable to agree on one arbitrator to be appointed jointly by all of them.²⁷ There is no proper justification for the UNCITRAL Rules retaining the potential for paralysis; they are outdated in this respect.
- (e) **General procedural duties and powers; procedural conferences; default provisions on specific procedural matters:** Article 15(1) expressly permits the arbitral tribunal to "conduct the arbitration in such manner as it considers appropriate". This is the hallmark of arbitration – that the format and timetable of the proceedings should be

²⁵ The ICC statistics are to be found in the first issue of the *ICC Bull* for each year. The relevant figures for 1991-1999 are to found in (2003) 14:1 ICC Bull 8.

²⁶ See Cass Civ Ire, 7 January 1992, *Sociétés Siemens & BKMI v Société Dutco* (1992) 119 JDI 707; and cf Case Å 7197-01 (Stockholm District Court, 2001) noted Petrochilos, [2002:1] Stockholm Arb Rep 201.

²⁷ Whitesell and Silva-Romero, "Multiparty and Multicontract Arbitration: Recent ICC Experience" (2003) ICC Bull (Special Supplement – Complex Arbitration) 7.

tailor-made to the circumstances of each particular case. While there is therefore no intention of detracting from the general rule in article 15(1), it seems appropriate in light of modern practice to include a general provision to the effect that the tribunal has a *duty* to take all steps necessary for an expeditious and efficient resolution of the dispute, and issue appropriate directions to the parties. The parties would have a corresponding duty to co-operate with (or among) each other and with the tribunal, including by complying with its directions; failure to do so would have costs consequences. These general rules would be supplemented by default provisions, subject to contrary party agreement, giving the tribunal specific powers on consolidation, joinder, and other matters.

(f) **Truncated tribunals and obstructing arbitrators:** This issue is touched upon in article 13, on substitute arbitrators; and in article 32(4), requiring the majority of the tribunal to state the reasons for the absence of one arbitrator’s signature from an award. Clear rules are required to deal with two situations:

- *Where the tribunal decides to “proceed with the arbitration”²⁸ notwithstanding the absence of one of its members.* The *Himpurna* case, involving an arbitrator impeded from attending hearings by agents of the respondent state that had appointed him, was conducted under the UNCITRAL Rules.²⁹ The decision of the two remaining arbitrators to proceed to fulfil their mandate and render an award reflects what Judge Schwebel has called “the better, but not the only, view of the matter”.³⁰ A clear rule would avoid the need to make controversial interpretations in the midst of a crisis.
- *Where the tribunal perceives that one of its members is obstructing the progress of the case, including the tribunal’s deliberations.* The parties are not privy to the internal workings of the tribunal, so they are not in a position to prove that it is appropriate to replace the obstructing arbitrator. A clear rule is required to give the tribunal the power to complete its mission and render an award.

(g) **Confidentiality:** Articles 25(4) and 32(5) deal with the confidentiality of hearings and awards respectively, but there are no rules regard-

²⁸ As article 28(2) provides in case of a party’s failure to appear at a hearing.

²⁹ See *Himpurna California Energy Ltd (Bermuda) v Republic of Indonesia* (2000) 25 YCA 186, para 59 (Final Award, UNCITRAL, 1999). The impeded arbitrator, Priyatna Abdurrasyid, has related his experience in a chapter of his memoirs entitled “They said I was going to be kidnapped”, (2003) 18:6 Mealey’s Int’l Arb Rep 29.

³⁰ Schwebel, “Injunction of Arbitral Proceedings and Truncation of the Tribunal”, (2003) 18:4 Mealey’s Int’l Arb Rep 33, 38.

ing the confidentiality of the proceedings as such or of the materials (including pleadings) before the tribunal. An explicit provision is overdue in any event, but now becomes essential given the pressures generated in the context of investment arbitrations. The possibility of accepting *amicus* briefs (see the proposed article 15(5)) reinforces the need for clear provisions on confidentiality.

- (h) **Majority decision:** Article 31(1), requiring that “any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators”, is inconsistent with the better rule, that the presiding arbitrator may decide alone if no majority is formed. It is true that this rule is hardly ever applied. But it would be false to think that it is therefore unimportant. The co-arbitrators are aware of the existence of the rule, so each of them has a clear incentive to adopt a reasonable posture. Put otherwise, the value of the rule permitting awards to be made by the presiding arbitrator alone lies primarily in its deterrent force. By contrast, under the UNCITRAL Rules, the onus in difficult cases is on the presiding arbitrator to move toward the least unreasonable co-arbitrator. Judge Bellet was heard to say that article 31(1) was an important reason for his resignation from the Iran-US Claims Tribunal.³¹
- (i) **Production of documents:** Article 24(3) is overly vague. It contains no hint of the criteria by reference to which a tribunal might “require” the production of “documents, exhibits, or other evidence”. The width of the tribunal’s power in this respect is in part due to the fact that articles 18(2) and 19(2), on the Statement of Claim and the Statement of Defence respectively, permit the claimant and the respondent to “add a reference to the documents or other evidence [they] will submit” at a later a stage, rather than produce that evidence with those submissions. This option does not comport with current practice, and ought to be corrected. This would also permit a reformulation of article 24(3), in line with Articles 3 and 9 of the IBA Rules.
- (j) **Interim measures:** Article 26 is narrowly worded (it refers only to “measures ... necessary in respect of the subject-matter of the dispute”), and contains an illustrative enumeration of measures that does not cover contemporary needs. UNCITRAL’s own (ongoing) efforts in this field ought to be taken into account in reformulating article 26 in a way that will permit tribunals to issue any provisional or conservatory measures properly required in the circumstances.

³¹ The formal letter of resignation tendered by Judge Bellet on 1 December 1982 is described by Aldrich, *The Jurisprudence of the Iran – United States Claims Tribunal* (1996) 18. Judge Bellet formally cited the unexpectedly large amount of cases and delays encountered in the work of the Tribunal as the reasons for his resignation.

- (k) **Interpretation of awards:** There has now been significant experience on article 35, notably in the Iran-US Claims Tribunal. The Rules should be clarified in the interest of predictability. The key concept is that this provision should apply only if there is a dispute as to what the award orders the parties to do.
 - (l) **Tribunal fees:** Article 39(1) of the Rules, requiring that fees be “reasonable in amount”, is in itself unobjectionable. In most cases involving experienced practitioners, the issue of fees is handled properly. But there have been disturbing instances of “negotiations” regarding fees between arbitrators and the parties, especially where one party finds it tactically appealing to accept anything the arbitrators say. Such experiences can cause loss of respect for the process. (And of course the purpose of having rules is not for the easy cases, where the participants have similar expectations.) There is no simple solution in the context of *ad hoc* rules, but the subject deserves serious attention in order to avoid the spectre of self-dealing arbitrators.
15. The importance of these issues demonstrates, in our view, that the need for a revision is not neutralised by the consideration that the existing Rules have been incorporated in other legal instruments (eg, BITs) and therefore enshrine settled expectations. It cannot be assumed that the expectations of the users of the Rules are settled in any way. To the contrary, users expect rules to be revised to accommodate innovations that reflect best practice. Such revisions are routinely brought into effect using familiar techniques of transitional rules.

IV. STRUCTURE OF THIS REPORT

16. The main body of our analysis and conclusions is set out at paragraphs 21 *et seq* below. For ease of review, we have dealt separately with each article whose revision should be considered; this gives rise to cross-referencing, and explains a certain degree of repetition. In respect of each provision, we start with its current text before going on to set out the rationale for revision and ending with a possible revised wording. Provisions that, in our view, give rise to no revision (or only to minor changes, in capitalization of terms for the sake of consistency) have not been dealt with in the main body of this report.
17. Where we suggest the insertion of a new article, we have provisionally numbered it after the article preceding it, in order to maintain the current article numbering of the Rules: thus, the new article on the respondent’s Response is article *3bis*. This makes for a few awkward references (“article *15bis(2)*”), but on the whole facilitates the comparison between proposed new articles and the existing articles. Similarly, we have followed – rather than altering – the existing structure of the Rules. Again, this was to facilitate review, and in no way to foreclose the question whether the existing structure of the Rules should be maintained – a question that in our submission requires serious consideration, but at a later stage. (For

example, it is arguable that provisions dealing with multiplicity of parties (eg, proposed articles 7 and 15(8)) should be gathered in a discrete section.) We fully recognize that our approach results in an inelegant clustering of many important, and diverse, procedural powers in and around article 15;³² but that can be easily corrected later.

18. For consistency, we have on the whole followed the nomenclature and style of the present Rules. Thus, where we propose new wording for an existing, or a new provision, we have tried to emulate as closely as possible relevant phraseology of existing provisions (eg “counter-claim” rather than “counterclaim”). However, it is undeniable that some of the terms of the 1976 text now appear quite outdated or inappropriate (eg exclusively masculine pronouns for arbitrators and parties, and “either” party rather than “any”), and the English syntax is sometimes odd. In addition, current usage is to capitalize certain terms as defined terms: eg, Statement of Claim, Claimant, Arbitral Tribunal. The importance of the UNCITRAL Rules is so great that they merit clear and elegant expression.
19. An annex to this report sets out the present text of the UNCITRAL Rules against the revised text proposed in this report.

V. ACKNOWLEDGMENTS

20. An earlier “discussion draft” of this report (dated 31 March 2006) was considered by the Secretariat³³ and circulated by the authors to a limited number of colleagues.³⁴ We have received valuable input,³⁵ which we have endeavoured to reflect in the present text. Finally, we have sought to incorporate reports and discussions at a colloquium to honour the 30th anniversary of the Rules, which was held on 6-7 April 2006 in Vienna.

³² Specifically, article 15(1) remains a principal, overarching provision, with two additional sentences; it is followed by several more detailed (and diverse) provisions in article 15(2)-(9). The existing article 15(2)-(3) is then incorporated in a new article 15*bis*, and there is also a new article 15*ter*, on confidentiality.

³³ See the Note by the Secretariat prepared for the September 2006 meeting of Working Group II, UN Doc A/CN.9/WG.II/WP.143 and Add.1 (20 July 2006)

³⁴ Key conclusions of that discussion draft are outlined in a Note by the Secretariat, UN Doc A/CN.9/610/Add.1 (3 April 2006) paras 3-13. The preliminary report is now available electronically at *Transnational Dispute Management (TDM)*, www.transnational-dispute-management.com/.

³⁵ Notably from Professors van den Berg and Berger.

ARTICLE 1(1)

I. PRESENT RULE

Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

* MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...

- 21. The issues that arise in respect of Article 1(1) concern:
 - the twin requirement that an arbitration agreement be “in writing” and that modifications thereof also be “in writing”;
 - the applicable version of the Rules, in case they are revised; and
 - the apparent limitation that disputes arbitrable under the Rules must be “in relation to [a] contract”.
- 22. As to the “in writing” requirement, the *travaux* indicate that it was intended to serve two distinct purposes. First, there was (and is) the issue of conformity with Article II(1)-(2) of the New York Convention³⁶ and with

³⁶ See UNCITRAL Discussions on Preliminary Draft Rules, para 18.

national laws to same or similar effect. Secondly, there was a concern that the parties' agreement should clearly express – hence “in writing” – an intention to arbitrate under the Rules.³⁷ It was, however, decided that the Rules should make no attempt to define what is a “writing” and how it is formed, leaving this matter to the New York Convention and applicable national laws.³⁸

23. As to the reference to disputes “in relation to [a] contract”, it was recognized as a narrow formulation but was nonetheless intentionally retained, in preference to a wider reference to “defined legal relationships”.³⁹

II. DISCUSSION

Agreement to arbitrate and modifications of the Rules “in writing”

24. The drafters of the Rules recognized a need for the “in writing” requirement to be formulated in simple and broad terms, allowing it to operate without difficulty under a variety of applicable laws and the New York Convention (and, one might add, Article 6 of the European Convention on Human Rights⁴⁰). This remains a valid consideration, in light of UNCITRAL's ongoing work on arbitration agreements recorded or concluded electronically.⁴¹ The text of article 1(1) as it stands seems to be capable of accommodating future legislative developments on the concept of “writing”,⁴² and should be retained on this basis.⁴³ (While we ac-

³⁷ See Report of UNCITRAL Secretary General on Revised Draft Rules (Commentary on Article 1), para 7.

³⁸ Hence a draft article 1(3) (“‘Agreement in writing’ means an arbitration clause in a contract or a separate agreement, including an exchange of letters, signed by the parties, or contained in an exchange of telegrams or telexes.”) was omitted from the final text of the Rules; see UNCITRAL Discussions on Preliminary Draft Rules, para 21.

³⁹ See Report of UNCITRAL Committee of the Whole II, para 13; and UNCITRAL Discussions on Preliminary Draft Rules, para 17.

⁴⁰ See Petrochilos, *Procedural Law in International Arbitration* (2004) paras 4.13-4.14.

⁴¹ UNCITRAL's current proposals relate to a possible interpretative declaration in respect of Articles II(2) and VII(1) of the New York Convention and a revised Article 7 of the Model Law on International Commercial Arbitration; see Note by Secretariat, Preparation of Uniform Provisions on Written Form for Arbitration Agreements, UN Doc A/CN.9/WG.II/WP.139 (2005); Sorieul, “UNCITRAL'S Current Work in the Field of International Commercial Arbitration”, (2005) 22:6 J Int'l Arb 543. Under the CIETAC Arbitration Rules (as revised in 2005), Article 5(3), an arbitration agreement must be “in the tangible form of a document [including] EDI [electronic data interchange], or Email”.

⁴² For example, where the applicable law qualifies as “agreements in writing” agreements concluded “otherwise than in writing by reference to terms which are in writing” (Arbitration Act 1996 (England & Wales) s 5(3)), reference to standard terms providing for arbitration under the UNCITRAL Rules would satisfy the requirement of writing under both the applicable law and article 1(1) of the Rules. See further Landau, “The Re-

(cont'd)

knowledge the force of an argument that the requirement (if any) of an agreement in writing should be left to the law of the arbitration,⁴⁴ the approach in article 1(1) has the merit of permitting the tribunal to identify with more certainty an agreement to arbitrate “under the ... Rules”.)

25. By contrast, article 1(1) is less compelling where it requires that the parties should set out any modifications they wish to make in a written agreement, or at least reduce those agreed modifications to writing. Either interpretation of the wording of article 1(1) would bring about unreasonable results in cases of *de minimis* modifications. For example, articles 18(1) and 19(1) call for the submission of (“*shall* communicate”) a “statement of claim” and a “statement of defence”, but the parties may prefer the terms “memorial” and “counter-memorial”:⁴⁵ no agreement in writing should be required. More generally, the parties are better placed to evaluate whether the modifications they desire are of such importance or detail as to call for a written agreement or document. Rare cases of disputes between the parties on whether they have or have not agreed to modify the Rules in any way would be resolved by the arbitral tribunal on the basis of this general principle.
26. The foregoing considerations lead to the proposal that the second “in writing” requirement in article 1(1) be deleted, in favour of the formulation “subject to such modification as the parties may agree upon”.

Which version of the Rules to apply?

27. As already noted, the model arbitration clause accompanying article 1(1) refers to the Rules “as at present in force”, so catering for the eventuality of a revision. In practice, and in particular in investment-treaty practice, such language is found infrequently. Most investment treaties simply refer to the “arbitration rules of the United Nations Commission on International Trade Law”.⁴⁶ Only a few treaties expressly stipulate that, in the event of a revision of the Rules, the applicable version will be the one in

quirement of a Written Form for an Arbitration Agreement: When ‘Written’ Means ‘Oral’”, in van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (ICCA Congress Series No 11, 2003) 19.

⁴³ Professor Sanders has, however, taken a different view; see *Sanders* (2004) 262.

⁴⁴ See, eg, Article 4(3)(d) of the ICC Rules.

⁴⁵ In *Saluka Investments BV v Czech Republic*, the parties agreed to such a change in nomenclature, and this was part of the arrangements that the tribunal and the parties agreed upon at a procedural hearing; see the Partial Award of 17 March 2006, para 7(f).

⁴⁶ See for example NAFTA Article 1120(1)(c); Article 10(3)(b) of the Greek Model BIT (2001), reprinted in UNCTAD, *International Investment Instruments: A Compendium* vol VIII (2003) 273; and Article 1 of the 2004 United States of America Model BIT.

force at the time of the initiation of the arbitration.⁴⁷ Even rarer are examples of BITs qualifying this language by reference to General Assembly Resolution 31/98⁴⁸ or the year of adoption of the Rules (1976).⁴⁹

28. The experience with the ICC Rules indicates that a revised version of the Rules should contain an express interpretative provision to the effect that when the parties have agreed to arbitrate under the UNCITRAL Rules, they

shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of the commencement of the arbitration proceedings^[50] unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.⁵¹

29. A General Assembly Resolution on the revised version of the UNCITRAL Rules might additionally recommend that where the parties have agreed to the 1976 Rules they should consider expressly agreeing to arbitrate pursuant to the revised version of the Rules.

Arbitrable disputes “in relation to [the parties’] contract”

30. It is plain that the UNCITRAL Rules have been used, and will continue to be used, in investment disputes that either (a) do not relate to a contract at all⁵² or (b) relate to a contract involving a person that is not a party in the arbitration.⁵³ This was also the case for several claims of “expropriation

47 See, eg, the Hong Kong SAR – Italy BIT (1995); United Kingdom of Great Britain and Northern Ireland – Bosnia and Herzegovina BIT (2002); and Article 8(2)(c) of the United Kingdom Model BIT (1991), reprinted in UNCTAD, *International Investment Instruments: A Compendium* vol III (1996) 185.

48 See, eg, the Egypt-Turkmenistan BIT (1995).

49 See, eg, the India-Portugal BIT (2000); and the Korea-Singapore BIT (2005).

50 As opposed to the version of the Rules in force at the time of the conclusion of the arbitration agreement.

51 ICC Rules, Article 6; on which see further *Derains & Schwartz* 74. The LCIA Rules contain an introductory statement referring not only to the current version of those Rules (“the following Rules”) but also to “such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration”.

52 For example, disputes on the withdrawal of a licence, under an investment treaty; see, eg, *International Thunderbird Gaming Corp v United Mexican States*, (Award of 26 January 2006).

53 As was the case in *CME and Lauder: CME Czech Republic BV v The Czech Republic* (Partial Award of 13 September 2001), and *Ronald S Lauder v The Czech Republic* (Final Award of 3 September 2001).

or other measures affecting property rights” before the Iran-US Claims Tribunal.⁵⁴

31. Apart from investment disputes and similar cases, there is no cogent reason to limit the ambit of the Rules to “disputes in relation to [a] contract”, if the applicable arbitration law contains no such requirement. Thus, Article 7(1) of the Model Law permits arbitration of disputes “in respect of a defined legal relationship, whether contractual or not”. Consistently with this approach, other major sets of arbitration rules (such as the ICC Rules and the LCIA Rules) contain no reference to the classes of disputes that are arbitrable under them. The arbitrability of a dispute is properly a matter for the law of the arbitration, and there is nothing on the face of the UNCITRAL Rules to suggest that they are not suitable for the resolution of non-contractual disputes.
32. This issue did arise in the *Larsen v The Hawaiian Kingdom* case, which concerned a dispute about the alleged “unlawful imposition of American municipal laws over claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom.” The arbitrability of the dispute under the UNCITRAL Rules (on the application of which the parties had agreed) was raised by the tribunal of its own motion as a preliminary matter.⁵⁵ The tribunal held as follows:

When regard is had to the non-prescriptive and non-coercive nature of the UNCITRAL Rules as a standard regime available for parties to apply to resolve disputes between them, however, there appears no reason why the UNCITRAL Rules cannot be adapted to apply to a non-contractual dispute. For example, the parties could agree that a dispute as to tort, or occupier’s or environmental liability might be determined in an arbitration applying the UNCITRAL Rules. Moreover they could so agree in

⁵⁴ Claims Settlement Declaration (note 12 above) Article II(1). Accordingly, Article 1 of the Rules of Procedure of the Iran-US Claims Tribunal did not refer to “disputes in relation to [a] contract”. See also *The Republic Srpska v The Federation of Bosnia and Herzegovina*, Arbitration over inter-entity boundary in Brcko Area (Award on Control over the Brcko Corridor, 14 February 1997), (1997) 36 ILM 396, which was an arbitration brought under the Dayton Accords to settle an inter-entity boundary dispute.

⁵⁵ *Larsen v The Hawaiian Kingdom*, Procedural Order No 3 (17 July 2000) para 8 (quoted at para 6.2 of the Award (2001), 119 ILR 566):

On the face of the pleadings, however, it appears that the dispute referred to arbitration is not a dispute “in relation to a contract” between the parties, or a dispute that relates to any other contractual or quasicontractual relationship between them, or that it falls within the field of “international commercial relations” referred to in the preamble to the United Nations General Assembly resolution which adopted the Rules (General Assembly resolution 31/98, 15 December 1976). There is therefore a preliminary question whether the dispute identified in Article 1 of the [parties’ arbitration] Agreement is an arbitrable dispute under the Rules.

relation to a dispute which had already arisen independently of any contractual relationship between them. In this manner the parties to an arbitration may specifically or by implication adopt or apply the UNCITRAL Rules to any dispute.⁵⁶

33. The *Larsen* tribunal felt the need to be satisfied that the dispute brought before it was arbitrable under the Rules; the parties had no such doubts. It would be good to resolve that question once for all, pre-empting possible preliminary objections on the arbitrability of non-contractual disputes under the Rules.
34. For the sake of consistency (see proposed article 16(5)) we recommend changing the model arbitration clause to refer to the “juridical seat”, rather than the “place of arbitration”.

III. PROPOSED REVISION

35. Proposed revised text of article 1(1):

Where the parties to a contract have agreed in writing* ~~that disputes in relation to that contract shall be referred to arbitration~~ of disputes under the UNCITRAL Arbitration Rules in respect of a defined legal relationship, whether contractual or not, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree ~~in writing upon~~. The parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have specified the Rules in effect on the date of their arbitration agreement.

* MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding:

- (a) The Appointing Authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);

⁵⁶ *Larsen Award*, *ibid*, para 10.7.

- (c) The ~~place of arbitration~~ juridical seat shall be ... (~~town~~ city or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...

ARTICLE 1(2)

I. PRESENT RULE

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.

36. Article 1(2) was added to the text of the Rules by the Committee on the Whole, in 1976, in order to make clear that the application of the Rules was subject to a controlling national arbitration law (the *lex arbitri*).⁵⁷ The Rules do not themselves define which law is the controlling law, nor the provisions of that law “from which the parties cannot derogate”. These questions are left – and in our view properly so – to the arbitral tribunal.⁵⁸

II. DISCUSSION

37. There are two concerns in relation to article 1(2). The first is that there is a general reference to “the law applicable to the arbitration”, without clarifying that the body of law that is relevant is *arbitration* law. The second concern is that it is often assumed that “law” can only be the law of a given state (ordinarily the law of the juridical seat of the arbitration⁵⁹), as opposed to public international law. Doubtless this is valid in the vast majority of cases, including UNCITRAL arbitrations under BITs or the NAFTA.⁶⁰ But, where a state or international organization is involved as an arbitrating party, it need not be so; and in some cases it is not so.⁶¹ (Note in that regard that the current practice of UN bodies and agencies is to agree to arbitration under the UNCITRAL Rules, in the expectation

⁵⁷ See Report of UNCITRAL Committee of the Whole II, para 12. The initial text proposed read simply: “These Rules are subject to the law applicable to the arbitration”; see UNCITRAL Report on the work of its 9th Session, para 53. For further details see Petrochilos (note 40 above) para 5.39 and the references.

⁵⁸ See further *ibid* Chapters 2-3 and in particular 5, with references.

⁵⁹ Cf article 32(7), requiring an award to be “filed or registered” if this is a requirement of the law “of the country where the award is made”.

⁶⁰ See Petrochilos (note 40 above) paras 6.60-6.62 and the references. Indeed, two NAFTA awards have been challenged (one successfully, in part) in the courts of the seat; see *United Mexican States v Metalclad Corp* [2001] BCSC 664; (2002) 119 ILR 647, (2002) 5 ICSID Rep 238 (Supreme Court of British Columbia, 2 May 2001); and *United Mexican States v Marvin Roy Feldman Karpa* (Court of Appeal for Ontario, 11 January 2005).

⁶¹ See Petrochilos (note 40 above) Chapter 6.

that such proceedings will *not* be governed by the national arbitration law of any state.⁶²⁾

38. The uncertainty in that regard has led to well-known problems in the early years of the Iran-US Claims Tribunal.⁶³ There is a straightforward way of eliminating it, by explicitly referring to “international law” in article 1(2). There would otherwise be no need to go further than article 1(2) currently does, in order to include a conflicts-of-laws provision defining which law it is that supplies the provisions from which the parties cannot derogate.⁶⁴

III. PROPOSED REVISION

39. Proposed revised text of article 1(2):

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

⁶² Ibid, paras 6.81-6.89.

⁶³ Ibid, paras 6.09-6.49.

⁶⁴ Cf Article 16.3 of the LCIA Rules and Article 59(b) of the WIPO Rules, both referring primarily to the “arbitration law of the seat of the arbitration”.

ARTICLE 2

I. PRESENT RULE

1. 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 his habitual residence, place of business or mailing 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.
 2. 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.
40. Both paragraphs in article 2 are based on the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods,⁶⁵ and embrace the so-called "effective receipt" theory.⁶⁶ They are intended to set forth default provisions, which the parties may vary.⁶⁷

II. DISCUSSION

41. The existing text of article 2 is satisfactory in what it says. It does not, however, deal with three issues: (a) delivery by electronic means;⁶⁸ (b) service on states; and (c) the tribunal's ability to extend or abbreviate the time-periods stipulated in other provisions of the Rules.
42. Taking each of those matters in turn:

⁶⁵ See Report of UNCITRAL Secretary General on Revised Draft Rules (ad Article 3) para 1; and UNCITRAL Discussions on Preliminary Draft Rules, para 24.

⁶⁶ See van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-US Claims Tribunal* (1991) 19.

⁶⁷ See *Caron/Caplan/Pellonpää* 379.

⁶⁸ *Sanders* (2004) 246.

- (a) The terms “physically delivered” in article 2(1) may be read as excluding electronic communications, contrary to contemporary practice.⁶⁹
- (b) In practice, claimants initiating arbitrations against states variously serve Notices of Arbitration to the respondent state’s Ministry of Foreign Affairs, the Head of the Government, other Ministries, an ambassador of the respondent state, or (less frequently) autonomous state agencies.⁷⁰ This incoherent practice is prone to cause confusion, and does not assist states in receiving notice of proceedings in a timely fashion. A rule setting forth the state organs capable of receiving service would clarify matters.⁷¹
- (c) The orderly conduct of the arbitral proceedings is primarily the responsibility of the arbitral tribunal, which has the power, and duty, to issue all appropriate directions in that regard.⁷² In discharge of that power and duty, arbitral tribunals ought to have an express power to extend or abbreviate the time-periods stipulated under the Rules,⁷³ as necessary for a “fair and efficient process of resolving the parties’ dispute”. The practical value of such a power would of course arise in cases where the parties fail to agree on these matters. The wording we propose in this regard contains the essential elements of Article 4.7 of the LCIA Rules.

III. PROPOSED REVISION

43. Proposed revised text of article 2:

⁶⁹ See, eg, Article 3(2) of the ICC Rules; Article 4.1 of the LCIA Rules; and cf Article 23(2) of the “Brussels Regulation” on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters (Council Regulation (EC) No 44/2001, [2001] OJ L12/1). See also Article 9(2) of the proposed UN Convention on the Use of Electronic Communications in International Contracts, reprinted in UN Doc A/60/515 (2005) 7:

Where the law requires that a communication or contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

⁷⁰ See, for the last-mentioned possibility, *Link-Trading v Department of Customs Control of the Republic of Moldova (Jurisdiction)* (16 March 2001). In that case, the intention in naming a Department of the Republic was to “su[e] the Republic in the name of its Customs Department”: *ibid*, 4. The tribunal upheld its jurisdiction against the Republic.

⁷¹ Parties would naturally be free to agree otherwise. Thus, Article 2(3) of the Iran-US Claims Tribunal Rules of Procedure required service on the Agent of the government concerned.

⁷² Proposed revised article 15(1) makes this clear: see paragraphs 115 *et seq* below.

⁷³ See, eg, Article 4.7 of the LCIA Rules; in exceptional cases, Article 38(c) of the WIPO Rules.

1. 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 his, her or its habitual residence, place of business or mailing 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.
2. Delivery pursuant to paragraph 1 may be made by facsimile, telex, e-mail or any other electronic means of communication that provides a durable record of dispatch and receipt.
3. Any notice, including a notification, communication or proposal, is deemed to have been received by a state if it is delivered to an organ of that state that is competent, under the law of that state, to receive such notices. Unless the parties have agreed otherwise, the head of a diplomatic mission of a state shall be deemed a competent organ for the purposes of the present article.
4. 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.
5. In discharge of its duties under article 15, paragraph 1, the Arbitral Tribunal may at any time extend or abridge any period of time prescribed under or pursuant to these Rules.

ARTICLE 3

I. PRESENT RULE

44. Article 3 reads:

1. The party initiating recourse to arbitration (hereinafter called the “claimant”) shall give to the other party (hereinafter called the “respondent”) a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the 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 addresses of the parties;
 - (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
 - (d) A reference to the contract out of or in relation to which the dispute arises;
 - (e) The general nature 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 (i.e. one or three), if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
 - (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
 - (b) The notification of the appointment of an arbitrator referred to in article 7;
 - (c) The statement of claim referred to in article 18.

II. DISCUSSION

45. The purpose of a Notice of Arbitration generally is to “apprise the respondent of the general context of the claim that will be asserted against

him and is useful in selecting qualified arbitrators”.⁷⁴ Article 3(3)-(4) distinguishes between the necessary elements of the Notice of Arbitration and the optional elements thereof. One of the optional elements (article 3(4)(c)) is an inclusion of the claimant’s Statement of Claim, as a means of expediting the proceedings.⁷⁵

46. Article 3 may be streamlined in two ways. First, it is important to separate the Notice of Arbitration from the Statement of Claim, consistently with the notion that the respondent should have an opportunity (and a duty) to express its views prior to the constitution of the arbitral tribunal.⁷⁶ Secondly, it would be useful for the Notice of Arbitration, being the claimant’s initial pleading commencing the arbitration (article 3(2)), to contain all of the elements necessary to permit the respondent to take a position on (a) the claimant’s claim, (b) the validity and scope of the arbitration agreement invoked, (c) counterclaims, and (d) the constitution of the tribunal. Article 1.1 of the LCIA Rules reflects that approach, and our proposed revised wording for article 3(3) of the Rules is consistent with the LCIA Rules in that regard.
47. We propose that article 3(4) be deleted: all elements set out in article 3(3), as amended below, would be obligatory, and the possibility for the claimant to treat its Notice of Arbitration as a Statement of Claim would be preserved by article 18(1). Our suggestions as to each sub-paragraph of article 3(3) are as follows:
- (a) No amendment.
 - (b) The Notice should also set out the names and contact details of the claimant’s counsel (if any).⁷⁷ This would lead to the deletion, in part, of the present article 4.
 - (c) There appears to be no cogent reason to permit the claimant simply to refer to – rather than provide a copy of – the arbitration agreement on which it relies. Indeed, one would imagine that receiving a copy of the arbitration agreement with the Notice of Arbitration would be particularly useful to the respondent in cases where, for example, the respondent is a successor to the person or entity that has concluded the arbitration agreement, or where the claimant and the respondent

⁷⁴ See Report of UNCITRAL Secretary General on Preliminary Draft Rules (Commentary on Article 3) para 3.

⁷⁵ See Report of UNCITRAL Committee of the Whole II, paras 22-23.

⁷⁶ See paragraph 14(a) above; and paragraphs 49 *et seq* below, in respect of the proposed new article 3bis.

⁷⁷ See Article 1.1(a) of the LCIA Rules; Article 9(ii) of the WIPO Rules; and Article 5(i) of the SCC Rules.

have several ongoing contracts on the basis of different standard terms, which contain different arbitration clauses.

- (d) Consistently with article 1(1), provision should be made for disputes which do not arise “out of or in relation to” a contract. Where the dispute does arise out of a contract, a copy of that contract (rather than merely a reference to it) should be provided.
- (e) To be retained, with a minor clarification: the claimant would provide “a brief description of the claim”, rather than an indication of “[t]he general nature of the claim” as the current article 3(3)(e) provides.
- (f) No amendment.
- (g) The existing sub-paragraph (g) would be re-numbered (i). Sub-paragraph (g) would be drafted along the lines of Article 1.1(e) of the LCIA Rules, and require the claimant to make the appointment called for under the arbitration agreement (if the arbitration agreement calls for such an appointment); see the proposed article 6(3)(a).
- (h) This would be the existing sub-paragraph (g), which is sound as far as it goes; see also the proposed article 5(2). However, if the claimant proposes that the tribunal consist of a sole arbitrator, it should also propose the name of one or more sole arbitrators: it is possible that the *identity* of a sole arbitrator proposed will make the sole-arbitrator formation acceptable to the respondent.
- (i) Consistent with the LCIA Rules⁷⁸ and the ICC Rules,⁷⁹ the claimant should also be required, under article 3(3), to make proposals on the juridical seat and language of the arbitration, if these matters have not already been agreed upon.

III. PROPOSED REVISION

48. Proposed revised text of article 3:

1. The party initiating recourse to arbitration (hereinafter called the “Claimant”) shall send to the other party (hereinafter called the “Respondent”) a ~~notice of arbitration~~ Notice of Arbitration. If the parties have agreed that the case is to be administered by an institution a copy of the Notice of Arbitration shall be sent to that institution.

⁷⁸ Article 1.1(d).

⁷⁹ Article 4(3)(f).

2. Arbitral proceedings shall be deemed to commence on the date on which the ~~notice of arbitration~~Notice of Arbitration is received by the ~~R~~Respondent.
3. The ~~notice of arbitration~~Notice of Arbitration shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names, and addresses and other known contact details of the parties and of the person or persons (if any) representing or assisting the Claimant in the arbitration;
 - (c) A copy of the reference to the arbitration clause or the separate arbitration agreement or other instrument that is invoked by the Claimant as the basis for commencing arbitration under the Rules;
 - (d) A copy of reference to the contract, if any, out of or in relation to which the dispute arises;
 - (e) ~~The general nature~~ A brief description of the dispute and the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;
 - (g) The identify of the Claimant's appointee, if the parties' agreement requires the parties to appoint arbitrators;
 - (h) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon. Where the Claimant proposes that the Arbitral Tribunal consist of a Sole Arbitrator, it shall also propose the names of one or more persons, one of whom would serve as the Sole Arbitrator;
 - (i) The Claimant's proposals as to the juridical seat and language of the arbitration, if the parties have not already agreed on these matters.
4. ~~The notice of arbitration may also include:~~
 - (a) ~~The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1.;~~
 - (b) ~~The notification of the appointment of an arbitrator referred to in article 7;~~

~~(c) The statement of claim referred to in article 18.~~

NEW ARTICLE 3bis

I. DISCUSSION

49. The rationale for requiring the submission of a brief “Response” (or, if that term is preferred, “Answer”) by the respondent is straightforward and has been set out at paragraph 14(a) above. In essence, the Response would be a brief pleading in which the respondent would take a position on the claimant’s Notice of Arbitration before the constitution of the tribunal and the submission of the claimant’s Statement of Claim.⁸⁰ Thus, a Response would serve to indicate from the outset the respondent’s views on:
- the existence or scope of the arbitration agreement invoked by the claimant;
 - any other issues relating to the admissibility of the claimant’s claim (which may be relevant to the timetable and format of the arbitration proceedings);
 - the nature (character and magnitude) of the dispute, and the respondent’s position on the claimant’s claim;
 - potential counterclaims;
 - the constitution of the tribunal; and
 - the juridical seat and language of the arbitration.
50. In other words, the exchange of the Notice of Arbitration and the Response would serve to set the stage for the subsequent phases of the arbitration, and to give a possibility to the respondent to have a measure of influence on the constitution of the tribunal. The Response is intended as a short document, mirroring the Notice of Arbitration. As stated in the Introduction to the Rules of the Netherlands Arbitration Institute (*NAI*) (at para 6.5):

The request for arbitration and the short answer may be brief. Once the arbitrators are appointed, the parties will have a full opportunity to present their case. The request for arbitration and short answer should not be confused with the statements of claim and defence. These memorials are not submitted until after the arbitrators are appointed ... The request for arbitration and the short answer are meant primarily to inform the Admin-

⁸⁰ At present, the ICSID Rules, the UNCITRAL Rules, and the WIPO Rules are the only major sets of arbitration rules that do not require the respondent to submit a brief opening pleading before the constitution of a tribunal.

istrator of the nature and circumstances of the dispute so as to facilitate the designation of the arbitrators.

51. Accordingly, the Response, as its name implies, would be a purely responsive pleading. It would incorporate elements that are under the current article 19(2) necessary parts of the Statement of Defence.
52. Our proposal proceeds on the basis that 30 days is a reasonable period for the submission of the respondent's Response.⁸¹ This would lead to a consequential amendment in article 5, which at present provides that a three-member tribunal is to be formed if within 15 days of the Notice of Arbitration the parties have not agreed on the principle of a single-member tribunal.
53. Finally, it would be appropriate to specify (on the example of Article 2.3 of the LCIA Rules) that the respondent's failure to submit a Response should not later preclude that party from denying the claimant's claims or from advancing its own counterclaims. This is consistent with article 19(3) of the present text of the Rules (requiring the respondent in principle to submit any counterclaims with its Statement of Defence).

II. PROPOSED RULE

54. Article 3*bis* would read as follows:

RESPONSE TO THE NOTICE OF ARBITRATION

Article 3*bis*

1. Within thirty days of receipt of the Notice of Arbitration, the Respondent shall send to the Claimant a written Response.
2. The Response shall include the following:
 - (a) A statement of the Respondent's position on particulars (a)-(f) and (h)-(i) of the Notice of Arbitration;
 - (b) A brief description of any counter-claims advanced by the Respondent, including an indication of the amounts involved (if any), and the relief or remedy sought in respect of such counter-claims; and
 - (c) If the parties' agreement requires the parties to appoint arbitrators, and the Respondent has not already

⁸¹ Cf Article 2.1 of the LCIA Rules; Article 5(6) of the ICC Rules; and Articles 11-12 of the WIPO Rules.

made such an appointment, the identity of the Respondent's appointee.

3. Failure to communicate a Response shall not preclude the Respondent from denying any claim or from advancing a counter-claim in the arbitration.

ARTICLE 4

I. PRESENT RULE

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

II. DISCUSSION

55. The “communications” provided for in article 4 would be made in the Notice of Arbitration and the Response, under articles 3(3)(b) and *3bis*(2)(a), making the second part of article 4 redundant.

III. PROPOSED REVISION

56. Proposed revised text of article 4:

The parties may be represented ~~and~~ assisted by persons of their choice. ~~The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.~~

SECTION II. COMPOSITION OF THE TRIBUNAL

57. The Rules devote four articles (articles 5-9) to the constitution of the arbitral tribunal. Those provisions are organized in a conceptually clear-cut way. First, the parties are given an opportunity to agree on the number of arbitrators, which is to be one or three, the default position being three (article 5). Secondly, there are separate provisions dealing respectively with sole-arbitrator formations (article 6) and three-member tribunals (article 7). Finally, article 8 complements articles 6 and 7 by some further procedural provisions.
58. Our preliminary report of March 2006 made three observations of considerable, in our view, importance:
- First, while the Rules give an opportunity to the parties to agree on the number of arbitrators, an Appointing Authority, and the identity of that Authority, the process for reaching agreement on all these matters is not explicitly set out in the Rules. In our March preliminary report, we organized the exchange of proposals between the parties in the Notice of Arbitration and the Response, and new provisions (in articles 5-7*quater*) were included in an attempt to cover all eventualities and sequences of possible agreement and disagreement.⁸² The resulting provisions might have been comprehensive but, practically, they were too complex to be satisfactory.
 - Secondly, the Rules do not at present address the question of multi-party cases at all. A specific provision is required in that regard.
 - Finally, the present Rules do not deal with agreements pursuant to which an Appointing Authority is to appoint the entire tribunal. Again, a specific provision is called for.
59. The present report proposes a simpler organization of the necessary provisions. In addition, it proposes a more prominent role for the Appointing Authority than is now the case: this is one of the reasons for which we propose that any party should have the right to request the Secretary-General of the PCA to designate an Appointing Authority at any time.
- Article 5 deals (as the present article 5) with the number of arbitrators. We propose a provision whereby if by the time the Response is due the parties have been unable to agree on the number of arbitrators (ie, in principle one or three), the Appointing Authority would decide on the matter. In addition, article 5 incorporates the text of the present article 8(2).

⁸² See paragraphs 40-51 of the March preliminary report; and the four-page flowchart describing the constitution of the tribunal at Annex 2 of the March report.

- A new article *5bis* deals with the designation of the Appointing Authority, and incorporates in substance the present article 8(1).
 - A new article 6 deals in one provision (instead of two, as is now the case, under articles 6-7) with the constitution of the tribunal, whether it consist of a sole arbitrator or three.
 - A new article 7 sets forth rules for cases involving multiple parties.
 - Article 8 deals with the situation where the constitution of the entire tribunal has been entrusted to an Appointing Authority.
60. We set out in the following paragraphs the reasoning for our approach in more detail.

ARTICLE 5

I. PRESENT RULE

61. Article 5 reads:

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen 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.

II. DISCUSSION

62. Four issues may be raised. First, whether the Rules should permit (and if so, cater for the constitution of) tribunals consisting of a number of arbitrators other than one or three. Secondly, whether the default number of arbitrators should be one or three. Thirdly, if the default number is to remain three, whether the Secretary-General of the PCA or the Appointing Authority should, on application of a party, nevertheless have the power to decide that “the dispute is such as to warrant the appointment” of a sole arbitrator.⁸³ Finally, the maintenance of the 15-day time period in which the parties may reach agreement on the number of arbitrators, in light of the 30-day period for the submission of the Response under proposed article 3*bis*.
63. The present text of article 5 makes it clear that a tribunal of a format other than a sole or three arbitrators – which undoubtedly represent less than 1% of intentional practice – requires the parties to agree to derogate from the Rules. We agree that there is no good reason to encourage parties to agree on two-member tribunals (with recourse to an umpire), four-member tribunals (with one member having a casting vote), or tribunals comprising five or more members. This is not, however, to say that such formations are impermissible under the Rules. The text of article 5 should reflect that such formations are possible under the Rules but that it is for the parties to make provision for the constitution of such tribunals.
64. Article 5 proceeds on the premise that the default, “safe” composition for arbitral tribunals sitting in international disputes should be three mem-

⁸³ Cf Article 8(2) of the ICC Rules (where the default position is that a sole arbitrator shall be appointed). See to the same effect Article 5 of the AAA Rules, according to which: “If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.”

bers.⁸⁴ Article 10 of the Model Law is to the same effect. However, claims involving relatively small sums have on occasion been heard by three-member tribunals simply because the respondent defaulted in the constitution of the tribunal. With a three-member tribunal as the default position, a respondent can force up costs by refusing to agree on a sole arbitrator where the claim does not warrant three. Though this would be a risky strategy, it may deter some claimants with good cases but limited resources. These problems would have been avoided if the Appointing Authority had the power to appoint a sole arbitrator when the circumstances justify this.

65. As to the 15-day period within which the parties may agree on a single- or three-member tribunal, it would simplify matters if the respondent expressed its views on the matter in the Response. This would permit the respondent more fully to articulate the reasons for its proposals on the constitution of the tribunal – for example, how counterclaims affect the nature and magnitude of the dispute, and any particular expertise or qualifications that a sole arbitrator should have. For this reason, we propose that the time-period in article 5 be harmonized with the 30-day period in which the respondent should submit its Response.
66. We also consider that the rule in current article 8(2) would appear more natural in the context of article 5, and recommend moving it to article 5(3).

III. PROPOSED RULE

67. Proposed text of the new article 5:
 1. These Rules contemplate that the Arbitral Tribunal will be comprised of either a sole arbitrator or three arbitrators. The parties may agree otherwise, but in that case they shall also agree on the method by which the tribunal is to be constituted. If the Arbitral Tribunal has not been constituted within [ninety] days of receipt of the Notice of Arbitration, any party may request the Appointing Authority to make all necessary appointments. The Appointing Authority shall make the necessary appointments following the procedure in article 6, paragraphs 3-5, and select one arbitrator as the presiding arbitrator.
 2. If the parties have not agreed on the number of arbitrators, the Notice of Arbitration shall contain a proposal for a Sole Arbitrator or a three-member tribunal. If any Respondent has not agreed to that proposal by the time at

⁸⁴ See Report of UNCITRAL Committee of the Whole II, para 28; and UNCITRAL Discussions on Preliminary Draft Rules, para 39.

which it is required to communicate its Response, any party may request the Appointing Authority to decide, in light of such observations by the parties as the Appointing Authority may invite, whether a Sole Arbitrator or a three-member tribunal is to be appointed.

3. Whenever the names of one or more persons are proposed for appointment as arbitrators, their full names, contact details and nationalities shall be indicated, together with a description of their qualifications.

NEW ARTICLE *5bis*

I. DISCUSSION

68. Given the nature of the Rules as *ad hoc* rules, the availability of an Appointing Authority is crucial. The model arbitration clause accompanying article 1 encourages the parties to make agreement on the Appointing Authority. Article 6(2)(b) (and article 7(2)(b)) provide a safety net: if the parties have not agreed, and are unable to agree, on an “institution or person” to perform the functions of an Appointing Authority, the Secretary-General of the PCA is to designate such an authority.
69. The *travaux* indicate that the “designating authority” role of the Secretary-General of the PCA was envisaged in the preliminary draft text of the Rules.⁸⁵ Experience shows that the dual structure of the Rules (designating authority and Appointing Authority) works well. The PCA has an experienced and professional secretariat of specialized lawyers, and considerable track record in identifying the institution or person who should serve as Appointing Authority in a given case.⁸⁶ The role of the PCA should therefore be retained. Indeed, it may be useful in the interest of efficiency that the possibility be given to the parties directly to designate the PCA as Appointing Authority.
70. Similarly, the list-procedure provided for in the current article 6(3) (and article 7(3)) seems to work well, in line with the intentions of its drafters.⁸⁷ (Indeed, it is on occasion used in discussions between parties attempting to reach agreement on a sole or presiding arbitrator in arbitrations under other rules.) On the other hand, it is in our experience unnecessary to require the Appointing Authority always and exclusively to resort to that procedure; our proposed article 6(3) spells this out.
71. We propose that a new article *5bis* be included in the Rules to deal exclusively with the designation of an Appointing Authority, by the parties or the Secretary-General of the PCA. To discourage dilatory tactics and increase efficiency, we propose that the parties should have the ability to seek the designation of an Appointing Authority at any time: in other words, such designation would no longer be contingent on a failure in the constitution of the tribunal and the passage of a 60-day period (as is now the case under articles 6(2) and 7(2)). The minor incidental cost involved

⁸⁵ See Report of UNCITRAL Secretary General on Preliminary Draft Rules, 169, para 2.

⁸⁶ See, eg, PCA Annual Report (2004) 10.

⁸⁷ “This procedure ... gives the parties an opportunity to raise objections against certain candidates, which may avoid challenge proceedings after an appointment has been made”: *Sanders* (1977) 186.

in such an advance designation is more than offset by the efficiency gains.

72. Recourse to the Secretary-General of the PCA is separately provided for in cases where the Appointing Authority fails to make an appointment within 30 (not 60, as is now the case) days of a request to do so; see article 6(6).
73. The proposed article *5bis* would also incorporate two procedural provisions (in paragraphs (3) and (4)) reflecting in substance the existing article 8(1) of the Rules.

II. PROPOSED RULE

74. Proposed text of new article *5bis*:
 1. The parties may agree on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, to exercise the functions of the Appointing Authority under these Rules.
 2. In the event that the parties have not agreed on the identity of an Appointing Authority, any party may, with or at any time following the Notice of Arbitration, request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate another person or institution as the Appointing Authority.
 3. When a party requests the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague to exercise their functions under these Rules, it shall supply with its request copies of the Notice of Arbitration and (if available) the Response, together with the supporting materials required under article 3, paragraph 3 and article *3bis*, paragraph 2. The Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague may require from any of the parties such further information as they deem necessary to exercise their functions.
 4. All requests or other communications between a party and the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague shall also be provided, in copy, to all other parties.

ARTICLE 6 (OLD ARTICLES 6-7)

I. PRESENT RULE

75. Article 6 reads:

1. If a sole arbitrator is to be appointed, either party may propose to the other:
 - (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
 - (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.
2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.
3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
 - (a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
 - (b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
 - (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator

from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

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

4. In making the appointment, 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 as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

76. Article 7 reads:

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

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefore, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

II. DISCUSSION

77. We propose a new article 6, amalgamating the provisions of the present articles 6 and 7. The salient features of the proposed article are:
- The operative time limit for appointments is 30 (not 60) days, and this applies not only to the parties but also to the Appointing Authority (whether it be designated by the parties or the PCA⁸⁸).
 - In the event the parties have agreed that the tribunal is to consist of a sole arbitrator, article 6(1) gives the parties an opportunity to agree on his or her identity within 30 days, failing which any party may request the Appointing Authority to select the sole arbitrator. In the event the decision that there is to be a sole arbitrator is made by the Appointing Authority (by application of article 5(2)), the 30-day deadline cannot apply. The words “upon the request of any party” in article 6(1) give the parties an opportunity to (i) attempt to select a sole arbitrator jointly or (ii) unilaterally request the Appointing Authority to make that selection.
 - Similarly, when a three-member formation has been decided by the Appointing Authority (see article 5(2)), the parties are given 15 days each to appoint two arbitrators.
 - It is now explicit that “hav[ing] regard to such considerations as are likely to secure the appointment of independent and impartial arbitrators” is necessary in all appointments by the Appointing Authority.
 - Consistent with the present article 6(4), third-state nationality is one of the criteria for the selection of presiding and sole arbitrators by the Appointing Authority – provided, however, that a party has indicated such a preference.
 - The nationality of corporations may, for the purposes of the Rules, be determined by having regard to beneficial ownership (rather than the state of incorporation, *siège social*, etc).
 - The existing articles 6(3) and 7(3) provide for a list-procedure to be followed as a mandatory and exclusive mechanism for the selection of arbitrators by the Appointing Authority, and that procedure is set out in detail in article 6(3). We propose that the list-procedure be explicitly referenced in the Rules, but as an option: the general rule in the proposed article 6(4) is that the Appointing Authority should adopt “such procedures as it deems appropriate”.

⁸⁸ Cf Baker & Davis, *The UNCITRAL Arbitration Rules in Practice* (1992) 26.

- The Secretary-General of the PCA is given a larger role than under the present Rules; see the proposed article 6(6).

III. PROPOSED RULE

78. Proposed text of new article 6:

1. If a Sole Arbitrator is to be appointed, and if by the time the Response is due to be communicated there has been no agreement as to his or her identity, the Sole Arbitrator shall, upon the request of any party, be appointed by the Appointing Authority.
2. If a three-member tribunal is to be appointed, the following procedure shall be followed, unless the parties have agreed otherwise.
 - (a) The Claimant shall appoint an arbitrator in the Notice of Arbitration.
 - (b) At the latest by the time the Response is to be communicated, the Respondent shall appoint a second arbitrator, failing which any party may request the Appointing Authority to make that appointment.
 - (c) In the event the decision to appoint a three-member tribunal has been made the Appointing Authority (article 5, para. 2), the Claimant shall appoint an arbitrator within 15 days of the Appointing Authority's decision; and the Respondent shall appoint an arbitrator within 15 days of the Claimant's appointment, failing which any party may request the Appointing Authority to make the relevant appointment.
 - (d) The two arbitrators appointed in accordance with paragraphs (a)-(c) shall appoint the third and presiding arbitrator within thirty days of the appointment of the second arbitrator, failing which any party may request the Appointing Authority to make that appointment.
3. In exercising its functions under this article, the Appointing Authority shall use such procedures as it deems appropriate, which may include the use of lists of proposed arbitrators whom the parties are invited to rank in order of preference.
4. In making any appointment under this article, the Appointing Authority shall have regard to such considera-

tions as are likely to secure the appointment of independent and impartial arbitrators.

5. In appointing the presiding arbitrator or a Sole Arbitrator, the Appointing Authority shall in principle accept requests by a party that the nationality of that arbitrator should not be that of any of the parties. For that purpose, the Appointing Authority shall take account of such indications as it may have received as to the dominant beneficial ownership of corporate entities.
6. If the Appointing Authority, howsoever designated, has not made an appointment pursuant to this article within thirty days of being requested to do so, the Secretary-General of the Permanent Court of Arbitration at The Hague may, upon the request of any party and unless he or she deems it appropriate to extend the time limit, make that appointment or designate another Appointing Authority to do so.
7. Any disagreement with respect to compliance with time limits under this article shall be resolved by the Secretary-General of the Permanent Court of Arbitration at The Hague.

NEW ARTICLE 7

I. DISCUSSION

79. The present Rules do not expressly envisage the possibility of an arbitration agreement providing for the appointment of the entire tribunal by an Appointing Authority.⁸⁹ Such agreements do exist and, as discussed below, have given rise to problems in practice. The problems that may arise are the following:
- The parties have not agreed on an institution or person to serve as the Appointing Authority, and are unable to reach agreement on this point after the commencement of the proceedings.
 - The Appointing Authority agreed upon by the parties refuses or fails to make the necessary appointments.
80. The latter issue arose in the recently reported *Econet* case (2005),⁹⁰ involving Zimbabwean, South African, and Nigerian parties. The dispute arose out of a shareholders' agreement involving multiple parties. Perhaps because of the multiplicity of parties, the arbitration clause in that agreement provided that a three-member tribunal would be empanelled by decision of a senior judge in Nigeria. The respondents opposed the appointment of arbitrators by the Appointing Authority, and the judge declined to appoint a tribunal. Two months thereafter, the claimant requested the Secretary-General of the PCA to designate another Appointing Authority, under article 7(2)(b) of the Rules. The Appointing Authority designated by the Secretary-General proceeded to appoint all three arbitrators, selecting one of them as the presiding arbitrator.
81. The tribunal dismissed the case on jurisdictional grounds, holding that it had not been appointed in accordance with the agreement of the parties. Article 7 was held inapplicable where the parties had agreed that the entire tribunal would be appointed by an Appointing Authority; and it was not possible to apply article 7 by analogy without rewriting the parties' agreement.⁹¹ (The defect in the present Rules is that they do not contemplate a default mechanism in the event the *first* of three arbitrators is not appointed; it may have been assumed that a claimant would never fail to make the first appointment, but this assumption is irrelevant when all

⁸⁹ Nor do any of the other commonly used institutional rules specifically cater for such a possibility.

⁹⁰ (2006) 21:6 Mealey's Int'l Arb Rep, with a note by Sinclair.

⁹¹ In this case, the law of the seat of the arbitration did contain provisions by which another Appointing Authority (a court) could be seised of a request to appoint the tribunal. That procedure had not been used.

three arbitrators are to be named by the Appointing Authority and the latter refuses to act.)

II. PROPOSED RULE

82. The proposed new article 7 would read as follows:

1. Where the parties have agreed that the Arbitral Tribunal in its entirety is to be appointed by an Appointing Authority and have agreed on the identity of that authority, any party may request that authority to make the necessary appointments.
2. Where the Appointing Authority refuses or fails to make the necessary appointments within thirty days of a request to that effect, any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate a replacement Appointing Authority.
3. The Appointing Authority designated in accordance with paragraph 1 or 2 shall make the necessary appointments following the procedure in article 6, paragraphs 3-5, and select one arbitrator as the presiding arbitrator.

NEW ARTICLE 8

I. DISCUSSION

83. In the well known *Dutco* case,⁹² the French *Cour de cassation* declined to uphold the validity of an appointment made under Article 2(6) of the 1975/1988 ICC Rules. Pursuant to that Article, the ICC Court had appointed an arbitrator on behalf of two co-respondents who had been unable to select an arbitrator. The Court held that “the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy and can be waived only after a dispute has arisen”.
84. The lesson of *Dutco* directly influenced the 1998 revisions of the ICC and LCIA Rules. Article 10 of the ICC Rules (entitled “Multiple Parties”) reads:
1. Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.
 2. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.
85. In practice, the ICC Court exercises its discretion in Article 10(2) (“the Court *may* appoint”) where it appears that the multiple claimants or respondents do not form a single group with common rights and obligations – as was the case in *Dutco*.⁹³
86. Article 8.1 of the LCIA Rules is clearly expressed in that regard (with emphasis added):

Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute num-

⁹² Cass Civ Ire, 7 January 1992, *Sociétés Siemens & BKMI v Société Dutco* (1992) 119 JDI 707.

⁹³ See *Derains & Schwartz* 177; and Whitesell and Silva-Romero, “Multiparty and Multi-contract Arbitration: Recent ICC Experience” (2003) ICC Bull (Special Supplement – Complex Arbitration) 7.

ber more than two and such parties *have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent respectively*, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's nomination.⁹⁴

87. The current text of the Rules does not accommodate *Dutco* in any way. This is a serious lacuna. The solution adopted in the ICC and LCIA Rules is sound and workable, and should be part of a revised text of the UNCITRAL Rules. A proposed new article 8 would deal with multiparty cases, and expressly give the Appointing Authority the ability to either constitute the entire tribunal or confirm an existing appointment and make the appointment that the multiple claimants or respondents are unable to make jointly.

II. PROPOSED RULE

88. Proposed text of new article 8:

1. Where there are multiple Claimants or Respondents, and where the Arbitral Tribunal is to be constituted pursuant to article 6, paragraph 2, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an arbitrator.
2. In the absence of such joint appointments and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal by the time the Response is due to be communicated, any party may request the Appointing Authority to make the necessary appointment or appointments, pursuant to paragraph 3.
3. The Appointing Authority, having heard the parties' views, may:
 - (a) revoke an appointment already made, and appoint each of the arbitrators and designate one of them as the presiding arbitrator; or
 - (b) confirm an appointment already made and make a further appointment,

⁹⁴ Note that the tenor of *Dutco* was recognized as sound by the Departmental Advisory Committee which had principal drafting responsibility for the Arbitration Act 1996 (England & Wales); see UK Department of Trade and Industry, Departmental Advisory Committee on Arbitration Law, *Report on The Arbitration Bill* (February 1996) para 88, reprinted in Mustill & Boyd, *Commercial Arbitration (Companion Volume to the 2nd edition)* (2001) 395 *et seq*; and s 18 of the Arbitration Act 1996 (England & Wales).

acting in either case in accordance with article 6, paragraphs 3-5.

ARTICLE 9

I. PRESENT RULE

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

II. DISCUSSION

89. Article 9 sets forth a two-step disclosure process in clear and effective language that is broadly consistent with Article 12(1) of the Model Law. Article 9 may, however, be improved in three respects:
- by making it explicit that the duty of impartiality and independence is a continuing one, consistently with Article 12(1) of the Model Law;⁹⁵
 - by clarifying that disclosure should be in the form of a written declaration;⁹⁶ and
 - by providing guidance (in a note) on the required content of the disclosure.

III. PROPOSED REVISION

90. Proposed revised text of article 9:

A prospective arbitrator shall disclose to those who approach him in connexion with his or her possible appointment any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. From the time of his or her appointment and throughout the arbitral proceedings, an arbitrator, ~~once appointed or chosen~~, shall without delay disclose such circumstances to the parties and to the Appointing Authority that has appointed him or her, unless they have already been informed by him or her of these circumstances. Upon acceptance of his or her appointment, an arbitrator shall provide to the parties and to the Appointing Authority that has appointed him or her a signed statement of independence.*

⁹⁵ See also Article 7(3) of the ICC Rules, and Article 5.2-5.3 of the LCIA Rules.

⁹⁶ As is the case in ICC, LCIA, and ICSID arbitrations, for example.

* PROPOSED TEXTS OF STATEMENT OF INDEPENDENCE

(A) UNQUALIFIED

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. 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.

(B) QUALIFIED

I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause my reliability for independent and impartial judgment to be questioned by a party.¹⁹⁷ I hereby undertake promptly to notify the parties and the other members of the Arbitral Tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.

⁹⁷

This sentence is inspired from the declaration required of ICSID arbitrators; see ICSID Administrative Council Resolution (AC/C/RES/2006) (Amendment of Arbitration Rule 6: Constitution of the Tribunal).

NEW ARTICLE 9bis

I. DISCUSSION AND PROPOSED RULE

91. Neither the Rules nor the Model Law contain any provision on the liability of arbitrators.⁹⁸ This must be recognized as a lacuna; the question is whether this question should be answered in the Rules or the law of the arbitration. The sets of arbitration rules that do deal with the question answer it by setting forth limitation-of-liability clauses, leaving the establishment of liability, if any, to the law of the arbitration (or, possibly, the national law of the arbitrator concerned, or the law of the place where the act has been committed that is said to give rise to liability).⁹⁹
92. Existing arbitration rules offer two possible approaches. The first, adopted in the ICC Rules (Article 34), is an unqualified exclusion of liability:
- Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act of omission in connection with the arbitration.
93. The second, and more common, is reflected in the Introductory Note to the IBA Rules of Ethics for International Arbitrators (1987),¹⁰⁰ which states the general rule that “international arbitrators should in principle be granted immunity from suit under national laws, except in extreme case of wilful or reckless disregard of their legal obligations”. The LCIA Rules (Article 31.1) and the AAA Rules (Article 35) similarly refer to “conscious and deliberate wrongdoing”.¹⁰¹
94. The term “wrongdoing”, however, suggests that liability may be established if the act in question is shown to be not only “conscious and delib-

⁹⁸ On the Model Law states that have adopted specific provisions on this matter see Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2004) 161 *et seq.*

⁹⁹ See *Derains & Schwartz* 383; and Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003) 294.

¹⁰⁰ In this respect, the 1987 text has not been superseded by the IBA Guidelines on Conflicts of Interest in International Arbitration of 2004.

¹⁰¹ The importance of safeguarding the arbitrators’ immunity is highlighted by a recent case in Texas, where a litigant unhappy with the outcome of the arbitration filed a suit against (among others) the arbitrators, alleging corruption. The arbitrators, all highly respected in the international arbitration community, refused to take part in the proceedings, and the claim was dismissed for lack of jurisdiction: *Gulf Petro Trading Company, Inc et al v Nigerian National Petroleum Corporation et al*, (Order on Defendant’s Motion to Dismiss, United States District Court, Eastern District of Texas, Beaumont Division, 15 March 2006) (Case No. 1:05CV619) 14.

erate” but also a “wrong” within the technical meaning of the applicable law. If this is so, then the term “wrongdoing” has little practical value in itself, at least in terms of establishing liability. What would be required is a possibility to hold an arbitrator liable not under the common law of torts but for grave and deliberate misconduct in the performance on his or her duties as an arbitrator. The English Arbitration Act 1996 (s 29(1)) and the Irish International Commercial Arbitration Act 1998 (s 12(1)) more aptly refer to an “act or omission shown to have been in bad faith” and “in the discharge or purported discharge of [one’s] functions as an arbitrator”. Bad-faith conduct would include, but not be limited to, a “deliberate violation of the arbitration agreement or the [arbitration] rules”.¹⁰²

95. In light of the foregoing, a new article *9bis* might be considered, with the following wording:

No arbitrator (including his or her employees and assistants), secretary to the Arbitral Tribunal appointed in accordance with article 15, paragraph 9, or expert to the Arbitral Tribunal shall be liable to any party for any act or omission in connexion with the performance of his or her tasks under these Rules except if that act or omission was manifestly in bad faith.

96. Consideration may also be given to extending the immunity of article *9bis* to persons or institutions performing the function of an Appointing Authority under the Rules, and even the Secretary-General of the PCA (although the question is at present probably purely theoretical, given his immunity from suit in the courts).

¹⁰² Cf Article 10.2 of the LCIA Rules.

ARTICLE 10(2)

I. PRESENT RULE

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

II. DISCUSSION AND PROPOSED REVISION

97. Article 10(2) should read:

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

ARTICLE 11

I. PRESENT RULE

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, 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 one party, the other party may agree to the challenge. In both cases the procedure provided in article 6 or 7 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 his right to appoint or to participate in the appointment.

II. DISCUSSION AND PROPOSED REVISION

98. Article 11 should read:

1. A party who intends to challenge an arbitrator shall send notice of ~~his~~his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the ~~A~~Aarbitral ~~T~~Tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by ~~a one~~a party, the other ~~parties~~party may agree to the challenge. In both cases the procedure provided in article 6 ~~or 7~~ 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 ~~his~~his right to appoint or to participate in the appointment.

ARTICLE 12(1)

I. PRESENT RULE

99. Article 12(1) reads:

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

- (a) When the initial appointment was made by an appointing authority, by that authority;
- (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by the authority;
- (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

II. DISCUSSION AND PROPOSED REVISION

100. The provision is drafted on the assumption that a party that has unsuccessfully invited an arbitrator to withdraw has an interest in seizing the Appointing Authority of a challenge application as soon as possible. Hence, Article 12(1) sets forth no time-limit by which the party making the challenge must seek a decision by the Appointing Authority (and, if necessary, seek the designation of an Appointing Authority).
101. In the hands of parties given to dilatory tactics, this has on occasion led to delay and, worse, uncertainty on the part of the tribunal, which may feel hesitant to proceed, in the shadow of a possible or likely challenge.
102. The possibility for mischief could be eliminated by the addition of the following words in the opening part of article 12(1):

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, within [fifteen/thirty] days from the date of the notice of challenge the party making the challenge may seek a ~~the~~ decision on the challenge, which will be made: ...

ARTICLE 13

I. PRESENT RULE

103. Article 13 reads:

1. In the event of the death or resignation of an arbitrator during the course of the 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 arbitrator being replaced.
2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

II. DISCUSSION

104. This crucial provision has given rise to several important questions:

- (a) Should an arbitrator's ability to resign be conditional on a showing of "serious reasons";¹⁰³ and if so, how would such a limitation be policed and by whom?
- (b) In the same vein, is a resignation always to take effect immediately?
- (c) Does the peremptory language of article 13 ("*shall* be appointed", "the procedure in respect of the challenge and replacement ... *shall apply*"¹⁰⁴) preclude the remaining arbitrators from continuing with the proceedings and possibly issuing an award?
- (d) What is the threshold of "impossibility" in article 13(2)? Does this provision adequately deal with obstruction – intentional or not – of the deliberations of the arbitral tribunal, unbeknownst to the parties?

105. The *travaux* provide little guidance on those questions. They indicate that care was taken to formulate article 13 in a way to dissuade vexatious, ill-grounded challenges to arbitrators. Thus, the Commission was careful to

¹⁰³ Cf *Sanders* (2004) 247.

¹⁰⁴ Practically, in cases of resignation of party-appointed arbitrators, application of the appointment process under article 7 means that the relevant party has 30 days in which to make a substitute appointment, failing which the designating authority/Appointing Authority process is to take its course. The potential for delay and disruption is obvious, especially where a hearing, deliberations, or the signature of an award are imminent.

choose the terms “*de jure* or *de facto* impossibility”¹⁰⁵ for article 13(2), as providing a more objective test than the term “incapacity”.¹⁰⁶ On the other hand, Article 13(2) was intended to cater for an arbitrator’s “failure to act” – a situation that the Commission felt could not be regarded as, in effect, a “resignation” under article 13(1).¹⁰⁷ Moreover, although it was recognized that an arbitrator should be able to resign only for exceptional “good reasons”,¹⁰⁸ it was felt that such an obligation could not be effectively enforced.¹⁰⁹

106. Practice under the Rules, in particular that of the Iran-US Claims Tribunal, furnishes some further answers.¹¹⁰ More importantly for present purposes, the available practice highlights the limitations of the present text of article 13.
107. Clear rules are necessary to give effect to the principle that “an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of an award”.¹¹¹ It is possible and desirable to dissuade spurious resignations, or at least contain their consequences. This might be achieved by rules to the effect described below.
- *In multi-member arbitral tribunals, a resignation is to be approved by the other arbitrators:* Requiring an arbitrator to articulate his reasons for resigning (however unverifiable these may in some cases be), and to submit to his colleagues’ scrutiny and judgment, may be an effective deterrent against ill-considered or plainly tactical resignations.¹¹²

105 The terms “*de jure* or *de facto*” are also to be found in Article 14(1) of the Model Law, in Article 12 (2) of the ICC Rules, and in Article 10 of IACAC Rules.

106 See Report of UNCITRAL Committee of the Whole II, 71, para 70.

107 See UNCITRAL Discussions on Preliminary Draft Rules, 34, paras 89-91.

108 See UN Doc A/CN.9/9/C.2/SR.5 (1976) 5, para 31; and *Sanders* (1977) 191.

109 Ibid.

110 For a detailed analysis and extensive references see *Caron/Caplan/Pellonpää* Chapter 6.

111 International Law Commission, Report to the General Assembly, [1958-II] ILCYB 83, 88, para 38. This comment expressed the rationale of Article 27(2) of the ILC Model Rules on Arbitral Procedure, endorsed by GA Res 1262 (XIII) (1958), reprinted in [1958-II] ILCYB 83. Article 27(2) of those Rules requires the replacement of an arbitrator only when the parties’ agreement so provides or an arbitrator absents himself *with* the permission of the tribunal president; in other cases the tribunal proceeds minus the absentee member.

112 One particular type of tactical resignations, identified by Mr Daly, the Deputy Secretary-General of the PCA, at the 30th Anniversary UNCITRAL/VIAC colloquium in April 2006, is a series of revolving resignations followed by successive appointments within the 30-day period stipulated in article 7(2), so preventing the appointing authority from intervening. It is both difficult and delicate to set out the circumstances in which the appointing authority (if one has been designated) would be authorized to take the matter in its own hands. The requirement of approval for all resignations would be a

(cont’d)

This practice ultimately prevailed in the Iran-US Claims Tribunal,¹¹³ and it is entirely consistent with the general rule that the arbitral tribunal is responsible for the conduct of the proceedings.¹¹⁴ Such a rule should function well in multi-member tribunals, especially given the proposed power for the presiding arbitrator to decide alone when no majority can be formed.¹¹⁵ On the other hand, difficulties would arise in the unusual hypothesis that the two party-appointed arbitrators might wish to force the presiding arbitrator to remain on the tribunal.¹¹⁶ And it is clear that the rule could not apply in single-member tribunals – where the risk of spurious resignations is inherently limited, however.

- *A resignation is to take effect on a date decided upon by the arbitral tribunal:* This rule would permit arbitral tribunals to continue with the proceedings in an orderly way.¹¹⁷
- *A non-approved resignation, or an arbitrator's failure to comply with the decisions of the arbitral tribunal as to the date on which his resignation is to take effect, will not prevent the tribunal from continuing with the case:* This is one manifestation of the more general rule that absences without a valid excuse (i.e., by way of resignation, plain absence, or failure to co-operate in advancing the proceedings) will not prevent the majority of the tribunal from continuing with the proceedings. This eliminates the possibility of making tactical gain by absences that are unjustified or timed to cause maximum disruption and delay.

The Iran-US Claims Tribunal experienced several different instances of truncated chambers. The Tribunal relied on an inherent power to proceed – that is, a jurisdictional empowerment outside the Tribunal

more straightforward solution to the problem, assuming that a tribunal has been fully constituted and is therefore in a position to approve a putative resignation.

113 See Aldrich, *The Jurisprudence of the Iran – United States Claims Tribunal* (1998) 13. In institutional arbitration, as under the ICC and the LCIA Rules, resignations are subject to approval by the respective Courts of Arbitration; see Article 12(1) of the ICC Rules, and Article 10.1 of the LCIA Rules.

114 See article 15(1) of the Rules.

115 See article 31(1), paragraphs 232 *et seq* below.

116 In fact, either of the two party-appointed arbitrators might cause deadlock by refusing to approve a reasonable resignation request by the presiding arbitrator. Consideration may be given to the idea of referring such (surely exceptional) cases, where the two party-appointed arbitrators fail to reach consensus, to the Appointing Authority.

117 Cf Article 13(5) of the Iran-US Claims Tribunal Rules of Procedure (the “Mosk Rule”), which requires an arbitrator who has resigned to “continue to serve ... with respect to all cases in which he had participated in a hearing on the merits”.

Rules of Procedure.¹¹⁸ The tribunal in the *Himpurna* case, sitting in an *ad hoc* arbitration under the UNCITRAL Rules, expressly relied upon the earlier practice of the Iran-US Claims Tribunal. In *Himpurna*, the respondent state was found to have prevented its appointed arbitrator from attending a scheduled hearing, shortly before its commencement. The tribunal held that, given the timing of the arbitrator's absence and the lack of a valid excuse, awaiting the replacement of the missing arbitrator would be "manifestly inappropriate". In material part, the tribunal held:

This text [article 12(1)] was the subject of specific comment in the Iran-United States Claims Tribunal decision in *Uiterwyk Corp, et al v Islamic Republic of Iran, et al* (6 July 1988). In response to a dissenting decision by the absent Iranian arbitrator Mostafavi, the two remaining arbitrators, Böckstiegel and Holtzmann, issued a Supplemental Opinion which concluded that Art. 13(2) of the UNCITRAL Rules "is not the exclusive procedure for dealing with failure of an arbitrator to act", and that it "cannot be invoked to disrupt the orderly process of the Tribunal or to obstruct its functions".

This Arbitral Tribunal concurs with that conclusion. A possible course may be to remove and replace an arbitrator who has withdrawn, if the withdrawal takes place at a sufficiently early stage that his replacement would cause only limited disruption. Such a solution is, however, manifestly inappropriate when an arbitrator withdraws at an advanced stage in the proceedings and that withdrawal is found by the Arbitral Tribunal to be without valid excuse.¹¹⁹

108. In Judge Schwebel's view the *Himpurna* tribunal's decision reinforces further "the better, but not the only, view of the matter".¹²⁰
109. Connivance between an arbitrator and a party which appointed him is to be severely discouraged. One of the few truly effective disincentives to this kind of behaviour is to deprive the party which has appointed an arbitrator whose resignation is not approved of the right to name his replacement. (In pathological cases, this could otherwise lead to a series of inappropriate appointments, and effectively sabotage the process.) Such a

118 See *Caron/Caplan/Pellonpää* 287-298.

119 *Himpurna California Energy Ltd (Bermuda) v Republic of Indonesia* (2000) 25 YCA 186 (Final Award, UNCITRAL, 1999) paras 58-59.

120 Schwebel, "Injunction of Arbitral Proceedings and Truncation of the Tribunal", (2003) 18:4 *Mealey's Int'l Arb Rep* 33, 38. See also Schwebel, *International Arbitration: Three Salient Problems* (1987) Chapter III.

sanction has always been part of the ICSID system.¹²¹ It was applied in the very first ICSID case in favour of the State of Morocco.¹²² This may have contributed to the near-absence of any such instances in ICSID arbitrations over the subsequent decades.¹²³ ICSID's example is implicitly followed in the 1998 LCIA revision¹²⁴ and is proposed for adoption in the revision of article 13 of the Rules.

110. This leaves one further question, whether the terms “*de jure* or *de facto* impossibility of performing [an arbitrator’s] functions” are sufficiently clear and comprehensive. The LCIA Rules (Article 10.1) use the rather clearer terms “unable or unfit”, but the Model Law (Article 14(1)) retains the terms “*de jure* or *de facto* unable to perform [an arbitrator’s] functions”. In order to maintain consistency between the Rules and the Model Law, the “*de jure* or *de facto*” terminology might be retained. On the other hand, the terms “*de jure* or *de facto* impossibility” are overly narrow inasmuch as they fail to cover cases where an arbitrator effectively “refuses ... to act” (LCIA Rules, Article 10.1) or “for other reasons fails to act without undue delay” (Model Law, Article 14(1)). This should be corrected.

III. PROPOSED REVISION

111. Proposed revised text of article 13:

1. Where the Arbitral Tribunal consists of more than one arbitrator, a resignation by an arbitrator shall require the approval of a majority of the other arbitrators. The presiding arbitrator shall have the casting vote. The decision approving the resignation of an arbitrator shall be in writing. It may stipulate that the resignation shall take effect on a future date.

¹²¹ See Article 56(3) of the ICSID Convention; commented upon as follows by its principal drafter: “[t]his provision reflects the suspicion that the party [that made the original appointment] may not be a stranger to the resignation”: Broches, “Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965: Explanatory Notes and Survey of Its Application”, (1993) 18 YCA 627, 766.

¹²² In respect of the rejected resignation of the claimants’ joint nominee, Sir John Foster QC, see *Holiday Inns v Morocco*, summarized in Lalive, “The First World Bank Arbitration (*Holiday Inns v Morocco*) – Some Legal Problems”, (1980) 51 BYIL 123.

¹²³ Although a second instance involving Mr Galo Leoro Franco was resolved with similar effect in March 2006: *Casado and President Allende Foundation v Republic of Chile* (ARB/98/2).

¹²⁴ Article 11.1 gives the LCIA Court “complete discretion to decide whether or not to follow the original nominating process.”

2. In the event of the death or approved resignation of 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 8 that was applicable to the appointment [or choice] of the arbitrator being replaced. In the event an arbitrator's resignation is not approved pursuant to paragraph 1, he or she shall be replaced by a direct selection by the Appointing Authority.
3. In the event that an arbitrator refuses or fails to act, or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, or if he or she for other reasons fails to act without undue delay, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply, subject to paragraph 4. Unless the Appointing Authority finds that the reasons for the arbitrator's non-performance of his or her functions are beyond his or her control, the Appointing Authority shall directly appoint the replacement arbitrator.
4. Where the other arbitrators unanimously determine that paragraph 3 applies to an arbitrator, or if he or she has tendered a resignation which is not accepted pursuant to paragraph 1, they shall have the power, upon written notice to the third arbitrator and the parties, to continue the arbitration and make any direction, decision, or award, if the circumstances of the case so warrant. For the purposes of this paragraph, the circumstances of the case include the stage of the arbitration and any explanation given by the third arbitrator.

ARTICLE 14

I. PRESENT RULE

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

II. DISCUSSION

112. While it may be appropriate in most cases where a sole arbitrator or presiding arbitrator is replaced for hearings to be repeated, there is no compelling reason to lay down a preemptory rule. Not all hearings are essential for the disposition of a claim: repetition may not justify the expense. In addition, verbatim transcripts of hearings are commonly held, and a newly appointed presiding arbitrator having confidence in his co-arbitrators may be content with such a transcript. In short, whether or not to repeat a hearing should be decided by the tribunal in light of all circumstances; no rigid rule appears necessary.
113. For this reason, Article 14 of the Rules of Procedure of the Iran-US Claims Tribunal and Article 12(4) of the ICC Rules leave this decision entirely to the tribunal without attempting to lay down any rigid rules.¹²⁵

III. PROPOSED REVISION

114. Proposed revised text of article 14:

If under articles 11 to 13 ~~the sole or presiding arbitrator is replaced,~~ any arbitrator is replaced, the reconstituted Arbitral Tribunal, having consulted the parties, shall determine if and to what extent any hearings held previously shall be repeated; ~~if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.~~

¹²⁵ See to the same effect SCC Rules, Article 25; ICSID Rules, Article 12.

ARTICLE 15(1)

I. PRESENT RULE

115. Article 15(1) reads:

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 any stage of the proceedings each party is given a full opportunity of presenting his case.

II. DISCUSSION

116. The *travaux* to article 15(1) highlight flexibility in the conduct of the proceedings and reliance on the expertise of the arbitrators as “two of the hallmarks of arbitration”.¹²⁶ Arbitrators must thus be entrusted with wide powers to regulate the conduct of the proceedings, provided that the parties receive equal treatment¹²⁷ and a full opportunity of presenting their case, as specified in Article 18 of the Model Law, a provision which the Secretary of UNCITRAL has called the *Magna Carta* of arbitration.¹²⁸

117. Where article 15(1) perhaps falls short is that it does not spell out the tribunal’s duty to ensure that arbitral proceedings are dealt with without unnecessary delay;¹²⁹ nor does it spell out the specific power of arbitral tri-

¹²⁶ Report of UNCITRAL Secretary General on Revised Draft Rules (Commentary on Article 14) 172, para 1.

¹²⁷ It should not be assumed however, that treating parties with equality means meeting out identical treatment to the parties in all circumstances. (This is relevant, in particular, to costs issues, including deposits.) For an example see *Howe v BIS* (Order of 31 August 2001) para H.2, discussed by Petrochilos (note 40 above) para 4.48. More generally, the intention in article 15(1) was to permit the tribunal to conduct the arbitral process “with fairness” eschewing absolute equality when circumstances so required; see *ibid* para 4.87 and the references.

¹²⁸ Quoted in *Holzmann & Neuhaus* 550. Article 18 of the Model Law states: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

¹²⁹ Such a rule is provided for under Article 14.1(ii) of the LCIA Rules, Article 20(3) of the SCC Rules, Article 38(c) of WIPO Rules and Article 16(2) of the AAA Rules. See also the UNCITRAL Model Law, Article 14(1) which cautions against the failure of an arbitrator to act “without undue delay”; and section 1(a) of the Arbitration Act 1996 (England & Wales), which states that “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”. Article 14.1(ii) of the LCIA rules is perhaps the most comprehensive by imposing the general duty on tribunals at all times “to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute.”

bunals to issue directions in that regard. It is within those limits that tribunals have to organize proceedings in the most efficacious way in the circumstances of the case.¹³⁰

118. Further, we consider that indicating the potential cost consequences of a failure to comply with such directions would assist in ensuring the efficacy of the arbitral process.¹³¹

III. PROPOSED REVISION

119. Proposed revised text of article 15(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 any stage of the proceedings each party is given a full opportunity of presenting ~~his~~its case. The Arbitral Tribunal shall take all action and issue all necessary directions to the parties in order to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The parties shall comply with and carry out any directions issued by the Arbitral Tribunal; failure to do so may be taken into account by the Arbitral Tribunal in allocating the costs of the arbitration pursuant to article 40.

¹³⁰ This general principle is also reflected in article 32(1) of the Rules, authorizing a tribunal to make “interim, interlocutory, or partial awards” at various stages of the proceedings. Thus, the general rule in article 15(1) would allow a tribunal to tailor its proceedings as necessary to deal with a manifestly unmeritorious claim (see the new ICSID Rule 41(5)), a question that created some difficulty in the *Occidental v Ecuador* case. The arbitral tribunal under the UNCITRAL Rules dismissed a claim of expropriation on grounds of “admissibility”, finding that “it is ... evident that there is no expropriation in this case”: *Occidental Exploration and Production Co v Republic of Ecuador*, Final Award (1 July 2004) para 80. Occidental challenged this holding before the English courts, on the basis that article 21(4) of the Rules does not authorize a tribunal to deal summarily with the merits of a claim. The High Court dismissed that challenge for reasons of English law not relevant here: *Republic of Ecuador v Occidental Exploration and Production Co* [2006] EWHC 345, paras 130-137. Questions of English law aside, the difficulty that Occidental identified with article 21(4) of the Rules would have been remedied if appropriate directions had been made under the proposed article 15(1) of the Rules.

¹³¹ A draft revised text for the SCC Rules (August 2006) would go further, and permit the tribunal to “draw such inferences as it considers appropriate” if a party fails to comply with (*inter alia*) the tribunal’s directions “without showing good cause”: draft Article 30(3).

NEW ARTICLE 15(2)-(3)

I. DISCUSSION

120. Preparatory meetings are increasingly viewed as serving a useful purpose, particularly in more complex international arbitration proceedings. Preparatory meetings are expressly provided for under the Iran-US Claims Tribunal Notes to Article 15.¹³² Further, arbitral tribunals are expressly empowered to hold such meetings in WIPO, ICSID as well as in AAA arbitrations.¹³³
121. There are three specific instances where holding preparatory meetings may be particularly recommended: at the beginning of the arbitration (to decide on the schedule and format of the proceedings), when witnesses are to be heard (to decide on the matters described in article 25(2)) and when the tribunal considers the appointment of one or more experts under article 27 of the Rules.¹³⁴
122. While the general rule contained in the current article 15(1) does not preclude tribunals from holding preparatory meetings, a provision should usefully be included in the Rules expressly conferring the power on the tribunal to hold such meetings “at an appropriate stage of the proceedings”, whether following a request by the parties or at its own initiative.¹³⁵
123. The UNCITRAL Notes provide guidance to both the arbitral tribunal and the parties on matters to be discussed in a preparatory meeting. These are, in particular, defining the points at issue, the order in which issues are to be decided and defining any relief or remedy sought; possible settlement negotiations and their effect on scheduling proceedings; the language to be used in the proceedings; the juridical seat of the arbitration and the possibility of meeting outside that place; administrative services that may be needed for the arbitral tribunal to carry out its functions (eg hearing arrangements or secretarial assistance); deposits in respect of costs; confidentiality of information relating to the arbitration; arrangements for the

¹³² The Iran-US Claims Tribunal adopted article 15 of the UNCITRAL Rules but provided in Note 4 to that article that “[t]he arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference. The pre-hearing conference will normally be held only after the Statement of Defence in the case had been received. The order will state the matters to be considered at the pre-hearing conference.”

¹³³ Article 47 of the WIPO Rules (1994); Article 21(1) of the ICSID Rules; and Article 16(2) of the AAA Rules. Under article 18 the ICC Rules, the Tribunal must in all cases draw up its terms of reference and a timetable for the proceedings. However, the ICC Rules do not in this regard reflect general international arbitration practice.

¹³⁴ Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2004) 11-13.

¹³⁵ See *ibid* 10; Sanders (2004) 247.

exchange of written submissions; other practical details concerning written submissions and evidence (eg copies, numbering, references); issues relating to documentary evidence, including time-limits for their submission; disclosure and exceptions (eg whether certain classes of documents should be immune from requests to produce); joint submission of a single set of documentary evidence and the possibility of submitting summaries of voluminous documentary evidence; physical evidence other than documents; issue regarding witnesses (eg the manner of taking oral evidence, the order in which the witnesses will be called); experts and expert witnesses; matters relating to the holding of hearings; and possible requirements concerning the filing or delivery the award.

II. PROPOSED RULES

124. Articles 15(2)-(3) would read as follows:

2. As soon as practicable after its constitution, the Arbitral Tribunal shall establish a provisional timetable for the conduct of the proceedings, in consultation with the parties.
3. At any appropriate stage of the proceedings, the Arbitral Tribunal may meet or confer with the parties on any issue relating to the conduct of the proceedings, having due regard to the UNCITRAL Notes on Organizing Arbitral Proceedings.

NEW ARTICLE 15(4)

I. DISCUSSION

125. Disputes occasionally arise between the same parties under separate contracts (eg, related contracts or a chain of contracts) containing separate arbitration clauses, and for one of the parties to refuse that all such disputes be resolved in the same proceedings. It may also occur that, pending proceedings in respect of a contract, a party should initiate a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage.¹³⁶ Consolidation in such situations might ensure an efficient resolution of the disputes between the (same) parties, consistently with the general principle in article 15(1). Consolidation would also reduce the possibility of inconsistent awards in parallel arbitrations.¹³⁷
126. Consolidation of claims would be especially desirable where the claims are part of the same overall transaction (or a chain of transactions) between the same parties or, at least, where the claims are closely related.¹³⁸
127. Under the present Rules consolidation is possible only where the parties specifically agree.¹³⁹ Moreover, a counterclaim arising out of a different, but closely related, contract is inadmissible.¹⁴⁰

¹³⁶ See *Derains & Schwartz* 60.

¹³⁷ The *cause célèbre* for consolidation is the contrasting outcomes of the awards in *CME Czech Republic BV v The Czech Republic* (Partial Award of 13 September 2001), and *Ronald S Lauder v The Czech Republic* (Final Award of 3 September 2001) – although it must be noted that the revision proposed here would not necessarily have assisted in the particular circumstances of the *CME* and *Lauder* arbitrations, because the claimants in those two proceedings were different.

¹³⁸ Consolidation is permitted under the Swiss Rules (Article 4(1)) and under the CEPANI Rules (Article 11). The NAFTA not only demonstrates that consolidation feasible in *ad hoc* arbitration under the Rules, but actually goes so far as to permit consolidation even when the parties are not the same (Article 1126(2)). The NAFTA provisions are remarkably far-reaching, as demonstrated by the decision of the NAFTA Consolidation Tribunal to accede to the United States’ request to consolidate the three “Softwood Lumber” arbitrations initiated by Canfor Corporation, various companies of the Tembec group, and Terminal Forest Products Inc; see *Canfor Corp et al v US*, Order of the Consolidation Tribunal (7 September 2005). The claimants in all three cases had objected to consolidation, and while two of them have proceeded with the arbitration, the Tembec claimants have withdrawn their claims and, in February 2006, moved to vacate the consolidation Order in the District Court for the District of Columbia (Case No 05-2345 (RMC)).

¹³⁹ See Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1998) 434-435 for the means by which the Iran-US Claims Tribunal “combine[d] separate claims in a single proceeding for reasons of economy and efficiency”.

128. The Departmental Advisory Committee which was principally responsible for the elaboration of the English Arbitration Act 1996 “concluded that the problem [of consolidation] was best left to be solved by consent, and expressed the hope that those responsible for drafting standard forms of contract and institutional arbitration rules would include clauses enabling the tribunal to order consolidation or concurrent hearings in appropriate cases”.¹⁴¹
129. Consolidation is allowed under the ICC Rules,¹⁴² when all proceedings relate to the same “legal relationship”, on the premise that the parties have consented to give a tribunal the power to consolidate claims by choosing to arbitrate in accordance with the ICC Rules. This serves also as the justification for including the proposed consolidation provision in the UNCITRAL Rules.
130. Note that our proposed wording is based on NAFTA (Article 1126(2)).

II. PROPOSED RULE

131. Article 15(4) would read as follows:

Where two or more claims which involve the same (and no other) parties and have a question of law or fact in common are the subject of separate arbitration proceedings under these Rules, the Arbitral Tribunal may, after hearing the parties, by reasoned order:

¹⁴⁰ Article 19(3) of the Rules states that the respondent can bring a counterclaim “arising out of the same contract”. There is, however, no reason why counterclaims should in principle be restricted to those that arise from the same contract, especially in light of the modern trend to arbitrate several different kinds of non-contractual disputes under the UNCITRAL Rules. The *travaux* show that while considering the draft article 19 (on counterclaims) the Commission noted that it would be normal arbitration practice to consolidate the hearings of two claims that arose out of separate, but connected, contracts (see UNCITRAL Discussions on Preliminary Draft Rules, paras 136-137), but no provision catering for this was included in the final text of the Rules. Such a provision should be considered for inclusion in the revised Rules.

¹⁴¹ Reprinted in Mustill and Boyd, *Commercial Arbitration (Companion Volume to the 2nd edition)* (2001) 309.

¹⁴² Article 4(6) of the ICC Rules provides: “When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.” Note that this provision has rarely been applied: *Derains & Schwartz* 59.

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

NEW ARTICLE 15(5)

I. DISCUSSION

132. Under the Rules, the question whether the arbitral tribunal may allow third parties to participate in arbitral proceedings, and to what extent it may do so, is controversial.¹⁴³ Third parties, for example non-governmental organisations, often ask for an opportunity to explain their concerns (or offer a particular insight) in relation to a claim in investment-treaty arbitrations.
133. Article 15(1) of the Rules, providing that the “tribunal may conduct the arbitration in such manner as it considers appropriate”, has been held to confer the power on the tribunal to accept *amicus curiae* briefs in written form.¹⁴⁴ Especially in light of the frequent use of the UNCITRAL Rules in arbitrations under international investment treaties, we believe and propose that such a power should be made explicit in the Rules.¹⁴⁵
134. The Iran-US Claims Tribunal, while accepting the text of article 15 without modifications in its Rules of Procedure, expressly allowed for *amicus* submissions from non-parties in its Note 5 to the Article:

The Tribunal may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not a party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the Tribunal by presenting oral and written statements.¹⁴⁶

135. In taking its decision on whether to accept *amicus curiae* briefs, the tribunal will have to consider a number of factors, including whether the case

¹⁴³ In the *travaux préparatoires*, “[i]t was suggested that a provision should be included in the Rules defining the circumstances in which a person not a party ... might participate in an arbitral proceeding, since in certain circumstances the participation of such persons might be desirable”: UNCITRAL Discussions on Preliminary Draft Rules, para 19.

¹⁴⁴ See *Methanex Corporation v United States of America* (Decision on Jurisdiction of 15 January 2001) (NAFTA) para 47. See also *United Parcel Service of America Inc v Government of Canada* (Decision on Jurisdiction of 17 October 2001) (NAFTA) para 72: the tribunal followed the *Methanex* decision, but added that “[t]he circumstances and the detail of the making of any *amicus* submissions would be the subject of consultation with the parties.”

¹⁴⁵ We also propose an amendment to article 25(4) that would enable the tribunal to allow third parties to attend or monitor hearings in appropriate circumstances: see paragraph 198 below.

¹⁴⁶ On the practice under that provision see *Caron/Caplan/Pellonpää* 37, citing *The United States of America v The Islamic Republic of Iran*, Decision No DEC 37-A17-FT (13 May 1985), (1985) 8 Iran-US CTR 189.

involves significant issues of public interest which might benefit from a wider scope of arguments than those of the disputants, whether such submissions would assist the tribunal in the determination of a factual or legal issue, and whether the purported *amicus* has a significant and legitimate interest.¹⁴⁷

II. PROPOSED RULE

136. Article 15(5) would read as follows:

Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.

¹⁴⁷ As the new proposed ICSID Rule 37(2) provides:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding, unduly burden or unfairly prejudice either party, and that both parties are given an opportunity of presenting their observations on the non-disputing party submission.

NEW ARTICLE 15(6)-(9)

I. DISCUSSION

137. The powers conferred on arbitral tribunals by article 15(1) are broad, ranging from permitting *amicus curiae* briefs,¹⁴⁸ to requesting the parties to submit specific briefs on certain points.¹⁴⁹ The present proposals are not aimed at limiting those powers, but only at providing guidance and indications, from which the parties can derogate, should they wish to do so.
138. Several such powers are already discussed in the UNCITRAL Notes, to which the arbitral tribunal may have regard to under our proposed article 15(3). The following matters are not.
- *Conducting enquiries*: It sometimes occurs that the arbitrators have to intervene in order to put the parties on the right track as to necessary points at issue in the proceedings. Such a power should be expressed in the Rules, along the lines of Article 22.1(c) of the LCIA Rules.¹⁵⁰
 - *Ordering a party to make property available for inspection*: The Rules already provide for the carrying out of inspections by the tribunal. The site or property to be inspected is usually under the control of one of the parties. Like Article 22.1(d) of the LCIA Rules, the Rules should provide the tribunal with the further power “to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal”.
 - *Allowing a third party to be joined in the proceedings*: It is in the interests of the efficiency of arbitration that a third party, most commonly an insurer, may be joined in the proceedings. This would require the consent of the parties to the main claim as well as that of the

¹⁴⁸ *Methanex Corporation v United States of America* (Decision on Jurisdiction of 15 January 2001) (NAFTA) para 47. See above, note 144.

¹⁴⁹ *Larsen v The Hawaiian Kingdom*, Procedural Order No 3 (17 July 2000) para 16 (quoted at para 6.2 of the Award (2001) 119 ILR 566).

¹⁵⁰ Article 22.1(c) provides the arbitrators with the power

to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties’ dispute and the Arbitration Agreement.

third party. The wording of Article 22.1(h) of the LCIA Rules is appropriate in this regard.¹⁵¹

- *Allowing tribunals to appoint secretaries:* Secretaries (or “administrative” or “legal” secretaries as they are sometimes called) perform useful functions, especially in complex cases, by assisting the tribunal in carrying out research and administrative tasks (for example, organizing hearings and meetings, co-ordinating communications among the members of the tribunal and with the parties, and organizing materials relevant to the tribunal’s deliberations).¹⁵² Following Professor Sanders’ suggestion,¹⁵³ we propose that the Rules codify the tribunal’s power to designate a secretary, which is well established in practice. The parties may naturally agree to exclude this power; and, in exercising its discretion to designate a secretary the tribunal would always take account of its duty to act efficiently and avoid unnecessary expense (see article 15(1)).

II. PROPOSED RULES

139. Articles 15(6)-(9) would read as follows:

6. After consulting with the parties, the Tribunal may conduct such enquiries as may appear to it to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties’ dispute, and the arbitration agreement.
7. After consulting with the parties, the Tribunal may order any party to make any property, site, or thing under that party’s control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, another party, its expert, or any expert appointed by the Arbitral Tribunal.
8. After consulting with the parties, the Tribunal may allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final

151 The Swiss Rules (Article 4(1)) also permit joinder.

152 See generally Partasides, “The Fourth Arbitrator: The Role of Secretaries to Tribunals in International Arbitration”, (2002) 18 Arb Int 147.

153 Sanders (2004) 265.

award, or separate awards, in respect of all parties so implicated in the arbitration.

9. The Arbitral Tribunal may, having consulted with the parties, and determined that it would contribute to overall cost-effectiveness by relieving the arbitrators of certain tasks, designate a secretary to the Tribunal. Any such designation shall be by written notice to the parties, identifying the person concerned and describing the tasks that may be entrusted to him or her by the Tribunal and under its responsibility. The secretary to the Tribunal shall provide to the parties a signed statement of independence conforming to article 9.

NEW ARTICLE 15bis (INCORPORATING CURRENT ARTICLE 15(2)-(3))

I. PRESENT RULE

2. If either party so requests at any stage of the proceedings, 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.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

II. DISCUSSION

140. On its face article 15(2) may be read as obliging the arbitrators to hear oral testimony tendered by a party even if they consider such testimony immaterial or irrelevant to the resolution of the dispute.¹⁵⁴
141. The concern over parties requesting hearings in order to disrupt proceedings or stall the issuance of an award is prevalent in the legislative history of Article 24 of the Model Law, a provision based on the wording of article 15(2) of the Rules.¹⁵⁵ The Working Group altered the phrase “at any stage of the proceedings” to “at an appropriate stage of the proceedings”, which was accepted as the final formulation.¹⁵⁶ Therefore, under the Model Law, “a request presumably must come at such a time as to permit the arbitral tribunal to hold a hearing at an appropriate stage of the proceedings. It may not come, for example, on the eve of the award or after the time set by the tribunal for such requests has lapsed.”¹⁵⁷ This better formulation should also be reflected in the UNCITRAL Rules.
142. The phrase “evidence by witnesses, including expert witnesses” is problematic in that in some legal systems (eg, Germany), the parties themselves, and their senior officers or employees, cannot be characterised as

¹⁵⁴ See Report of UNCITRAL Secretary General on Revised Draft Set of Rules (Commentary on article 13 [now article 15]), para 3.

¹⁵⁵ *Holtzmann & Neuhaus* 673.

¹⁵⁶ *Ibid*, 693-695. Article 24(1) of the Model Law formulates in general the rule in a better fashion than article 15(2) of the Rules, creating a need to harmonise the two provisions.

¹⁵⁷ *Holtzmann & Neuhaus* 673.

witnesses.¹⁵⁸ Accordingly, Article 24 of the Model Law was drafted so as to avoid any reference to the technical term “witnesses”; Instead, only the word “evidence” was retained.¹⁵⁹ Our proposals regarding this issue are included in article 25(2).

III. PROPOSED REVISION

143. Proposed revised text of article 15~~bis~~ (current article 15(2)-(3)):

1. Upon request of any ~~If either party so requests at any stage of the proceedings,~~ the Arbitral Tribunal shall hold hearings at an appropriate stage of the proceedings 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 exclusively on the basis of documents and other materials.
2. All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.

¹⁵⁸ See, eg, Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 698-699.

¹⁵⁹ See below, at paragraphs 193-196.

NEW ARTICLE 15^{ter}

I. DISCUSSION

144. Following substantial controversy on whether arbitral proceedings should be confidential, the ICC considered including an express provision on confidentiality in its Rules when it most recently revised them in 1998.¹⁶⁰ After extensive consideration, it was decided that a general confidentiality provision should not be included, and that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties (for example, in the Tribunal’s Terms of Reference).¹⁶¹
145. In arbitrations under the UNCITRAL Rules, the issue could be addressed in preparatory meetings,¹⁶² having regard to paragraphs 31 and 32 of the UNCITRAL Notes.
146. Confidentiality of the materials used in the arbitration is a different matter. While Article 20(7) of the ICC Rules provides the tribunal with the power to “take measures for protecting trade secrets and confidential information”,¹⁶³ the WIPO, LCIA, AAA and Swiss Rules all set forth a general rule that any materials used in the arbitration are confidential.¹⁶⁴ We believe that the Rules should adopt a similar provision, while making it clear that confidentiality may yield the countervailing legal rights or duties.¹⁶⁵
147. We have also made a suggestion in the proposed rule that conforms with the power in revised article 15(5) to permit the submission of *amicus curiae* briefs. The broad language employed in the last sentence of the proposed article, dealing with exceptions to the duty of confidentiality, comports with our proposed article 32(2) on exclusion of appeals.

¹⁶⁰ *Derains & Schwartz* 284-285.

¹⁶¹ *Ibid*, 285.

¹⁶² See the commentary to the proposed new article 15(2)-(3) of the Rules above, at paragraphs 120-123.

¹⁶³ Note that this rule was initially inspired by Article 52 of the WIPO Rules: *Derains & Schwartz* 285.

¹⁶⁴ See Article 74(a) of the WIPO Rules; Article 30.1 of the LCIA Rules; Article 34 of the AAA Rules; and Article 43(1) of the Swiss Rules.

¹⁶⁵ For an example of a provision that expressly requires open hearings and non-confidential materials, see Article 29 of the United States of America–Uruguay BIT (2004).

II. PROPOSED RULE

148. Article 15~~ter~~ would read as follows:

Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in *bona fide* legal proceedings before a state court or other judicial authority in relation to an award.

ARTICLE 16(1)

I. PRESENT RULE

PLACE OF ARBITRATION

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

II. DISCUSSION

149. According to Professor Sanders:

This [rule] not only refers to practical considerations in connection with the arbitral proceedings, such as the least possible displacement of parties, witnesses and arbitrators, but also ... to the legal consequences of the choice, and more especially to the recognition and enforcement of the award.¹⁶⁶

[T]he decision of the arbitral tribunal on the place of arbitration is a majority decision. In view of the legal consequences of the choice of the place of arbitration, such a decision is not – like the decision on the language to be used in the arbitration proceedings – a decision on a “question of procedure”, and Article 31 para 2 does not, therefore ... apply.¹⁶⁷

150. For the avoidance of doubt, a requirement that such a decision should be taken by majority should be inserted in article 16(1) itself.
151. More importantly, the choice of the place of the arbitration imports, in the vast majority of national arbitration laws, the supervisory and support jurisdiction of the courts of that country, and the application of the national arbitration law.¹⁶⁸ The legal nature of the place of the arbitration is referred to, in s 3 of the Arbitration Act 1996, as the “juridical seat”. This expression is to be preferred to the current one. The existing expression in many cases creates the mistaken impression that the place chosen for occasional meetings is also the formal place of arbitration.

¹⁶⁶ Sanders (1977) 194.

¹⁶⁷ Ibid. See also *Caron/Caplan/Pellonpää* 93: “[I]t is advisable that an arbitral tribunal select the place of arbitration by a majority decision in accordance with Article 31(1)”.

¹⁶⁸ See Model Law, Article 1(2).

III. PROPOSED REVISION

152. Proposed revised text of article 16(1):

~~*PLACE OF ARBITRATION*~~*JURIDICAL SEAT*

~~Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.~~

If the parties have agreed on a place of arbitration, that place shall be the juridical seat of the arbitration. Otherwise, this determination shall be made by the Arbitral Tribunal, in accordance with article 31, paragraph 1. The Arbitral Tribunal shall nevertheless have the discretion to conduct hearings or other meetings in any other place. With the exception of provisions which the national procedural law of the juridical seat of the arbitration explicitly defines as mandatory, the Arbitral Tribunal shall not be required to apply that national law to the conduct of the arbitration.

ARTICLES 16(2)-(3)

I. PRESENT RULE

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
4. The award shall be made at the place of arbitration.

II. DISCUSSION

153. It has become apparent from contemporary practice¹⁶⁹ that the “limited flexibility” granted to the tribunal under the present Rules should be extended¹⁷⁰ to allow the tribunal to perform all of its functions outside the country which is the formal *place of arbitration*, “having regard to the circumstances of the arbitration”.¹⁷¹
154. The formulation of the Model Law, Article 20(2), is more comprehensive and more useful:

Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation

¹⁶⁹ In *Himpurna California Energy Ltd (Bermuda) v Republic of Indonesia* (2000) 25 YCA 111, para 73 (Interim Award, UNCITRAL, 1999), the arbitral tribunal felt it necessary to move the hearing from Jakarta to The Hague as a result of an injunction ordered by the courts of Jakarta enjoining the arbitral proceedings and imposing a fine of USD \$1 million per day for any breach of the injunction. See also *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (CA).

¹⁷⁰ Support can also be drawn from the stance taken by most modern institutional arbitration rules – see for example Article 14(2) of the ICC Rules, Article 13(2) of the AAA Rules, Article 16.2 of the LCIA Rules, Article 39(b) of the WIPO Rules, Article 16(2) of the Swiss Rules.

¹⁷¹ “Article 14(2) [of the ICC Rules] requires the Arbitral Tribunal to consult with the parties before deciding to conduct a hearing or meeting at a location other than the place of the arbitration. ... This obliges the arbitrators to explain to the parties why they consider their decision appropriate and this, in turn, should generally suffice to discourage the most blatant abuses”: *Derains & Schwartz* 220.

among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The wording of Article 20(2) of the Model Law “would seem to include ... all the possible stages of the arbitral proceeding.”¹⁷²

155. It thus seems possible to amalgamate and simplify articles 16(2) and (3) into a single paragraph.
156. Former article 16(4) should be changed for clarity,¹⁷³ consistency with Article 16(1), and to avoid any confusion as to which country’s courts may exercise supervisory jurisdiction.

III. PROPOSED REVISION

157. Proposed revised text of articles 16(2)-(4):

2. ~~The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.~~

Having regard to the circumstances of the arbitration and subject to any specific contrary agreement of the parties, the Arbitral Tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

3. ~~The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.~~
4. ~~The~~ Any award, decision or order of the Arbitral Tribunal shall be considered made at the place-judicial seat of arbitration, even if it is not physically signed there.

¹⁷² *Holtzmann & Neuhaus* 596.

¹⁷³ Article 25(3) of the ICC Rules; and s 53 of the Arbitration Act 1996 (England & Wales).

NEW ARTICLE 16(4)

I. DISCUSSION

158. Although most institutional arbitration rules retain the term “place arbitration”, we feel that this term creates unnecessary and avoidable confusion.¹⁷⁴ The Rules should be accessible to people with varying degrees of knowledge about arbitration proceedings and different linguistic skills. Using an obviously technical term, such as “juridical seat” will aid the parties’ understanding that this term does not refer to the physical place where any hearings or meetings must take place, but is rather an expression that gives rise to certain legal consequences.
159. For the sake of clarity it is also desirable to set out expressly the connection between the technical term “juridical seat” and the more commonly used “place of arbitration”. The presumption should be that the term “place of arbitration” does not require for any hearings to be conducted at that place.

II. PROPOSED RULE

160. Article 16(4) would read as follows:

Reference to a place of arbitration shall ordinarily be construed as defining the juridical seat of arbitration, without any necessary implication hearings must be conducted in that place. Any controversy in this regard shall be resolved by the Arbitral Tribunal.

¹⁷⁴ The *travaux* do not reveal any specific reason for using the term “place of arbitration”. Indeed, during the consultations the terms “place of arbitration” and “seat of arbitration” appear to have been used interchangeably: see, eg, UN Doc A/CN.9/97, (1975) 6 UNCITRAL YB 182-3.

ARTICLE 17(1)

I. PRESENT RULE

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.

II. DISCUSSION

161. It was noted in the *travaux préparatoires* that in cases where the arbitrators selected the language or languages to be used in the arbitral proceedings, the arbitrators could consult with the parties before reaching their decision.¹⁷⁵ However, a suggestion to add this requirement to the text of article 17(1) was rejected because it was thought that any competent arbitrator would invariably consult with the parties before determining the language to be used. Given the occasional sensitivity of this issue, article 17(1) should expressly require consultation with the parties.¹⁷⁶
162. It is understood that a determination under article 17(1) is a “question of procedure” in the sense of article 31(2).¹⁷⁷
163. To avoid an impasse at the outset of the case, it would be useful to provide that the language to be used in initial stages of the case should be that of the arbitration agreement.

III. PROPOSED REVISION

164. Proposed revised text of article 17(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, in consultation with the parties. This determination shall apply to the statement of claim, the statement of defence, and any further written state-~~

¹⁷⁵ Report of UNCITRAL Committee of the Whole II, para 90; *Caron/Caplan/Pellonpää* 354.

¹⁷⁶ Article 14 of the AAA Rules, Article 17.3 of the LCIA Rules and Article 40 of the WIPO Rules all require the arbitral tribunal to have regard to the parties’ views.

¹⁷⁷ *Sanders* (1977) 194.

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

The initial language of the arbitration shall be the language in which the agreement to arbitrate has been expressed. Upon the formation of the Arbitral Tribunal and unless the parties have reached agreement in that respect, the Arbitral Tribunal shall decide upon the language of the arbitration.

ARTICLE 17(2)

I. PRESENT RULE

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.

II. PROPOSED REVISION

165. For clarity and consistency with our revisions, article 17(2) should read:

The Aarbitral 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~~ all texts relied upon by a party and submitted in their original language shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the Aarbitral Tribunal pursuant to paragraph 1.

ARTICLE 18(1)

I. PRESENT RULE

Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

II. PROPOSED REVISION

166. In accordance with the revision of article 3(3), article 18(1) would now read:

~~Unless the statement of claim was contained in the notice of arbitration, W~~within a period of time to be determined by the ~~A~~arbitral ~~T~~ribunal, the ~~C~~claimant shall communicate ~~his~~its ~~S~~statement of ~~C~~elaim in writing to the ~~R~~espondent and to each of the arbitrators. ~~A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.~~ The Claimant may elect to treat its Notice of Arbitration (article 3, para. 3) as a Statement of Claim.

ARTICLE 18(2)

I. PRESENT RULE

The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

II. DISCUSSION

167. As indicated in the *travaux*:

This paragraph describes the information that must be contained in a statement of claim ... [T]he claimant ... is not required to annex the documents which he deems relevant and on which he intends to rely [but] should he wish to do so, a claimant may annex to his statement of claim a list of the documents he intends to submit in support of his claim or he may even annex the relevant documents themselves.¹⁷⁸

168. There are no compelling reasons why this option should be maintained. Article 41(c) of the WIPO Rules¹⁷⁹ and Article 6.6 of the LCIA Rules¹⁸⁰

¹⁷⁸ Report of UNCITRAL Secretary on Revised Draft Rules (Commentary on article 17), para 5.

¹⁷⁹ Article 41(c) of the WIPO Rules provides:

The Statement of Claim shall, to as large an extent as possible, be accompanied by the documentary evidence upon which the Claimant relies, together with a schedule of such documents. Where the documentary evidence is especially voluminous, the Claimant may add a reference to further documents it is prepared to submit.

¹⁸⁰ Article 6.6 of the LCIA Rules reads:

All Statements referred to in this Article shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples.

reflect good practice. We propose that article 18(2) of the Rules be reworded accordingly.

169. As a consequence of our revision of articles 3(3)(b) and 3bis(2)(a), paragraph (a) of article 18 should be deleted.

III. PROPOSED REVISION

170. Proposed revised text of article 18(2):

The Sstatement of Cclaim shall include the following particulars:

- (a) ~~The names and addresses of the parties;~~
- (b) ~~—~~A statement of the facts and legal principles supporting the claim;
- (~~e~~)(b) The points at issue;
- (~~d~~)(c) The relief or remedy sought.

~~The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit. The Statement of Claim shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Claimant, or by references to them. If the documentary evidence is especially voluminous, the Claimant may list any further documents it deems relevant.~~

ARTICLES 19(1)-(2)

I. PRESENT RULE

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

II. PROPOSED REVISION

171. Consistently with our revisions to article 18(1)-(2), the text of article 19(1)-(2) should read:

1. Within a period of time to be determined by the Aarbitral Tribunal, the Respondent shall communicate hisits Sstatement of Defence ~~in writing~~ to the Celaimant and to each of the arbitrators. The Respondent may elect to treat its Response to the Notice of Arbitration (article 3bis, para. 2) as a Statement of Defence.
2. The Sstatement of Defence shall reply to the particulars (a), (b) (e) and (d) (c) of the sStatement of Celaim (article 18, para. 2). ~~The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.~~ The Statement of Defence shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Respondent, or by references to them. If the documentary evidence is especially voluminous, the Respondent may list any further documents it deems relevant.

ARTICLES 19(3)-(4)

I. PRESENT RULE

3. In his 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 arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
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.

II. DISCUSSION

172. There appears to be no compelling reason to envisage explicitly that the respondent might submit counterclaims after the submission of his Statement of Defence, especially given that (a) counterclaims are in principle to be submitted with the Response (article 3*bis*); and (b) the respondent will have seen the claimant's full case as articulated in the Statement of Claim.¹⁸¹
173. The LCIA and the ICC Rules do not limit counterclaims to those arising out of the same contract. There appears to us to be no compelling reason for such a limitation; indeed, permitting counterclaims arising from separate but related agreements between the parties (provided they are all to be referred to arbitration under the UNCITRAL Rules) would enhance consistency and efficiency.¹⁸² As the Rules stand at present, such counterclaims would require a specific *compromis* between the parties.¹⁸³ The

¹⁸¹ It should be noted that at one stage in the *travaux préparatoires*, Article 18(2) governing the contents of the statement of claim also contained a provision dealing with any amendments to it. Later, the current article 20 governing amendments to the claim and defence was inserted in the Rules, and that provision was removed from Article 18(2) accordingly. It is not clear why the corresponding provision in Article 19(2) was not removed.

¹⁸² Note that Article II(1) of the Claims Settlement Declaration (note 12 above) gave the Iran-US Claims Tribunal jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the] national's claims."

¹⁸³ "[T]he parties may agree, under special circumstances, that the respondent may assert as a counterclaim or set-off a claim that did not arise out of the same contract as where the disputes arise out of other contracts are also referred to arbitration under these Rules. Pursuant to article 2 of these Rules, such agreement of the parties would have to be in writing": Report of UNCITRAL Secretary on Revised Draft Rules (Commentary on article 18) para 4.

relevant limitation is rather that the counterclaims must fall within the scope of an agreement to arbitrate under the UNCITRAL Rules.

174. The limitation to contracts is simply inappropriate to arbitrations arising under international treaties.
175. The distinction between counterclaims and claims in set-off is well understood, but contemporary arbitration parlance refers to all such claims generically as “counterclaims”.¹⁸⁴ For simplicity, we propose to eliminate the distinction between counterclaims and claims in set-off.

III. PROPOSED REVISION

176. Proposed revised text of articles 19(3)-(4):

3. ~~In his~~Sstatement of ~~D~~defence, ~~or at a later stage in the~~
~~arbitral proceedings if the arbitral tribunal decides that the~~
~~delay was justified under the circumstances,~~ the Rrespon-
dent may make a counter-claim provided that it falls
within the scope of an agreement between the parties to
arbitrate under these Rules arising out of the same con-
tract or rely on a claim arising out of the same contract for
the purpose of a set-off.
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.~~

¹⁸⁴ See, eg, the LCIA Rules, Article 15.4.

NEW ARTICLE 19bis

I. DISCUSSION AND PROPOSED RULE

177. Article 21(3) assumes that the claimant will have an opportunity to reply to a counterclaim.¹⁸⁵ But article 21(3) gives no indication of the time-limits in which such reply should be submitted,¹⁸⁶ or its content.¹⁸⁷ Equally, there is no possibility under the Rules for an answer by the respondent to the claimant's reply to the counterclaim.¹⁸⁸
178. We propose a provision modelled on Article 15.4 of the LCIA Rules, leaving it to the tribunal to determine the need for a further response by the respondent, under article 22.
179. Proposed text of article 19bis:

Where the Respondent's Statement of Defence includes a counter-claim, the Claimant may, within thirty days, submit a reply to the counter-claim.

185 "It is obvious that the claimant must get an opportunity to reply to the counter-claim. The Rules only say so indirectly when dealing with a plea as to the arbitrator's jurisdiction. The claimant should raise this plea with respect to a counter-claim 'not later than in the reply to the counter-claim' (*Article 21, para 3*)." *Sanders* (1977) 205.

186 It appears that under the Rules at present this matter would be dealt with by decision of the tribunal under article 22.

187 Cf Article 15.4 of the LCIA Rules:

Within 30 days of receipt of the Statement of Defence, the Claimant shall send to the Registrar a Statement of Reply which, where there are any counter-claims, shall include a Defence to Counterclaim in the same manner as a defence is to be set out in the Statement of Defence.

188 Cf Article 15.5 of the LCIA Rules:

If the Statement of Reply contains a Defence to Counterclaim, within 30 days of its receipt the Respondent shall send to the Registrar a Statement of Reply to Counterclaim.

ARTICLE 20

I. PRESENT RULE

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

II. DISCUSSION AND PROPOSED REVISION

180. For consistency, article 20 should read as follows:

During the course of the arbitral proceedings ~~either~~any party may amend or supplement ~~his~~its claim, ~~or~~ defence or counter-claim unless the ~~A~~arbitral ~~T~~ribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim or counter-claim falls outside the scope of the arbitration clause or separate arbitration agreement.

ARTICLE 21(1)

I. PRESENT RULE

The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

II. DISCUSSION AND PROPOSED REVISION

181. On a literal interpretation of the paragraph, the arbitral tribunal does not have the power to rule on its jurisdiction if no objection to its jurisdiction is raised by the parties. This position does not reflect modern arbitration practice.¹⁸⁹ The tribunal should have the power of its own motion to raise and decide the existence and scope of its own jurisdiction (for example when the dispute is not arbitrable).¹⁹⁰
182. This is reflected in Article 16(1) of the Model Law,¹⁹¹ whose wording we propose should be adopted in article 21(1) of the Rules as follows:

~~The Aarbitral Ttribunal shall have the power to~~ may rule on its own jurisdiction, including ~~objections that it has no jurisdiction, including~~ any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

¹⁸⁹ See, eg, *Larsen v The Hawaiian Kingdom*, Procedural Order No 3 (17 July 2000) para 7 (quoted at para 6.2 of the Award (2001), 119 ILR 566).

¹⁹⁰ Professor Sanders also supports this view: “The [arbitral tribunal] may, in my opinion, *proprio motu*, decide it has no jurisdiction when the dispute is not arbitrable”: Sanders, *The work of UNCITRAL on Arbitration and Conciliation* (2004) 15. Professor Sanders also recommends an addition clarifying that a party may challenge the tribunal’s jurisdiction even though it has participated in the formation of that tribunal: Sanders, “Arbitration Rules of UNCITRAL: 30 years”, paper presented at an UNCITRAL colloquium on 6 April 2006 4. With respect, we do not consider such an addition to be necessary.

¹⁹¹ Article 16(1) of the Model Law:

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 ipso jure the invalidity of the arbitration clause.

ARTICLE 21(3)

I. PRESENT RULE

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

II. DISCUSSION AND PROPOSED REVISION

183. The corresponding provision in the Model Law, Article 16(2), follows very closely the text of the Rules but, in addition, deals with two important points on which article 21(3) is silent. First, the admissibility of untimely objections (“pleas”) to jurisdiction and, secondly, the admissibility of an objection “that the arbitral tribunal is exceeding the scope of its authority”.¹⁹² In addition, the Model Law makes clear that the objecting party has every interest in co-operating in the constitution of the tribunal, for such co-operation does not imply an acceptance of the tribunal’s authority.
184. Thus, the revision proposed below follows almost word-for-word Article 16(2) of the Model Law, except for the first sentence, which is based on the existing article 21(3) of the Rules but clarifies that the “reply to the counter-claim” is not a separate submission specifically provided for in the Rules:

A plea that the ~~A~~arbitral ~~T~~ribunal does not have jurisdiction shall be raised not later than in the ~~S~~statement of ~~D~~efence or, with respect to a counter-claim, in the first opportunity to submit a reply to the counter-claim. 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.

¹⁹² See in detail *Holtzmann & Neuhaus* (1989) 482 *et seq.* For an example of an allegation that the tribunal has exceeded its authority or mandate see Svea Court of Appeal, 15 May 2003, *Czech Republic v CME Czech Republic BV* (Case No T 8735-03), (2003) 42 ILM 915: the Swedish court accepted that two challenges to the tribunal’s award (cited at note 137 above) ought to have been raised as objections in the arbitration, and were subsequently inadmissible by operation of article 21(3) of the Rules and s 34 of the Swedish Arbitration Act. In other words, the Svea court did read a preclusion effect in article 21(3) of the Rules.

ARTICLE 21(4)

I. PRESENT RULE

In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

II. DISCUSSION

185. This paragraph deals with the procedural aspect of objections to jurisdiction of the tribunal. It “stresses that ‘in general’ the arbitrators should rule on such objections as a preliminary question. On the other hand, the flexibility, corresponding also with the freedom allowed to arbitrators in article 15(1) has been maintained by adding the last sentence.¹⁹³
186. The Rules do not prescribe the form of a decision on jurisdiction. It is good practice,¹⁹⁴ and conducive to certainty¹⁹⁵ that such decisions should ultimately be made in the form of a (reasoned) award on jurisdiction.
187. In accordance with Article 16(3) of the Model Law,¹⁹⁶ recourse to domestic courts should only be had *after* the tribunal has pronounced on its ju-

193 *Sanders* (1977) 200.

194 Article 23.3 of the LCIA Rules provides:

The Arbitral Tribunal may determine the plea to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances.

195 CA Paris, 1 July 1999, *Braspetro Oil Services Company v The Management and Implementation Authority of the Great Man-Made River Project* (1999) 14:8 Mealey’s Int’l Arb Rep G-1, 7:

[O]nly arbitral awards may be set aside [*faire l’objet d’un recours immédiat*], that is, decisions by arbitrators that conclusively liquidate, in whole or in part, the dispute that has been submitted to them, whether on the merits, or as a jurisdictional matter, or in connection with a procedural objection which terminates the case

(authors’ translation from the French original)

196 Article 16(3) of the Model Law provides:

The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

isdiction, and such recourse should not delay the arbitral proceedings or prevent the tribunal from making a further award.¹⁹⁷ The revised text proposed below would not, however, comport with a (mandatory) national law provision expressly permitting a party to test the validity or scope of a putative arbitration agreement in the courts *before* an arbitral tribunal has been constituted.¹⁹⁸

III. PROPOSED REVISION

188. Proposed revised text of article 21(4):

In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in the final award as it considers appropriate in the circumstances. Any request to a domestic court to decide on the Arbitral Tribunal's jurisdiction may only be made after the Arbitral Tribunal has rendered its award on jurisdiction. While such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award.

¹⁹⁷ “The advantage of this procedure is that the arbitral tribunal can assess in each case and with regard to each jurisdictional question whether the risk of dilatory tactics is greater than the danger of wasting money and time in a useless arbitration.” *Holtzmann & Neuhaus* 486.

¹⁹⁸ See s 1032(2) of the German Code of Civil Procedure (ZPO): “Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.”

ARTICLE 24

I. PRESENT RULE

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
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.

II. DISCUSSION

189. This paragraph provides that the tribunal may, at any time during the proceedings, require a party to produce documents, exhibits or other evidence (again including evidence by witnesses).¹⁹⁹
190. In the Iran-US Claims Tribunal²⁰⁰ and under the LCIA²⁰¹ and WIPO Rules,²⁰² the power of the tribunal to require a party to produce evidence

¹⁹⁹ *Sanders* (1977) 203.

²⁰⁰ See *Caron/Caplan/Pellonpää* 575.

²⁰¹ Article 22 of the LCIA Rules reads:

22.1 Unless the parties at anytime agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views ...

(e) to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant

²⁰² WIPO Rules, Article 48(b) provides:

At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.

can be exercised on the tribunal's own motion. This should be clarified in Article 24(3) as well.

191. It is proposed that good practice, reflected in Articles 3.9²⁰³ and 9.2²⁰⁴ of the IBA Rules, be adopted in the UNCITRAL Rules.

III. PROPOSED REVISION

192. Proposed revised text of article 24:

1. Each party shall have the burden of proving the facts relied on to support ~~his~~its claim or defence.
2. The ~~A~~Arbital ~~T~~Tribunal may, if it considers it appropriate, require a party to deliver to the ~~T~~Tribunal and to the other ~~parties~~parties, within such a period of time as the ~~A~~Arbital ~~T~~Tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in ~~his~~its ~~S~~Statement of ~~C~~Claim or ~~S~~Statement of ~~D~~Defence.

²⁰³ IBA Rules, Article 3.6:

The Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objections. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce to the Arbitral Tribunal and to the other Parties those requested documents in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case, and (ii) none of the reasons for objection set forth in Article 9.2 apply.

²⁰⁴ IBA Rules, Article 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance or materiality;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the document that has been reasonably shown to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. At any time during the arbitral proceedings the Arbitral Tribunal may, on the application of any party or of its own motion and having given the parties a reasonable opportunity to state their views, require any of the parties to produce documents, exhibits, materials or other evidence in their possession, custody or control within such a period of time as the Tribunal shall determine. The Arbitral Tribunal's decision under this article shall be made pursuant to article 31, paragraph 1.

4. The Arbitral Tribunal may exercise its power under paragraph 3 when it determines that such documents, materials or other evidence are relevant and material to the outcome of the case, provided that none of the following reasons is extant:
 - (a) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
 - (b) unreasonable burden to produce the requested evidence;
 - (c) loss or destruction of the document that has been reasonably shown to have occurred;
 - (d) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
 - (e) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;
or
 - (f) considerations of fairness or equality of the parties that the Arbitral Tribunal determines to be compelling.

ARTICLE 25(2)

I. PRESENT RULE

If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

II. DISCUSSION

193. In order to avoid the confusion, referred to in the commentary relating to our proposed article 15*bis*,²⁰⁵ regarding the terms “witness” and “testimony” as used in the Rules,²⁰⁶ article 25(2) should contain a definition of “witness”.
194. We consider that the definition offered by Article 20.7 of the LCIA Rules should be adopted.²⁰⁷ That Article 20.7 states:

Any individual intending 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 was or is an officer, employee or shareholder of any party.

²⁰⁵ At paragraphs 140-142 above. Note that the problem was resolved in the Iran-US Claims Tribunal by its adoption of Note 5 to Article 25, which reads:

Notwithstanding the provisions of paragraph 4 of Article 25, the arbitral tribunal may at its discretion permit representatives of arbitrating parties in other cases which present similar issues of fact or law to the present to observe all or part of the hearing in a particular case, subject to the prior approval of the arbitrating parties in the particular case. The Agents of the two Governments are permitted to be present at pre-hearing conferences and hearings.

²⁰⁶ “[T]his issue has led to difficulties for the Iran-US Claims Tribunal regarding, for example, the hearing of the parties themselves or their officers and employees While in the common law it is standard for a party to be called as a witness, the civil law tradition shows considerable reluctance to accept testimony from a party or a person who, because of his affiliation to a party, is likely to have a financial interest in the matter”: *Caron/Caplan/Pellonpää* 611-612. Similar concerns were also expressed in the legislative history of Article 24(1) of the Model Law, and the conclusion was reached that no reference to “witness” should be made in that Article: *Holtzmann & Neuhaus* 673.

²⁰⁷ Note also that Article 4(2) of the IBA Rules states “Any person may present evidence as a witness, including a Party or a Party’s officer, employee or other representative.”

195. Furthermore, the tribunal controls the proceedings (article 15(1)), not the parties. It should have the power to decide whether to hear oral evidence, and if so, in what form, on what issues etc.²⁰⁸

III. PROPOSED REVISION

196. Proposed revised text of article 25(2):

~~If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.~~

Witnesses may be heard under conditions set by the Arbitral Tribunal, including time limits for their identification and a requirement of prior submission of signed statements containing the substance of their testimony. Any individual testifying 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 was or is an officer, employee or shareholder of any party.

²⁰⁸ Professor Sanders recommends an addition to article 25 along the lines of article 4(8) of the IBA Rules providing that, as a general rule, the written statement of a witness that fails to appear before the tribunal when summoned should be disregarded: *Sanders* (2004) 263. With respect, we would prefer to leave the tribunal with more flexibility in this regard.

ARTICLE 25(4)

I. PRESENT RULE

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. The arbitral tribunal is free to determine the manner in which witnesses are examined.

II. DISCUSSION

197. The last sentence of the paragraph, dealing with the manner in which witnesses are examined should be deleted, since it is already covered by article 15 and is also dealt with in the UNCITRAL Notes, paragraph 63.

198. It should also be clarified in this article that the tribunal has the power, after consulting the arbitrating parties, to allow third parties to attend hearings and to issue directions for that purpose. Thus, a specific provision was added to the ICSID Rules in their most recent revision in April 2006. ICSID Rule 32(2) reads:

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel or advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

199. Such a power would be particularly relevant when the tribunal decides to receive *amicus curiae* submissions pursuant to article 15(5) of the Rules.

III. PROPOSED REVISION

200. Proposed revised text of article 25(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. ~~The arbitral tribunal is free to determine the manner in which witnesses are examined~~After consulting the parties and having regard to the circumstances and article 15, paragraph 1, the Arbitral Tribunal may allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangements. The Arbitral Tribunal shall for such cases issue neces-

sary directions under article 15, paragraph 1 for the protection of proprietary or privileged information.

ARTICLE 25(5)

I. PRESENT RULE

Evidence of witnesses may also be presented in the form of written statements signed by them.

II. DISCUSSION AND PROPOSED REVISION

201. We propose to delete article 25(5). A provision covering the same issue has been added to article 25(2), making 25(5) redundant.

~~Evidence of witnesses may also be presented in the form of written statements signed by them.~~

ARTICLE 26

I. PRESENT RULE

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

II. DISCUSSION

202. It is clear that the term “interim measures” in article 26 was intended to encompass not only provisional measures but also conservatory measures. Article 26 proceeds on the assumption (which was perhaps valid in 1976) that a typical case would arise out of international trade; hence the emphasis on measures related to “the conservation of ... goods”. The Model Law, following almost 20 years later, places no such emphasis: it speaks more generally of “interim measure[s] of protection ... in respect of the subject-matter of the dispute” (Article 17).
203. Today, article 26 of the Rules raises a number of difficult questions:
 - Whether the types of measures available as “interim measures” are to be determined by reference to a particular law (including international law) or, rather, as an autonomous legal concept proper to international arbitration.
 - Whether the terms “in respect of the subject-matter of the dispute” encompass measures to preserve the position of a party (eg injunctions, security for costs, or orders to refund part of an advance on costs that one party was forced to make in default of a payment by its opponent) or the integrity of the arbitral process (eg freezing orders to secure funds out of which an award may be satisfied, or anti-suit injunctions).
 - In what circumstances (eg risk of irreparable harm, existing damage, or lack of another remedy), under what conditions (eg on a showing of

a good arguable case on the merits) and in what procedure (after hearing both parties' views or *ex parte*) interim protection may be granted.

- Whether interim measures – in the form of an “interim award” or not – are binding and to be carried out without delay (as awards under article 32(2)).
204. With respect to some questions the Rules cannot, given their nature, provide an answer.²⁰⁹ Notably, the Rules cannot answer the question whether tribunal-ordered interim measures are enforceable as “arbitral awards” under the New York Convention.²¹⁰
205. On the other hand, the Commission’s detailed treatment of the question, as part of an intended revision of Article 17 of the Model Law (proposed Chapter IV bis), comprehensively deals with the issues above.²¹¹ The choice that presents itself is whether article 26 should mirror, in part at least, the proposed revised Article 17 of the Model Law or, rather, anticipate the *lignes directrices* of that proposed revision. This question involves not only practical considerations of timing, but also the question of legislative policy whether the Rules should go to the level of detail required of the Model Law.
206. Our suggestion is twofold:
- First, to maintain the basic structure and content of the existing article 26, making the clarifications that practice has shown are necessary or at least highly desirable. The necessary changes include language expanding the facially restrictive phraseology “measures ... in respect of the subject-matter of the dispute” in article 26(1).²¹²

209 In addition, given the nature of the Rules as *ad hoc* rules, interim protection can be given only by the arbitral tribunal itself, and therefore not before the tribunal’s constitution. Compare the “summary arbitral proceedings” procedure under Article 42a of the NAI Rules; and the revised Article 37 of the AAA Rules (effective 1 May 2006) providing for “emergency arbitrators” to deal with urgent requests for interim or conservatory measures.

210 This is a matter currently under consideration by the Commission; see Report of UNCITRAL Working Group on the Work of its 44th Session, UN Doc A/CN.9/592 (2006) paras 34-39; Note by the UNCITRAL Secretariat, UN Doc A/CN.9/WG.II/WP.141 (5 December 2005); and Articles 17 novies and 17 decies of the current draft Chapter IV bis for the Model Law, reprinted in *ibid* 5-6. For an assimilation of interim-measures orders to awards cf s 593(4) of the Austrian Code of Civil Procedure (ÖZPO).

211 The draft text currently under consideration is set out in a Note by the UNCITRAL Secretariat, UN Doc A/CN.9/WG.II/WP.141 (5 December 2005) 2-6. It consists of eleven detailed articles.

212 This would be entirely consistent with the significantly broader formulations to be found in Article 23(1) of the ICC Rules; Article 46(a) of the WIPO Rules; Article 26(1)-(2) of the Swiss Rules; and Article 21(1) of the AAA Rules.

- Secondly, to include in article 26 provisions containing broad guidance on the purposes of, and conditions for, interim measures to be granted thereunder.

The current draft Articles 17 and 17 bis for Chapter IV bis of the Model Law (whose text has already been extensively debated and appears settled²¹³) would serve both those purposes well (see “alternative one” below). Another possibility would be to preserve the existing text of article 26, making limited changes that would be consistent with – but not fully reflect the tenor of – the proposed revision of the Model Law (see “alternative two”).

III. PROPOSED REVISION

ALTERNATIVE ONE

207. Article 26 would read as follows (following draft Articles 17, 17 bis, and 17 sexies (2) for Chapter IV bis of the Model Law):

1. ~~At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.~~

Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure, whether in the form of an [interim] award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, 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;

²¹³ See Report of UNCITRAL Working Group on the Work of its 37th Session, UN Doc A/CN.9/523 (2002) paras 15-76; Report of UNCITRAL Working Group on the Work of its 39th Session, UN Doc A/CN.9/545 (2003) paras 19-92; Report of UNCITRAL Working Group on the Work of its 43rd Session, UN Doc A/CN.9/589 (2005) paras 11-75; and Report of UNCITRAL Working Group on the Work of its 44th Session, UN Doc A/CN.9/592 (2006) paras 12-21.

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

2. ~~Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.~~

The party requesting an interim measure under sub-paragraphs (a), (b) and (c) of paragraph 1 shall satisfy the Arbitral Tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if 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, provided that any determination on this possibility shall not affect the discretion of the Arbitral Tribunal in making any subsequent determination.

3. With regard to a request for an interim measure under paragraph 1(d), the requirements in sub-paragraphs (a) and (b) of paragraph 2 shall apply only to the extent the Arbitral Tribunal considers appropriate.

4. The Arbitral Tribunal may require the party requesting an interim measure to provide appropriate security in connexion with the measure.

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

208. A less ambitious text (following Article 23(1) of the ICC Rules) would be as follows:

ALTERNATIVE TWO

1. At the request of ~~either any~~ party, the ~~Arbitral Tribunal~~ may ~~take order any~~ interim or conservatory measures it deems necessary ~~in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as or~~

~~dering their deposit with a third person or the sale of perishable goods.~~

2. Such interim measures may be established in the form of an ~~interim~~ award. The ~~A~~arbitral ~~T~~ribunal shall be entitled to require security ~~for the costs of~~ in connexion with such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

ARTICLE 27(1)

I. PRESENT RULE

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.

II. DISCUSSION

209. The tribunal should consult the parties before appointing any expert to report to it. The ICC, WIPO and Swiss Rules so require.²¹⁴
210. Consultation with the parties “should normally concern not only the question of whether an expert should be appointed, but the precise nature of the expert's mission (‘terms of reference’) as well as his identity and cost.”²¹⁵
211. It is not clear whether the decision under article 27(1) is to be made under article 31(1) or 31(2). Professor Sanders holds the view that it is “a matter of procedure and *Article 31, para. 2* applies”.²¹⁶

III. PROPOSED REVISION

212. The revised text of article 27(1) reads:

The Aarbitral Tribunal may, after consultation with the parties, 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 Aarbitral Tribunal, shall be communicated to the parties.

²¹⁴ Article 20(4) of the ICC Rules; Article 55(a) of the WIPO Rules; and Article 27(2) of the Swiss Rules.

²¹⁵ *Derains & Schwartz* 279. Under the ICC Rules, “although Article 20(4) might arguably be said to give the Arbitral Tribunal the right to appoint an expert even if none of the parties desires this, there is not any way in which the Arbitral Tribunal can, as a practical matter, impose an expert on the parties against all of their wishes, as the expert is required to be paid by the parties”: *ibid* 279-280.

²¹⁶ *Sanders* (1977) 203.

ARTICLE 27(2)

I. PRESENT RULE

The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he 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.

II. DISCUSSION

213. The arbitral tribunal should expressly be given the power to direct any experts appointed by the parties to meet with the tribunal-appointed expert in order to attempt to reach an agreement on contentious issues or, at least, to narrow them down.

214. The Civil Procedure Rules of England and Wales (1998, as amended) allow for such discussions among experts. CPR Rule 35.12 provides:

35.12 (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to

- (a) identify and discuss the expert issues in the proceedings; and
 - (b) where possible, reach an agreed opinion on those issues.
- (2) The court may specify the issues which the experts must discuss.
- (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing
- (a) those issues on which they agree; and
 - (b) those issues on which they disagree and a summary of their reasons for disagreeing.
- (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
- (5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

215. Our proposed provision is inspired by CPR Rule 35.12.

III. PROPOSED REVISION

216. Proposed revised text of article 27(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 the~~ expert as to the relevance of the required information or production shall be referred to the Arbitral Tribunal for decision. The Arbitral Tribunal may direct a meeting between the expert appointed by the Tribunal and any experts appearing for the parties for the purpose of identifying, discussing and, where possible, reaching an agreed opinion on, expert issues in the proceedings. The Arbitral Tribunal may also direct such a meeting between or among experts appearing for the parties.

217. It would also be possible to include this provision as a new article 27(3), renumbering the current article 27(3)-(4) as 27(4)-(5).

ARTICLE 27(4)

I. PRESENT RULE

At the request of either 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 either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

II. DISCUSSION AND PROPOSED REVISION

218. For clarity, article 27(4) should read:

At the request of ~~either~~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 ~~either~~any party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

ARTICLE 28(1)

I. PRESENT RULE

If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

II. DISCUSSION

219. The text needs to clarify that where the respondent has failed to communicate his Statement of Defence, such failure cannot and should not be treated by the tribunal as an admission of the claimant's allegation. Rather, some discretion should be given to a tribunal faced with such a situation.²¹⁷

220. A provision to the same effect was added to Article 25 of the Model Law.²¹⁸ Article 25(a)-(b) of the Model Law provides:

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his Statement of Claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his Statement of Defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

III. PROPOSED REVISION

221. Proposed revised text of article 28(1):

²¹⁷ See *Sanders* (2004) 252.

²¹⁸ Such a provision was added in order that the tribunal be provided with "certain discretion" in the event of default by the respondent in submitting his statement of defence. The tribunal, in such a case, would not be bound to treat such default as a full admission of the claim and of all the supporting facts. Nor would it be precluded from drawing inferences from such default. *Holtzmann & Neuhaus* 700.

If, within the period of time fixed by the Aarbitral Tribunal, the Celaimant has failed to communicate hisits Statement of Celaim without showing sufficient cause for such failure, the Aarbitral Tribunal shall issue an order for the termination of the arbitral proceedings, unless the Respondent has submitted a counter-claim. If, within the period of time fixed by the Aarbitral Tribunal, the Respondent has failed to communicate hisits Statement of Defence without showing sufficient cause for such failure, the Aarbitral Tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the Claimant's allegations.

ARTICLE 28(2)

I. PRESENT RULE

If one of the parties, 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.

II. PROPOSED REVISION

222. The following revised text would be consistent with article 21(4), as we propose it be amended, in accordance with the Model Law:

If ~~one~~any of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the Arbital Tribunal may proceed with the arbitration and make an award.

ARTICLE 28(3)

I. PRESENT RULE

If one of the parties, duly invited to produce documentary 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.

II. PROPOSED REVISION

223. For clarity, article 28(3) should read:

If ~~anyone~~ of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the ~~A~~arbitral ~~T~~ribunal may make the award on the evidence before it.

ARTICLE 29

I. PRESENT RULE

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

II. DISCUSSION

224. It is unclear why, in relation to the closure of proceedings, a distinction needs to be drawn between the holding of hearings and the submission of written documents. While the current position under the UNCITRAL Rules provides separate procedural tracks for hearings and for written submissions,²¹⁹ it seems that the intention of the drafters of this article was to close proceedings *generally* (rather than hearings only) before the issuance of an award.²²⁰
225. There seems to be no reason why, in principle, written submissions and hearings should not be declared to be at an end at the same point in time.
226. ICSID Rule 38 expresses the better rule more clearly:
- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
 - (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive

²¹⁹ *Caron/Caplan/Pellonpää* 651.

²²⁰ In the *travaux préparatoires*, Report of UNCITRAL Committee of the Whole II, para 149, it was said:

It was noted that the proposed article 25 bis would ensure that no party could unreasonably delay the arbitral proceedings by repeated requests for hearings *and the taking of further evidence*. (emphasis added)

It should also be noted that “Article 29 has no precedent in previous drafts of the Rules. It was added to the final version during the ninth session of UNCITRAL (1976)”: *Sanders* (1977) 207.

factor, or that there is a vital need for clarification on certain specific points.²²¹

227. We suggest revisions to article 29 in line with ICSID Rule 38.

III. PROPOSED REVISION

228. Proposed revised text of article 29:

1. The ~~A~~arbitral ~~T~~ribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed. When the parties have completed the presentation of the case, or of a phase of the case, the Tribunal shall declare the proceedings closed with respect to the whole case or its relevant phase.
2. ~~The arbitral tribunal may, if~~ If it considers it necessary owing to exceptional circumstances, ~~the Arbitral Tribunal may decide,~~ on its own motion or upon application of a party, ~~to~~ re-open the hearings-proceedings at any time before ~~the~~ an award is made pursuant to article 21, paragraph 4, article 31 or article 37, paragraph 2 and issue directions, pursuant to article 15, paragraph 1, with respect to further actions that the parties or the Arbitral Tribunal should take before an award is issued.

²²¹ See also Article 21 of the 1958 ILC Model Rules.

ARTICLE 30

I. PRESENT RULE

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

II. DISCUSSION AND PROPOSED REVISION

229. First, consistently with Article 33 of the ICC Rules which imputes knowledge of a failure to comply on any party that proceeds notwithstanding such failure,²²² we would simply add the words “ought to know” in order to maintain, as much as possible, the current wording of article 30.
230. Secondly, directions of the arbitral tribunal should also be covered by this article.²²³ Other changes are inspired by Article 32.1 of the LCIA Rules.²²⁴
231. Proposed revised text of article 30:

A party that knows or ought to know that any provision of, or requirement under the arbitration agreement (including these Rules), or any directions given by the Arbitral Tribunal under these Rules, has not been complied with and yet proceeds with the arbitration without promptly stating ~~his~~its objection to such

²²² Article 33 of the ICC Rules:

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its right to object.

²²³ Ibid. Article 58 of the WIPO Rules also provides:

A party which knows that any provision of, or requirement under, these Rules, or any direction given by the Tribunal, has not been complied with, and yet proceeds with the arbitration without promptly recording an objection to such non-compliance, shall be deemed to have waived its right to object.

²²⁴ Article 32.1 LCIA Rules:

A party who knows that any provision of the Arbitration Agreement (including these Rules) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object.

non-compliance, shall be deemed irrevocably to have waived his right to object.

ARTICLE 31(1)

I. PRESENT RULE

When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

II. DISCUSSION

232. There can be no question that decisions (other than those on “questions of procedure”, under article 31(2)) should in principle be taken by a majority of the tribunal. Article 31(1) is, in other words, unimpeachable so far as it goes; but it provides no fallback position where no majority exists. It is a well-documented fact that this is a real possibility.
233. The *RAKTA* arbitration²²⁵ illustrates how deadlock may arise in such a way that the presiding arbitrator would have to sacrifice principle in order to render an award under the UNCITRAL Rules. The arbitration was brought by an Egyptian state-owned paper manufacturer, RAKTA, against a US construction company, Parsons & Whittemore. The tribunal, operating under the 1955 ICC Rules, was composed of two nationals of the disputing parties and Judge Lagergren of Sweden as chairman. A preliminary phase of the arbitration involved the determination of a *force majeure* defence advanced by Parsons & Whittemore as justification for having abandoned the construction site never to return. The Egyptian arbitrator would dismiss that defence entirely, while the American arbitrator would fully accept it. The chairman concurred in neither view: he considered that *force majeure* could be invoked in respect of a limited period of time only, after which Parsons & Whittemore should have returned to the site. Under the ICC Rules, Judge Lagergren was not obliged to align himself with either of the two party-appointed arbitrators to form a majority. He was able to issue his ruling as an award by the chairman alone.
234. The present version of the ICC Rules formulates the relevant rule as follows (with added emphasis), in Article 25(1):

When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decisions. *If there be no majority, the award shall be made by the chairman of the Arbitral Tribunal alone.*

²²⁵ *RAKTA*, ICC 1703/1971, summarized in Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000) 370.

Article 26.3 of the LCIA Rules, Article 61 of the WIPO Rules, Article 31 of the Swiss Rules and Article 28 of the IACAC Rules are to the same effect.

235. It is true that chairman-alone awards are rare.²²⁶ It may be the very paucity of such awards that proves the value of permitting the presiding arbitrator to decide an issue alone, “as if acting as sole arbitrator”.²²⁷ Knowledge that unreasonable positions can yield no tactical benefit dissuades partisan conduct on the part of the co-arbitrators.²²⁸ Conversely, the presiding arbitrator – presumptively the most neutral member of the panel – need not compromise his views and join with the *least unreasonable* of the co-arbitrators in order to form a majority.

236. Neither of those two aims can be achieved by the present article 31(1) of the UNCITRAL Rules, for it is clear that under that provision:

arbitrators are forced to continue their deliberations until a majority, and probably a compromise solution, has been reached.²²⁹

237. The *travaux* indicate that the Commission considered giving the presiding arbitrator the power to make an award alone, to avoid forcing him “to agree to a juridically dubious solution in order to attain the necessary majority”.²³⁰ But that suggestion was dismissed,²³¹ principally on the considerations that the requirement of forming a majority would prevent co-arbitrators from being reduced to “mere assessors” and emphasise the consultative process.²³²

238. Experience under article 31(1) suggests the provision should be reconsidered, and that the predominant approach led by the ICC Rules has not, in fact, had the result of marginalising co-arbitrators. (We note from the outset that the experience relevant here concerns tribunals operating in a

²²⁶ *Craig, Park & Paulsson*, *ibid*, records one further ICC award: ICC 3381/1984, [1986] JDI 1096, note Jarvin.

²²⁷ WIPO Rules, Article 61.

²²⁸ See *Derains & Schwartz* 306-307.

²²⁹ *Sanders* (1977) 208.

²³⁰ Sixth UNCITRAL Secretariat Note, UN Doc A/CN.9/263, (1985) 16 (1985) UNCITRAL YB 54, *ad* article 29(1).

²³¹ See UNCITRAL Report, UN Doc A/31/17, (1976) 7 YB 9, paras 159-161.

²³² Summary Record of the 11th Meeting of the Committee of the Whole (II), UNCITRAL 9th Session, UN Doc A/CN.9/9/C.2/SR.11, (1976) 3. The Model Law also requires majority awards, but the authors are aware of at least one instance where a state adopting the Model Law made a specific amendment to enable the arbitral tribunal Chair to rule without a majority: Act 2735/1999, ‘On International Commercial Arbitration’ (Greece) [1999] Government Gazette No A167, Article 31(1).

highly contentious atmosphere; it is the test of such hard cases that the Rules must be able to withstand.)

239. The Iran-US Claims Tribunal saw several cases of jigsaw majorities being formed on an issue-by-issue basis, resulting in narrowly decided and worded awards followed by forceful dissenting/concurring opinions by the Iranian and US judges.²³³ Neither the dissentients nor the presiding judges thought this a happy experience. The first President of the Tribunal, Judge Pierre Bellet, was heard to say that one of the reasons he resigned that post was his lack of authority to disregard two extreme positions.²³⁴ And, as to party-appointed judges, in the *Ultrasystems* case, Judge Mosk wrote:

I concur in the Tribunal's Partial Award. I do so in order to form a majority, so that an award can be rendered.²³⁵

In the *Economy Forms* case, Judge Holtzmann made clear that the damages awarded were only half of what would have been proper, but went on:

Why then do I concur in this inadequate award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which "something is better than nothing".²³⁶

²³³ See, eg, *Foremost Teheran, Inc v Iran*, (1986) 10 Iran-US CTR 229, 239 where the separate votes are recorded as follows:

[Judge] Ameli:

1. Joining as to denial of expropriation claims.
2. Concurring as to granting of claims for two unpaid dividends, except dissenting as to subparagraph 2(d) of the *dispositif*.
3. Dissenting as to granting of contractual claims.
4. Joining as to costs.
5. Dissenting as to award of interest.
6. Dissenting as to the existence of jurisdiction over certain of the claims and Parties. ...

[Judge] Holtzmann:

1. Dissenting as to denial of expropriation claims.
2. Joining as to granting of claims for two unpaid dividends.
3. Joining as to granting of contractual claims.
4. Dissenting as to denial of costs to the Claimants.
5. *Joining as to award of only 10% interest solely in order to form a majority.*
(emphasis added)

²³⁴ The formal grounds Judge Bellet gave are summarized at note 31 above.

²³⁵ *Ultrasystems, Inc v Iran*, (1983) 2 Iran-US CTR 114, 123 (Op Mosk).

²³⁶ *Economy Forms Corp v Iran*, (1983) 3 Iran-US CTR 42, 55 (Conc Op Holtzmann).

240. Roberts B. Owen, chairing the tribunal in the highly politicized *Dispute over Inter-entity Boundary in Brcko Area* between the Republika Srpska (area of Bosnia Herzegovina populated largely by ethnic Serbs) and the Federation of Bosnia and Herzegovina stated explicitly in the award he rendered without concurrence from either of his co-arbitrators that

from the outset the positions of the two parties on the merits have been polar opposites and each party has explicitly refused to compromise. These polar positions and accompanying intense animosities, consistently in evidence from the opening of the Dayton conference onward, make clear from the outset that any party-appointed arbitrator would encounter significant difficulties in conducting himself with the usual degree of detachment and independence.²³⁷

Fortunately the parties to that dispute had been sensible enough to agree in advance to an amendment to article 31 of the UNCITRAL Rules making decisions by the presiding arbitrator binding in the absence of a majority.²³⁸

241. In sum, it would be useful to consider whether a fallback rule is not advisable, in the model of the ICC or LCIA Rules. The wording proposed below (“[i]f no majority is *formed*”) purports to suggest that the arbitrators must make a good-faith reasonable effort to form a majority – but that they do not have to compromise their professional conscience to form a majority in every case. A provision to that effect would be entirely consistent with Article 29 of the Model Law, which requires “any decision of the arbitral tribunal” to be made by majority “unless otherwise agreed by the parties”. The parties’ agreement to arbitrate under the Rules, including article 31(1), would constitute an advance agreement by the parties within Article 29 of the Model Law.

III. PROPOSED REVISION

242. Proposed revised text of article 31(1):

When there are three (or more) arbitrators, any award or other decision of the Aarbitral Tribunal shall be made by a majority of the arbitrators. If no majority is formed, any award or other decision shall be made by the presiding arbitrator alone.

²³⁷ *The Republic Srpska v The Federation of Bosnia and Herzegovina*, Arbitration over inter-entity boundary in Brcko Area (Award on Control over the Brcko Corridor of 14 February 1997) (1997) 36 ILM 396, para 5.

²³⁸ Ibid.

ARTICLE 31(2)

I. PRESENT RULE

In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

II. DISCUSSION AND PROPOSED RULE

243. For clarity, article 31(2) should read:

In the case of questions of procedure, when there is no majority or when the Aarbitral Tribunal so authorises, the presiding arbitrator may decide on his or her own, subject to revision, if any, by the Aarbitral Tribunal.

NEW ARTICLE 31(3)

I. DISCUSSION

244. Secrecy of deliberations is a cardinal principle in international arbitration. Indeed, it is guaranteed by most major modern arbitration rules.²³⁹ The rule is absolute and not subject to qualifications: “The deliberations of the tribunal shall remain secret.”²⁴⁰
245. The principle also has a forward reach: it enjoins tribunal members from later divulging (eg, in a dissenting opinion) any information or materials concerning or produced in and for the deliberation process.
246. A qualification is required, however, for obstructionist arbitrators, as illustrated in the cases discussed in the context of “truncated” tribunals (article 13 above). Accordingly, Article 30.2 of the LCIA provides (with emphasis added):

The deliberations of the Arbitral Tribunal are likewise confidential to its members, *save and to the extent* that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.

II. PROPOSED RULE

247. Proposed new article 31(3):

The deliberations of the Arbitral Tribunal shall remain secret, save as may be necessary for a notice to be given pursuant to article 13, paragraph 5.

²³⁹ See Iran-US CTR Rule 31.2; Article 34 of the AAA Rules; Article 76 of the WIPO Rules; Article 20(3) of the SCC Rules; Article 30.2 of the LCIA Rules; Article 43(2) of the Swiss Rules.

²⁴⁰ Article 26 of the 1958 ILC Model Rules.

ARTICLE 32(1)

I. PRESENT RULE

In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

II. DISCUSSION

248. The Rules do not set forth criteria by which to distinguish between “final”, “interim”, “interlocutory”, and “partial” awards.²⁴¹ The intention is to give the widest latitude to the arbitral tribunal to handle and ultimately liquidate the dispute in the most efficient way in the circumstances.²⁴² Without detracting in any way from that sound approach, minor clarifications to article 32(1) could be achieved by following the model set by section 47(1) of the Arbitration Act 1996²⁴³ and ICSID Arbitration Rule 48(3). The latter provision is a useful reminder that the arbitrators must fully and efficiently determine all claims before them, so as to reduce the need of additional awards under article 37.

III. PROPOSED REVISION

249. Proposed revised text of article 32(1):

In addition to making a final award terminating the arbitral proceedings, the Arbitral Tribunal shall be entitled to make interim, interlocutory, or partial awards on the issues to be determined, as necessary to deal with every claim submitted to the Arbitral Tribunal.

241 In addition, there are overlaps: a decision dismissing certain but not all of the claims on grounds of jurisdiction or admissibility may be both partial (for it does not dispose of the whole case) and final (terminating the proceedings in respect of the claims dismissed).

242 This latitude is mirrored in articles 34-38, which use the generic term “award” without qualification, although some of the provisions therein lend themselves more naturally to final awards.

243 “Unless otherwise determined by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.”

ARTICLE 32(2)

I. PRESENT RULE

The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

II. DISCUSSION

250. We propose adding a new sentence, modelled on Article 29(2) of the IACAC Rules of 2002, Article 28(6) of the ICC Rules, and Article 26.9 of the LCIA Rules. Unlike the ICC and LCIA Rules, however, the proposed text is formulated as a positive rule (“The award shall be subject to no appeal ...”), rather than as a constructive waiver of the right to appeal.²⁴⁴ In addition, the proposed text does not contain the self-evident limitation “insofar as such waiver [of any right to appeal, etc] can validly be made”. Thus, the proposed new provision would operate to exclude, for example, an appeal on point of law.²⁴⁵ However, the provision would not be construed as an “express” agreement excluding a challenge to the award (for example, on lack of jurisdiction, violation of due process, etc).²⁴⁶

III. PROPOSED REVISION

251. Proposed revised text of article 32(2):

The award shall be made in writing and shall be final and binding on the parties. The award shall be subject to no appeal or other recourse before any court or other authority [other than

²⁴⁴ The term “final” does not fully convey that the award is subject to no appeal in the courts; see, eg, *Sanders* (1977) para 17.4. In particular, the French text of the Rules renders the term “final” as: “*Elle [la sentence] n’est pas susceptible d’appel devant une instance arbitrale*” (emphasis added). It is not clear from the *travaux* why this formulation was preferred to alternative, broader ones; see A/CN.9/9/C.2/SR.10 (21 April 1976) paras 76-77 (“*[sentence] rendue en dernier ressort*”); and A/CN.9/9/C.2/SR.17 (26 April 1976) paras 18-19 (“*[sentence] qui n’est pas susceptible de voie de recours*”). *Caron/Caplan/Pellonpää* 797-798 explain the French-language formulation on the basis that the term “final” conveys the effect of *res judicata* which, in the context of the Rules, means that “an award is final when it is no longer capable of revision by *the* arbitral tribunal” (emphasis added, citation omitted).

²⁴⁵ See Arbitration Act 1996 (England & Wales) s 69(1).

²⁴⁶ Agreements to contract out of the supervisory jurisdiction of the courts are permitted by Swiss, Belgian, Swedish, Tunisian, and Turkish law. For details on the requirements for and effects of such agreements: Petrochilos (note 40 above) paras 3.87 *et seq.*

pursuant to articles 35, 36 and 37]. The parties undertake to carry out the award without delay.

ARTICLE 32(4)

I. PRESENT RULE

An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

II. DISCUSSION

252. Article 32(4) could benefit from limited modifications for the sake of consistency with our proposed revised articles 16(4) and 31(1) and Article 31(3) of the Model Law.²⁴⁷ The “place of arbitration” is the “juridical seat” of the arbitral proceedings and should not vary depending as a result of the happenstance of signature at another place, for reasons of convenience,²⁴⁸ which arise with even more force in three-member tribunals where the arbitrators are often based in different countries (cf articles 6(4) and 7(3)).

III. PROPOSED REVISION

253. Proposed revised text of article 32(4):

An award shall be signed by the arbitrators and ~~it shall state~~ contain the date on which it was made and the juridical seat of arbitration as determined in accordance with article 16, paragraph 3 ~~and the place where the award was made~~. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

²⁴⁷ See also ICC Rules, Article 25(3); AAA Rules, Article 27(3); LCIA Rules, Article 26(1); and WIPO Rules, Article 62.

²⁴⁸ Sanders, “Arbitration Rules of UNCITRAL: 30 Years”, paper presented at an UNCITRAL colloquium on 6 April 2006, 7.

ARTICLE 32(5)

I. PRESENT RULE

The award may be made public only with the consent of both parties.

II. DISCUSSION

254. Article 32(5) as at present worded does not, on its face, cater for cases where a party is under a legal duty to disclose an award or its tenor. Our suggestions in that regard follow the clearly worded language of Article 30.1 of the LCIA Rules.

III. PROPOSED REVISION

255. Proposed revised text of article 32(5):

The award may be made public ~~only~~ with the consent of ~~both the 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 [bona fide] legal proceedings before a state court or other judicial authority.

ARTICLE 32(7)

I. PRESENT RULE

If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

II. DISCUSSION AND PROPOSED REVISION

256. Article 32(7) should be amended to avoid an onerous burden being placed on the arbitral tribunal in countries where registration requirements are ambiguous:

If the arbitration law of the country where the award is made requires that the award be filed or registered by the ~~A~~arbitral ~~T~~ribunal, the ~~T~~ribunal, at the timely request of any party, shall comply with this requirement within the period of time required by law.

NEW ARTICLE 32(8)

I. DISCUSSION

257. On the basis of Article 35 of the ICC Rules we propose a new article 32(8), which deals with the essential duty of arbitrators and parties to act in the spirit of the Rules even in circumstances where no specific provision covers the situation in question. We consider this to be a useful general provision, since – as has been said with respect to the ICC Rules – the “Rules are not intended to be a comprehensive code for the conduct of an arbitration.”²⁴⁹ We see no reason why this provision should leave out the parties, as the ICC Rules do. Parties as well as arbitrators would benefit if at least *some* guidance were given to indicate how the lacunae in the Rules – that will inevitably emerge from time to time – should be dealt with. We also regard it as appropriate that this general duty be linked to the enforceability of the award.

II. PROPOSED RULE

258. Proposed new article 32(8):

In all matters not expressly provided for in these Rules, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every effort to ensure that any decision or award is legally enforceable.

²⁴⁹ *Derains & Schwartz* 384.

ARTICLE 33

I. PRESENT RULE

1. The arbitral tribunal shall apply the 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 determined by the conflict of laws rules, which it considers applicable.
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 the contract and shall take into account the usages of the trade applicable to the transaction.

II. DISCUSSION

259. A few minor amendments are recommended in respect of this provision, mainly to ensure consistency with article 1(1) of the Rules and Article 28(1) of the Model Law. The term “rules of law” has been preferred essentially because of its broad scope, respecting party autonomy to elect, for example, different legal systems to govern different aspects of the relationship.²⁵⁰

III. PROPOSED REVISION

260. Proposed revised text of article 33:
1. The Aarbitral Tribunal shall decide the dispute in accordance with such rules of law as are chosen ~~apply the law designated~~ by the parties as applicable to the substance of the dispute. Failing any such ~~any such~~ designation by the parties, the Aarbitral Tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable.
 2. The Aarbitral Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the Aarbitral Tribunal to do so and if

²⁵⁰ See, in more detail, *Holtzmann & Neuhaus* 766-768.

the law applicable to the ~~arbitration~~ arbitral procedure permits such arbitration.

3. In all cases, the ~~A~~ Arbitral Tribunal shall decide in accordance with the terms of the parties' contract, if any, and ~~shall take into account~~ the usages of the trade applicable to the transaction.

ARTICLE 34

I. PRESENT RULE

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 both 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 7, shall apply.

II. DISCUSSION AND PROPOSED REVISION

261. Article 34(2) may be deleted. It is difficult to understand. If it concerns issues such as “failure to prosecute”, these are best left to be governed by national law.

1. If, before the award is made, the parties agree on a settlement of the dispute, the ~~A~~arbitral ~~T~~ribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by ~~all~~~~both~~ parties and accepted by the ~~T~~ribunal, record the settlement in the form of an arbitral award on agreed terms. The ~~A~~arbitral ~~T~~ribunal 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 Arbital Tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

ARTICLE 35

I. PRESENT RULE

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

II. DISCUSSION

262. An award is final and *res judicata*. In principle it is not subject to review or challenge in the courts in respect of its legal or factual reasoning.²⁵¹ It follows that a legitimate request for interpretation of an award can only concern a failure on the tribunal's part to articulate its dispositive ruling in a way that is comprehensible and unambiguous, and so permits the parties to carry it out in accordance with article 32(2).
263. As the Permanent Court of International Justice has stated, interpretation cannot "add" to a decision (and so cannot concern new points), and must relate to the "meaning and scope which the Court intended to give to the *judgment* in question".²⁵²
264. With the benefit of the extensive experience of the Iran-US Claims Tribunal,²⁵³ it is clear that interpretation means "clarification" of an ambiguity²⁵⁴ and must relate to the operative part (the "dispositif") of an award.²⁵⁵ Article 33(1)(b) of the Model Law, stating that interpretation is permitted "on a specific point or part of the award" does not, in our view, fully reflect the practice outlined above.

²⁵¹ See eg Model Law, Article 34.

²⁵² *Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory)* (Decision of 16 December 1927) PCIJ, Series A No 13, 1 at 10-11 and 21 (emphasis added). See thus Article 33(1) of the 1958 ILC Model Rules.

²⁵³ See *Caron/Caplan/Pellonpää 880 et seq.*

²⁵⁴ *Uiterwyk Corporation et al v The Government of the Islamic Republic of Iran et al*, (1988) 19 Iran-US CTR 107.

²⁵⁵ Fouchard, Gaillard, Goldman, *Traité de l'arbitrage international* (1996) 776.

265. Further, in order for a party to have a legitimate interest to seek an interpretation, a *dispute* must have arisen between the parties.²⁵⁶
266. The operative time period should be 30, rather than 45 days. This would align the provision with the tribunal's power, in article 36(1), to correct awards. If there is a need for clarification by the tribunal, it will be manifest on the face of the award and so immediately detectable by the parties.
267. Finally, to avoid the risk of obstruction, it should be specified that an arbitrator who has not joined in the award should not be involved in its interpretation.

III. PROPOSED REVISION

268. Proposed revised text of article 35:
 1. If a dispute arises between the parties as to the meaning or scope of the ruling contained in an award, ~~W~~within thirty days after the receipt of the award, ~~either any~~ party, with notice to the other party~~ies~~, may request that the ~~A~~arbitral ~~T~~ribunal give an interpretation of the specific point in the award in respect of which the dispute has arisen.
 2. The Arbitral Tribunal, if it considers the request to be justified, shall give an interpretation ~~The interpretation shall be given~~ in writing within ~~forty five~~thirty days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to ~~87~~, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its interpretation under this article.

²⁵⁶ See Article 50(1) of the ICSID Convention; and Schreuer, *The ICSID Convention: A Commentary* (2001) 858.

ARTICLE 36

I. PRESENT RULE

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
2. Such correction shall be in writing, and the provisions of article 32, paragraph 2 to 7, shall apply.

II. DISCUSSION

269. We agree with and endorse Professor Sanders' recommendations for widening the scope of article 36. We also agree with his proposal to

introduce the possibility of repair in case arbitrators omitted to sign the award or omitted to state the date or place of the award. When the award has not been signed there is no award and if the date or place are omitted, which the award according to art. 32 "shall contain", the award may be set aside. All three omissions could be easily repaired by the [arbitral tribunal].²⁵⁷

III. PROPOSED REVISION

270. Proposed revised text of article 36:

1. Within thirty days after the receipt of the award, ~~either any~~ party, with notice to the other party~~ies~~, may request the ~~A~~arbitral ~~T~~ribunal to correct in the award
 - (a) any errors in computation, any clerical or typographical errors, or any errors of similar nature; ~~or~~
 - (b) the omission of the juridical seat, the date on which the award was made and the reasons for an arbitrator's failure to sign.
2. If the Arbitral Tribunal considers a request pursuant to paragraph 1 to be justified, it shall make the necessary

²⁵⁷ Sanders (2004) 252.

corrections within thirty days of such request. The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall make a correction, by giving written notice to the parties.

3. The Arbitral Tribunal may within thirty days after the communication of the award make ~~such~~ corrections such as described in paragraph 1 on its own initiative.
4. ~~Such~~ Corrections pursuant to paragraph 1 or 3 shall be in writing, and the provisions of article 32, paragraphs 2 to 78, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its correction under this article.

ARTICLE 37

I. PRESENT RULE

1. Within thirty days after the receipt of the award, either party, with notice to the other party, 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 and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provision of article 32, paragraphs 2 to 7, shall apply.

II. DISCUSSION

271. Two possible revisions may be considered, and have been suggested by Professor Sanders:²⁵⁸
- (a) elimination of the requirement that the arbitrators should be satisfied that “no further hearings or evidence are needed”, on the basis that the arbitrators should be free to convene fresh hearings or request further evidence or pleadings; and
 - (b) allowing tribunals to extend the 60-day period, in line with Article 33(4) of the Model Law.
272. Both of these suggestions are sound.

III. PROPOSED REVISION

273. Proposed revised text of article 37:
1. Within thirty days after the receipt of the award, ~~either~~any party, with notice to the other partyies, may request the Aarbitral Tribunal to make an additional award as to claims (including counter-claims) presented in the arbitral proceedings but omitted from the award.

²⁵⁸ Sanders (2004) 256.

- (2) If the ~~A~~arbitral ~~T~~ribunal considers the request for an additional award to be justified ~~and considers that the omission can be rectified without any further hearings or evidence,~~ it shall complete its award within sixty days after the receipt of the request. The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall complete its award, by giving written notice to the parties.
- (3) When an additional award is made, the provision of article 32, paragraphs 2 to ~~8~~7, shall apply.

ARTICLE 38

I. PRESENT RULE

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 travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

II. DISCUSSION

274. Care must be taken to ensure that the list of the elements making up the costs of the arbitration is comprehensive. This is because “*only*” elements expressly listed under article 38 qualify as costs.²⁵⁹

275. We consider two amendments desirable. First, elements (b)-(d) should be qualified with the word “reasonable” as is already the case with element (e) (which refers to parties’ legal costs): it would constitute a useful reminder to arbitrators that they must act efficiently in all respects in the conduct of the arbitration (as provided in article 15(1)). Secondly, fees and expenses of a secretary appointed by the arbitral tribunal should be expressly included in element (c).²⁶⁰

²⁵⁹ The word “only” was specifically added at the drafting stage of article 38: UNCITRAL Report on the Work of its 9th Session, para 57 (draft article 38(a)).

²⁶⁰ *Sanders* (2004) 257.

III. PROPOSED REVISION

276. Proposed revised text of article 38:

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, including the fees and expenses of any secretary appointed pursuant to article 15, paragraph 9;
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable;
- (f) Any fees of the Appointing Authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

ARTICLE 39

I. PRESENT RULE

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 Permanent Court at The Hague, and if that authority has issued 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. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

II. DISCUSSION

277. As already noted (paragraph 14(1) above), the core provision in article 39(1), is sound – as far as it goes. Given the nature of *ad hoc* arbitration, unsupervised by an arbitral institution, abuses have on occasion occurred. The issue merits serious consideration, because it detracts from the legitimacy of the process in the eyes of parties. There is no easy answer. Possible safeguards against abuse might be the following.

- The tribunal and the parties would be explicitly encouraged to agree on the method of calculating the tribunal's fees from the outset, at a preparatory meeting. Such a provision might be included in article 15.

- The Appointing Authority, or if none has been agreed upon or designated, the Secretary-General of the PCA, would have the power to resolve any objection by a party to a tribunal’s decision on its fees pursuant to articles 39(1) and 38. (The value of such a provision would perhaps lie in its deterrent force, not in its actual application.)²⁶¹

278. Professor Sanders suggests the deletion of paragraphs (3)-(4). We agree, for the reasons he gives:

Paragraph 3 deals with the situation that the A.A. [Appointing Authority] does not have a schedule for fees. In that case any party may at any time request the A.A. to furnish a statement setting forth ‘the basis for establishing fees which is customarily followed in international cases in which the A.A. appoints arbitrators’. If the A.A. consents to do so, the A.T. [Arbitral Tribunal] shall take this statement into account, when fixing its fees.

I doubt whether the A.A., in case it has no schedule for fees, which anyhow will be the case when a private person functions as A.A., will ever consent to furnish such statement and also doubt whether any party, when the A.T. arrives at the stage of fixing its fees, will make such request. The A.T. may consider such a request as expressing doubts about the reasonableness of the A.T. in fixing its fees.

...

Paragraph 4 even goes a step further than the obligation of the A.T. to take into account the schedule of the A.A. (para. 2) or the Statement of the A.A. (para. 3). According to para. 4 the A.T. shall fix its fees “only after consultation with the A.A.”. The A.A., in this consultation, may make “any comment it deems appropriate to the A.T.” in respect of the fees the A.T. envisages to fix.

I doubt again whether a party, at the final stage of the arbitration proceedings when the A.T. is working on the draft of its award which will contain its decision on the fees, will make such request. I also doubt whether the A.A. will “consent to perform this function”.

²⁶¹ The proposition that the PCA maintain and publish a range of hourly rates for UNCITRAL arbitrations was considered and rejected in 1976: Report of UNCITRAL Committee of the Whole II, paras 206-208. Given that the PCA has been performing crucial functions in the operation of the UNCITRAL Rules over 30 years, this role – rarely to be performed, but very important when it is – could usefully be added to its range of support services.

The request of a party to consult the A.A. on the fees the A.T. envisages to fix, may be regarded by the A.T. as expressing doubts about the reasonableness of the A.T. in fixing its fees. A party may, at this stage of the proceedings, prefer to avoid this reaction. On the other hand, consultation of the A.A. on the fees the A.T. has to fix in its award, requires full information of the A.A. about all the work done by the A.T. This consultation-intermezzo will also postpone the rendering of the award.²⁶²

III. PROPOSED REVISION

279. Proposed revised text of article 39:

1. The fees of the ~~A~~arbitral ~~T~~ribunal 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 Permanent Court of Arbitration at The Hague, and if that authority has issued 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.~~

If any party disagrees when the Arbitral Tribunal fixes its fees, the fees shall be fixed by the Appointing Authority. If the Appointing Authority is unwilling or unable to do so, the fees shall be fixed by the Secretary-General of the Permanent Court of Arbitration at The Hague or by another institution or person selected by the Secretary-General for that purpose.

- ~~3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.~~

²⁶² Sanders (2004) 258.

4. ~~In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.~~

ARTICLE 40

I. PRESENT RULE

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
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.

II. DISCUSSION

280. We propose to delete article 40(2), which fails to establish any meaningful distinction except a very vague indication that costs of legal representatives are less easily recoverable than other costs. Practice has shown that the discretion exercised by arbitral tribunals depends on the circumstances of each case; the current formulation adds confusion rather than predictability.
281. We also propose to delete article 40(4). That provision is implicitly premised on the belief that arbitrators do not deserve additional fees because the need for correction or completion of their award is due to their own fault. Whether one agrees or not with this rigorous premise, it does not account for legitimate work on unmeritorious requests for correction or completion of an award.

III. PROPOSED REVISION

282. Proposed revised text of article 40:

1. ~~Except as provided in paragraph 2,~~ The costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. ~~With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.~~
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.~~

ARTICLE 41

I. PRESENT RULE

1. The arbitral tribunal, on its establishment, may request each party 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 Permanent Court of Arbitration at The Hague, 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 thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another 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 has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

II. DISCUSSION

283. Article 41(1) should be adjusted to cater for multi-party arbitration.
284. We also propose one consequential amendment in order to conform with our proposal to delete article 40(4) and, additionally, the deletion of article 40(3) for the reasons given by Professor Sanders:

According to para. 3 the A.A., if requested by a party, may make “any comments to the A.T. it deems appropriate concerning the amount of such deposits and supplementary deposits”. For making its comments on the amount for the deposits the A.T. has in view to require, the A.A. needs to be informed by

the A.T. This information concerns its estimation of work to be done as well as the remuneration of the arbitrators for their work. It would be a time consuming procedure before the A.A. can make its comment. *Quid iuris*, if the A.T. and the A.A. do not reach agreement?

I am not aware of any other Arbitration Rules requiring, if so requested by a party, comments of a third party on the amount of deposits, required by the A.T. Paragraph 3 requires consent of the A.A. to perform this function and make its comments subject to a request of a party. Neither the request nor the acceptance by the A.A. to make comments will in my opinion ever occur.²⁶³

285. Article 41(4) (renumbered 41(3)) could also benefit from widening the scope of the arbitral tribunal's discretion in dealing with a failure to pay a requested deposit.

III. PROPOSED REVISION

286. Proposed revised text of article 41:

1. The Arbitral Tribunal, on its establishment [or thereafter], may request each party/the parties to deposit advance-~~an equal amount as an advance~~ for the costs referred to in article 38, paragraphs (a), (b) and (c). In principle such advances shall be in equal shares, subject to different proportions if the Tribunal deems it appropriate, particularly in the case of multi-party arbitrations.
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 Permanent Court of Arbitration at The Hague, 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.~~

²⁶³ Sanders (2004) 259-260.

- 4.—If the required deposits are not paid in full within thirty days after the receipt of the request, the Aarbitral Tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Aarbitral Tribunal may order any sanctions it considers appropriate, including the suspension or termination of the arbitral proceedings.

54. After the award has been made, the Aarbitral Tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Annex 1

Comparison of provisions of the existing Rules and the proposed Rules

Article	Existing Rule	Proposed Changes	Proposed Rule
1(1)	<p>Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.</p> <p>_____</p> <p>* MODEL ARBITRATION CLAUSE</p> <p>Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.</p> <p>Note – Parties may wish to consider adding:</p> <p>(a) The appointing authority shall be ... (name of institution or person);</p> <p>(b) The number of arbitrators shall be ... (one or three);</p>	<p>Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration of disputes <u>under the UNCITRAL Arbitration Rules in respect of a defined legal relationship, whether contractual or not</u>, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing upon. <u>The parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have specified the Rules in effect on the date of their arbitration agreement.</u></p> <p>_____</p> <p>* MODEL ARBITRATION CLAUSE</p> <p>Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.</p> <p>Note – Parties may wish to consider adding:</p> <p>(a) The Aappointing Aauthority shall be ... (name of institution or person);</p> <p>(b) The number of arbitrators shall be ... (one or three);</p> <p>(c) The place of arbitration <u>juridical seat</u> shall be ... (town <u>city</u>);</p>	<p>Where the parties have agreed in writing* to arbitration under the UNCITRAL Arbitration Rules in respect of a defined legal relationship, whether contractual or not, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree upon. The parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have specified the Rules in effect on the date of their arbitration agreement.</p> <p>_____</p> <p>* MODEL ARBITRATION CLAUSE</p> <p>Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.</p> <p>Note – Parties may wish to consider adding:</p> <p>(a) The Appointing Authority shall be ... (name of institution or person);</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>(c) The place of arbitration shall be ... (town or country);</p> <p>(d) The language(s) to be used in the arbitral proceedings shall be ...</p>	<p>or country);</p> <p>(d) The language(s) to be used in the arbitral proceedings shall be ...</p>	<p>(b) The number of arbitrators shall be ... (one or three);</p> <p>(c) The juridical seat shall be ... (city or country);</p> <p>(d) The language(s) to be used in the arbitral proceedings shall be ...</p>
1(2)	<p>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.</p>	<p>These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the <u>applicable arbitration law</u> applicable to the arbitration <u>(including, where applicable, international law)</u> from which the parties cannot derogate, that provision shall prevail.</p>	<p>These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the applicable arbitration law (including, where applicable, international law) from which the parties cannot derogate, that provision shall prevail.</p>
2(1)	<p>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 his habitual residence, place of business or mailing 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.</p>	<p>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 his, <u>her or its</u> habitual residence, place of business or mailing 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.</p>	<p>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 his, her or its habitual residence, place of business or mailing 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.</p>
2(2)	<p>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,</p>	<p><u>Delivery pursuant to paragraph 1 may be made by facsimile, telex, e-mail or any other electronic means of communication that provides a durable record of dispatch and receipt.</u></p>	<p>Delivery pursuant to paragraph 1 may be made by facsimile, telex, e-mail or any other electronic means of communication that provides a durable record of dispatch and</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	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.		receipt.
2(3)		<u>Any notice, including a notification, communication or proposal, is deemed to have been received by a state if it is delivered to an organ of that state that is competent, under the law of that state, to receive such notices. Unless the parties have agreed otherwise, the head of a diplomatic mission of a state shall be deemed a competent organ for the purposes of the present article.</u>	Any notice, including a notification, communication or proposal, is deemed to have been received by a state if it is delivered to an organ of that state that is competent, under the law of that state, to receive such notices. Unless the parties have agreed otherwise, the head of a diplomatic mission of a state shall be deemed a competent organ for the purposes of the present article.
2(4)		[Existing article 2(2)] 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.	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.
		<u>In discharge of its duties under article 15, paragraph 1, the</u>	In discharge of its duties under article 15,

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>Arbitral Tribunal may at any time extend or abridge any period of time prescribed under or pursuant to these Rules.</u>	paragraph 1, the Arbitral Tribunal may at any time extend or abridge any period of time prescribed under or pursuant to these Rules.
3(1)	The party initiating recourse to arbitration (hereinafter called the “claimant”) shall give to the other party (hereinafter called the “respondent”) a notice of arbitration.	The party initiating recourse to arbitration (hereinafter called the “ C claimant”) shall <u>send</u> to the other party (hereinafter called the “ R espondent”) a notice of arbitration <u>Notice of Arbitration</u> . <u>If the parties have agreed that the case is to be administered by an institution a copy of the Notice of Arbitration shall be sent to that institution.</u>	The party initiating recourse to arbitration (hereinafter called the “Claimant”) shall send to the other party (hereinafter called the “Respondent”) a Notice of Arbitration. If the parties have agreed that the case is to be administered by an institution a copy of the Notice of Arbitration shall be sent to that institution.
3(2)	Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.	Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration <u>Notice of Arbitration</u> is received by the R espondent.	Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Respondent.
3(3)	The notice of arbitration shall include the following: (a) A demand that the dispute be referred to arbitration; (b) The names and addresses of the parties; (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked; (d) A reference to the contract out of or in relation to which the dispute arises; (e) The general nature of the claim and an	The notice of arbitration <u>Notice of Arbitration</u> shall include the following: (a) A demand that the dispute be referred to arbitration; (b) The names, and addresses <u>and other known contact details</u> of the parties <u>and of the person or persons (if any) representing or assisting the Claimant in the arbitration;</u> (c) A <u>copy of the reference to the arbitration clause or the separate arbitration agreement or other instrument that is invoked by the Claimant as the basis for commencing arbitration under the Rules;</u> (d) A <u>copy of reference to the contract, if any,</u> out of or in relation to which the dispute arises; (e) The general nature <u>A brief description of the dispute and the</u>	The Notice of Arbitration shall include the following: (a) A demand that the dispute be referred to arbitration; (b) The names, addresses and other known contact details of the parties and of the person or persons (if any) representing or assisting the Claimant in the arbitration; (c) A copy of the arbitration agreement or other instrument invoked by the Claimant as the basis for commencing arbitration under the Rules; (d) A copy of the contract, if any, out of or in

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>indication of the amount involved, if any;</p> <p>(f) The relief or remedy sought;</p> <p>(g) A proposal as to the number of arbitrators (ie. one or three), if parties have not previously agreed thereon.</p>	<p>claim and an indication of the amount involved, if any;</p> <p>(f) The relief or remedy sought;</p> <p>(g) <u>The identify of the Claimant’s appointee, if the parties’ agreement requires the parties to appoint arbitrators;</u></p> <p>(h) A proposal as to the number of arbitrators (i.e. one or three), if <u>the</u> parties have not previously agreed thereon. <u>Where the Claimant proposes that the Arbitral Tribunal consist of a Sole Arbitrator, it shall also propose the names of one or more persons, one of whom would serve as the Sole Arbitrator;</u></p> <p>(i) <u>The Claimant’s proposals as to the juridical seat and language of the arbitration, if the parties have not already agreed on these matters.</u></p>	<p>relation to which the dispute arises;</p> <p>(e) A brief description of the dispute and the claim and an indication of the amount involved, if any;</p> <p>(f) The relief or remedy sought;</p> <p>(g) <u>The identify of the Claimant’s appointee, if the parties’ agreement requires the parties to appoint arbitrators;</u></p> <p>(h) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not agreed thereon. Where the Claimant proposes that the Arbitral Tribunal consist of a Sole Arbitrator, it shall also propose the names of one or more persons, one of whom would serve as the Sole Arbitrator;</p> <p>(i) The Claimant’s proposals as to the juridical seat and language of the arbitration, if the parties have not already agreed on these matters.</p>
3(4)	<p>4. The notice of arbitration may also include:</p> <p>(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;</p> <p>(b) The notification of the appointment of an arbitrator referred to in article 7;</p> <p>(c) The statement of claim referred to in</p>	<p>The notice of arbitration may also include:</p> <p>(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;</p> <p>(b) The notification of the appointment of an arbitrator referred to in article 7;</p> <p>(c) The statement of claim referred to in article 18.</p>	

Article	Existing Rule	Proposed Changes	Proposed Rule
	article 18.		
3bis(1)		<u>Within thirty days of receipt of the Notice of Arbitration, the Respondent shall send to the Claimant a written Response.</u>	Within thirty days of receipt of the Notice of Arbitration, the Respondent shall send to the Claimant a written Response.
3bis(2)		<p><u>The Response shall include the following:</u></p> <p><u>(a) A statement of the Respondent's position on particulars (a)-(f) and (h)-(i) of the Notice of Arbitration;</u></p> <p><u>(b) A brief description of any counter-claims advanced by the Respondent, including an indication of the amounts involved (if any), and the relief or remedy sought in respect of such counter-claims; and</u></p> <p><u>(c) If the parties' agreement requires the parties to appoint arbitrators, and the Respondent has not already made such an appointment, the identity of the Respondent's appointee.</u></p>	<p>The Response shall include the following:</p> <p>(a) A statement of the Respondent's position on particulars (a)-(f) and (h)-(i) of the Notice of Arbitration;</p> <p>(b) A brief description of any counter-claims advanced by the Respondent, including an indication of the amounts involved (if any), and the relief or remedy sought in respect of such counter-claims; and</p> <p>(c) If the parties' agreement requires the parties to appoint arbitrators, and the Respondent has not already made such an appointment, the identity of the Respondent's appointee.</p>
3bis(3)		<u>Failure to communicate a Response shall not preclude the Respondent from denying any claim or from advancing a counter-claim in the arbitration.</u>	Failure to communicate a Response shall not preclude the Respondent from denying any claim or from advancing a counter-claim in the arbitration.
4	The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being	The parties may be represented and assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.	The parties may be represented and assisted by persons of their choice.

Article	Existing Rule	Proposed Changes	Proposed Rule
	made for purposes of representation or assistance.		
5 / 5(1)	If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen 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.	<p>If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen 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.</p> <p><u>These Rules contemplate that the Arbitral Tribunal will be comprised of either a sole arbitrator or three arbitrators. The parties may agree otherwise, but in that case they shall also agree on the method by which the Arbitral Tribunal is to be constituted. If the Arbitral Tribunal has not been constituted within [ninety] days of receipt of the Notice of Arbitration, any party may request the Appointing Authority to make all necessary appointments. The Appointing Authority shall make the necessary appointments following the procedure in article 6, paragraphs 3-5, and select one arbitrator as the presiding arbitrator.</u></p>	These Rules contemplate that the Arbitral Tribunal will be comprised of either a sole arbitrator or three arbitrators. The parties may agree otherwise, but in that case they shall also agree on the method by which the Arbitral Tribunal is to be constituted. If the Arbitral Tribunal has not been constituted within [ninety] days of receipt of the Notice of Arbitration, any party may request the Appointing Authority to make all necessary appointments. The Appointing Authority shall make the necessary appointments following the procedure in article 6, paragraphs 3-5, and select one arbitrator as the presiding arbitrator.
5(2)		<p><u>If the parties have not agreed on the number of arbitrators, the Notice of Arbitration shall contain a proposal for a Sole Arbitrator or a three-member tribunal. If any Respondent has not agreed to that proposal by the time at which it is required to communicate its Response, any party may request the Appointing Authority to decide, in light of such observations by the parties as the Appointing Authority may invite, whether a Sole Arbitrator or a three-member tribunal is to be appointed.</u></p>	If the parties have not agreed on the number of arbitrators, the Notice of Arbitration shall contain a proposal for a Sole Arbitrator or a three-member tribunal. If any Respondent has not agreed to that proposal by the time at which it is required to communicate its Response, any party may request the Appointing Authority to decide, in light of such observations by the parties as the Appointing Authority may invite, whether a Sole Arbitrator or a three-member tribunal is to be appointed.

Article	Existing Rule	Proposed Changes	Proposed Rule
5(3)		<p>[Existing article 8.2]</p> <p>Where Whenever the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses <u>contact details</u> and nationalities shall be indicated, together with a description of their qualifications.</p>	Whenever the names of one or more persons are proposed for appointment as arbitrators, their full names, contact details and nationalities shall be indicated, together with a description of their qualifications.
5bis(1)		<p><u>The parties may agree on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, to exercise the functions of the Appointing Authority under these Rules.</u></p>	The parties may agree on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, to exercise the functions of the Appointing Authority under these Rules.
5bis(2)		<p><u>In the event that the parties have not agreed on the identity of an Appointing Authority, any party may, with or at any time following the Notice of Arbitration, request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate another person or institution as the Appointing Authority.</u></p>	In the event that the parties have not agreed on the identity of an Appointing Authority, any party may, with or at any time following the Notice of Arbitration, request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate another person or institution as the Appointing Authority.
5bis(3)		<p><u>When a party requests the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague to exercise their functions under these Rules, it shall supply with its request copies of the Notice of Arbitration and (if available) the Response, together with the supporting materials required under article 3, paragraph 3 and article 3bis, paragraph 2. The Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague may require from any of the parties such further information as they deem necessary to exercise their functions.</u></p>	When a party requests the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague to exercise their functions under these Rules, it shall supply with its request copies of the Notice of Arbitration and (if available) the Response, together with the supporting materials required under article 3, paragraph 3 and article 3bis, paragraph 2. The Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague

Article	Existing Rule	Proposed Changes	Proposed Rule
			may require from any of the parties such further information as they deem necessary to exercise their functions.
5bis(4)		<u>All requests or other communications between a party and the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague shall also be provided, in copy, to all other parties.</u>	All requests or other communications between a party and the Appointing Authority or the Secretary-General of the Permanent Court of Arbitration at The Hague shall also be provided, in copy, to all other parties.
6(1)	<p>If a sole arbitrator is to be appointed, either party may propose to the other:</p> <p>(a) The names of one or more persons, one of whom should serve as the sole arbitrator; and</p> <p>(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.</p>	<p><u>If a Sole Arbitrator is to be appointed, and if by the time the Response is due to be communicated there has been no agreement as to his or her identity, the Sole Arbitrator shall, upon the request of any party, be appointed by the Appointing Authority.</u> either party may propose to the other:</p> <p>(a) The names of one or more persons, one of whom should serve as the sole arbitrator; and</p> <p>(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.</p>	<p>If a Sole Arbitrator is to be appointed, and if by the time the Response is due to be communicated there has been no agreement as to his or her identity, the Sole Arbitrator shall, upon the request of any party, be appointed by the Appointing Authority.-</p>
6(2)	<p>If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty</p>	<p><u>If a three-member tribunal is to be appointed, the following procedure shall be followed, unless the parties have agreed otherwise.</u></p> <p><u>(a) The Claimant shall appoint an arbitrator in the Notice of Arbitration.</u></p> <p><u>(b) At the latest by the time the Response is to be communicated, the Respondent shall appoint a second arbitrator, failing which any party may request the Appointing Authority to make that appointment.</u></p> <p><u>(c) In the event the decision to appoint a three-member tribunal</u></p>	<p>If a three-member tribunal is to be appointed, the following procedure shall be followed, unless the parties have agreed otherwise.</p> <p>(a) The Claimant shall appoint an arbitrator in the Notice of Arbitration.</p> <p>(b) At the latest by the time the Response is to be communicated, the Respondent shall appoint a second arbitrator, failing which any party may request the Appointing Authority to make that appointment.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.</p>	<p>has been made the Appointing Authority (article 5, para. 2), the Claimant shall appoint an arbitrator within 15 days of the Appointing Authority's decision; and the Respondent shall appoint an arbitrator within 15 days of the Claimant's appointment, failing which any party may request the Appointing Authority to make the relevant appointment.</p> <p><u>(d) The two arbitrators appointed in accordance with paragraphs (a)-(c) shall appoint the third and presiding arbitrator within thirty days of the appointment of the second arbitrator, failing which any party may request the Appointing Authority to make that appointment.</u></p> <p>If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.</p>	<p>(c) In the event the decision to appoint a three-member tribunal has been made the Appointing Authority (article 5, para. 2), the Claimant shall appoint an arbitrator within 15 days of the Appointing Authority's decision; and the Respondent shall appoint an arbitrator within 15 days of the Claimant's appointment, failing which any party may request the Appointing Authority to make the relevant appointment.</p> <p>(d) The two arbitrators appointed in accordance with paragraphs (a)-(c) shall appoint the third and presiding arbitrator within thirty days of the appointment of the second arbitrator, failing which any party may request the Appointing Authority to make that appointment.</p>
6(3)	<p>The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for</p>	<p><u>In exercising its functions under this article, the Appointing Authority shall use such procedures as it deems appropriate, which may include the use of lists of proposed arbitrators whom the parties are invited to rank in order of preference.</u></p> <p>The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list procedure should not be used or unless the appointing authority determines in its discretion that the use of the list procedure is not appropriate for the</p>	<p>In exercising its functions under this article, the Appointing Authority shall use such procedures as it deems appropriate, which may include the use of lists of proposed arbitrators whom the parties are invited to rank in order of preference.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>the case:</p> <p>(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;</p> <p>(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;</p> <p>(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;</p> <p>(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.</p>	<p>case:</p> <p>(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;</p> <p>(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;</p> <p>(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;</p> <p>(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.</p>	
6(4)	<p>In making the appointment, 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 as well the advisability of</p>	<p>In making the <u>any</u> appointment <u>under this article</u>, the Appointing Authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrators and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.</p>	<p>In making any appointment under this article, the Appointing Authority shall have regard to such considerations as are likely to secure the appointment of independent and impartial arbitrators.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	appointing an arbitrator of a nationality other than the nationalities of the parties.		
6(5)		<u>In appointing the presiding arbitrator or a Sole Arbitrator, the Appointing Authority shall in principle accept requests by a party that the nationality of that arbitrator should not be that of any of the parties. For that purpose, the Appointing Authority shall take account of such indications as it may have received as to the dominant beneficial ownership of corporate entities.</u>	In appointing the presiding arbitrator or a Sole Arbitrator, the Appointing Authority shall in principle accept requests by a party that the nationality of that arbitrator should not be that of any of the parties. For that purpose, the Appointing Authority shall take account of such indications as it may have received as to the dominant beneficial ownership of corporate entities.
6(6)		<u>If the Appointing Authority, howsoever designated, has not made an appointment pursuant to this article within thirty days of being requested to do so, the Secretary-General of the Permanent Court of Arbitration at The Hague may, upon the request of any party and unless he or she deems it appropriate to extend the time limit, make that appointment or designate another Appointing Authority to do so.</u>	If the Appointing Authority, howsoever designated, has not made an appointment pursuant to this article within thirty days of being requested to do so, the Secretary-General of the Permanent Court of Arbitration at The Hague may, upon the request of any party and unless he or she deems it appropriate to extend the time limit, make that appointment or designate another Appointing Authority to do so.
6(7)		<u>Any disagreement with respect to compliance with time limits under this article shall be resolved by the Secretary-General of the Permanent Court of Arbitration at The Hague.</u>	Any disagreement with respect to compliance with time limits under this article shall be resolved by the Secretary-General of the Permanent Court of Arbitration at The Hague.
7(1)	If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as	<u>Where the parties have agreed that the Arbitral Tribunal in its entirety is to be appointed by an Appointing Authority and have agreed on the identity of that authority, any party may request that authority to make the necessary appointments.</u>	Where the parties have agreed that the Arbitral Tribunal in its entirety is to be appointed by an Appointing Authority and have agreed on the identity of that authority,

Article	Existing Rule	Proposed Changes	Proposed Rule
	the presiding arbitrator of the tribunal.	If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.	any party may request that authority to make the necessary appointments.
7(2)	<p>If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:</p> <p>(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or</p> <p>(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.</p>	<p><u>Where the Appointing Authority refuses or fails to make the necessary appointments within thirty days of a request to that effect, any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate a replacement Appointing Authority.</u></p> <p>If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:</p> <p>(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or</p> <p>(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.</p>	<p>Where the Appointing Authority refuses or fails to make the necessary appointments within thirty days of a request to that effect, any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate a replacement Appointing Authority.-</p>
7(3)	If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the	<u>The Appointing Authority designated in accordance with paragraph 1 or 2 shall make the necessary appointments following the procedure in article 6, paragraphs 3-5, and select</u>	The Appointing Authority designated in accordance with paragraph 1 or 2 shall make the necessary appointments following the

Article	Existing Rule	Proposed Changes	Proposed Rule
	presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.	<u>one arbitrator as the presiding arbitrator.</u> If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.	procedure in article 6, paragraphs 3-5, and select one arbitrator as the presiding arbitrator.
8(1)	When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.	When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function. <u>Where there are multiple Claimants or Respondents, and where the Arbitral Tribunal is to be constituted pursuant to article 6, paragraph 2, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an arbitrator.</u>	Where there are multiple Claimants or Respondents, and where the Arbitral Tribunal is to be constituted pursuant to article 6, paragraph 2, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an arbitrator.
8(2)	Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.	<u>In the absence of such joint appointments and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal by the time the Response is due to be communicated, any party may request the Appointing Authority to make the necessary appointment or appointments, pursuant to paragraph 3.</u>	In the absence of such joint appointments and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal by the time the Response is due to be communicated, any party may request the Appointing Authority to make the necessary appointment or appointments, pursuant to paragraph 3.
8(3)		<u>The Appointing Authority, having heard the parties' views, may:</u> <u>(a) revoke an appointment already made, and appoint each of the arbitrators and designate one of them as the presiding arbitrator;</u>	The Appointing Authority, having heard the parties' views, may: (a) revoke an appointment already made, and

Article	Existing Rule	Proposed Changes	Proposed Rule
		<p><u>or</u> <u>(b) confirm an appointment already made and make a further appointment.</u> <u>acting in either case in accordance with article 6, paragraphs 3-5.</u></p>	<p>appoint each of the arbitrators and designate one of them as the presiding arbitrator; or (b) confirm an appointment already made and make a further appointment, acting in either case in accordance with article 6, paragraphs 3-5.</p>
9	<p>A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.</p>	<p>A prospective arbitrator shall disclose to those who approach him in connexion with his <u>or her</u> possible appointment any circumstances likely to give rise to justifiable doubts as to his <u>or her</u> impartiality or independence. <u>From the time of his or her appointment and throughout the arbitral proceedings, an arbitrator, once appointed or chosen, shall without delay disclose such circumstances to the parties and to the Appointing Authority that has appointed him or her, unless they have already been informed by him <u>or her</u> of these circumstances. <u>Upon acceptance of his or her appointment, an arbitrator shall provide to the parties and to the Appointing Authority that has appointed him or her a signed statement of independence.*</u></u></p> <p>-----</p> <p><u>* PROPOSED TEXTS OF STATEMENT OF INDEPENDENCE</u></p> <p><u>(A) UNQUALIFIED</u></p> <p><u>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. 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.</u></p>	<p>A prospective arbitrator shall disclose to those who approach him in connexion with his or her possible appointment any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. From the time of his or her appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose such circumstances to the parties and to the Appointing Authority that has appointed him or her, unless they have already been informed by him or her of these circumstances. Upon acceptance of his or her appointment, an arbitrator shall provide to the parties and to the Appointing Authority that has appointed him or her a signed statement of independence.*</p> <p>-----</p> <p><u>* PROPOSED TEXTS OF STATEMENT OF INDEPENDENCE</u></p> <p><u>(A) UNQUALIFIED</u></p> <p><u>I am independent of each of the parties and intend to remain so. To the best of my</u></p>

Article	Existing Rule	Proposed Changes	Proposed Rule
		<p><u>(B) QUALIFIED</u></p> <p><u>I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause my reliability for independent and impartial judgment to be questioned by a party. I hereby undertake promptly to notify the parties and the other members of the Arbitral Tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.</u></p>	<p>knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality. 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.</p> <p><u>(B) QUALIFIED</u></p> <p>I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause my reliability for independent and impartial judgment to be questioned by a party. I hereby undertake promptly to notify the parties and the other members of the Arbitral Tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.</p>
9bis		<p><u>No arbitrator (including his or her employees and assistants), secretary to the Arbitral Tribunal appointed in accordance with article 15, paragraph 9, or expert to the Arbitral Tribunal shall be liable to any party for any act or omission in connexion with the performance of his or her tasks under these Rules except if that act or omission was manifestly in bad faith.</u></p>	<p>No arbitrator (including his or her employees and assistants), secretary to the Arbitral Tribunal appointed in accordance with article 15, paragraph 9, or expert to the Arbitral Tribunal shall be liable to any party for any act or omission in connexion with the performance of his or her tasks under these Rules except if that act or omission was manifestly in bad faith.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
10(1)	Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.		Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
10(2)	A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.	A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.	A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
11(1)	A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.	A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.	A party who intends to challenge an arbitrator shall send notice of its challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
11(2)	The challenge shall be notified to the other party, 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.	The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the A rbital T ribunal. The notification shall be in writing and shall state the reasons for the challenge.	The challenge shall be notified to the other party, 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.
11(3)	When an arbitrator has been challenged by one party, the other party may agree to the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a	When an arbitrator has been challenged by a one party, the other parties may agree to the challenge. In both cases the procedure provided in article 6 or 7 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 his right to appoint or to participate in the appointment.	When an arbitrator has been challenged by a party, the other parties may agree to the challenge. In both cases the procedure provided in article 6 or 7 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

Article	Existing Rule	Proposed Changes	Proposed Rule
	party had failed to exercise his right to appoint or to participate in the appointment.		appoint or to participate in the appointment.
12(1)	<p>If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:</p> <p>(a) When the initial appointment was made by an appointing authority, by that authority;</p> <p>(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;</p> <p>(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority provided for in article 6.</p>	<p>If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, <u>within [fifteen/thirty] days from the date of the notice of challenge the party making the challenge may seek a</u> the decision on the challenge, <u>which</u> will be made:</p> <p>(a) When the initial appointment was made by an <u>A</u>appointing <u>A</u>authority, by that authority;</p> <p>(b) When the initial appointment was not made by an <u>A</u>appointing <u>A</u>authority, but an <u>A</u>appointing <u>A</u>authority has been previously designated, by the authority;</p> <p>(c) In all other cases, by the <u>A</u>appointing <u>A</u>authority to be designated in accordance with the procedure for designating an <u>A</u>appointing <u>A</u>authority as provided for in article 6.</p>	<p>If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, within [fifteen/thirty] days from the date of the notice of challenge the party making the challenge may seek a decision on the challenge, which will be made:</p> <p>(a) When the initial appointment was made by an Appointing Authority, by that authority;</p> <p>(b) When the initial appointment was not made by an Appointing Authority, but an Appointing Authority has been previously designated, by the authority;</p> <p>(c) In all other cases, by the Appointing Authority to be designated in accordance with the procedure for designating an Appointing Authority as provided for in article 6.</p>
12(2)	If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which	If the <u>A</u> appointing <u>A</u> authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an <u>A</u> appointing <u>A</u> authority, the appointment of the arbitrator shall be made by the <u>A</u> appointing <u>A</u> authority which decided on the challenge.	If the Appointing Authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an Appointing Authority, the appointment of the arbitrator shall be made by the Appointing Authority which decided on the challenge.

Article	Existing Rule	Proposed Changes	Proposed Rule
	decided on the challenge.		
13(1)	In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.	<u>Where the Arbitral Tribunal consists of more than one arbitrator, a resignation by an arbitrator shall require the approval of a majority of the other arbitrators. The presiding arbitrator shall have the casting vote. The decision approving the resignation of an arbitrator shall be in writing. It may stipulate that the resignation shall take effect on a future date.</u>	Where the Arbitral Tribunal consists of more than one arbitrator, a resignation by an arbitrator shall require the approval of a majority of the other arbitrators. The presiding arbitrator shall have the casting vote. The decision approving the resignation of an arbitrator shall be in writing. It may stipulate that the resignation shall take effect on a future date.
13(2)	In the event that an arbitrator fails to act or in the event of the <i>de jure</i> or <i>de facto</i> impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.	[Existing article 13(1)] In the event of the death or <u>approved</u> resignation of 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 <u>8</u> that was applicable to the appointment [or choice] of the arbitrator being replaced. <u>In the event an arbitrator's resignation is not approved pursuant to paragraph 1, he or she shall be replaced by a direct selection by the Appointing Authority.</u>	In the event of the death or approved resignation of 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 8 that was applicable to the appointment [or choice] of the arbitrator being replaced. In the event an arbitrator's resignation is not approved pursuant to paragraph 1, he or she shall be replaced by a direct selection by the Appointing Authority.
13(3)		[Existing article 13(2)] In the event that an arbitrator <u>refuses or</u> fails to act, or in the event of the <i>de jure</i> or <i>de facto</i> impossibility of his <u>or her</u> performing his <u>or her</u> functions, <u>or if he or she for other reasons fails to act without undue delay</u> , the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply, <u>subject to paragraph 4. Unless the Appointing Authority finds that the reasons for the arbitrator's non-performance of his or her functions are beyond</u>	In the event that an arbitrator refuses or fails to act, or in the event of the <i>de jure</i> or <i>de facto</i> impossibility of his or her performing his or her functions, or if he or she for other reasons fails to act without undue delay, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply, subject to paragraph 4. Unless the Appointing Authority

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>his or her control, the Appointing Authority shall directly appoint the replacement arbitrator.</u>	finds that the reasons for the arbitrator's non-performance of his or her functions are beyond his or her control, the Appointing Authority shall directly appoint the replacement arbitrator.
13(4)		<u>Where the other arbitrators unanimously determine that paragraph 3 applies to an arbitrator, or if he or she has tendered a resignation which is not accepted pursuant to paragraph 1, they shall have the power, upon written notice to the third arbitrator and the parties, to continue the arbitration and make any direction, decision, or award, if the circumstances of the case so warrant. For the purposes of this paragraph, the circumstances of the case include the stage of the arbitration and any explanation given by the third arbitrator.</u>	Where the other arbitrators unanimously determine that paragraph 3 applies to an arbitrator, or if he or she has tendered a resignation which is not accepted pursuant to paragraph 1, they shall have the power, upon written notice to the third arbitrator and the parties, to continue the arbitration and make any direction, decision, or award, if the circumstances of the case so warrant. For the purposes of this paragraph, the circumstances of the case include the stage of the arbitration and any explanation given by the third arbitrator.
14	If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.	If under articles 11 to 13 the sole or presiding arbitrator is replaced, any arbitrator is replaced, the reconstituted Arbitral Tribunal, having consulted the parties, shall determine if and to what extent any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.	If under articles 11 to 13 any arbitrator is replaced, the reconstituted Arbitral Tribunal, having consulted the parties, shall determine if and to what extent any hearings held previously shall be repeated.
15(1)	Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the	Subject to these Rules, the A arbitral T ribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his its case. The Arbitral Tribunal shall take all action	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 any stage of the proceedings each party is

Article	Existing Rule	Proposed Changes	Proposed Rule
	proceedings each party is given a full opportunity of presenting his case.	<u>and issue all necessary directions to the parties in order to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The parties shall comply with and carry out any directions issued by the Arbitral Tribunal; failure to do so may be taken into account by the Arbitral Tribunal in allocating the costs of the arbitration pursuant to article 40.</u>	given a full opportunity of presenting its case. The Arbitral Tribunal shall take all action and issue all necessary directions to the parties in order to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The parties shall comply with and carry out any directions issued by the Arbitral Tribunal; failure to do so may be taken into account by the Arbitral Tribunal in allocating the costs of the arbitration pursuant to article 40.
15(2)	If either party so requests at any stage of the proceedings, 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.	<u>As soon as practicable after its constitution, the Arbitral Tribunal shall establish a provisional timetable for the conduct of the proceedings, in consultation with the parties.</u>	As soon as practicable after its constitution, the Arbitral Tribunal shall establish a provisional timetable for the conduct of the proceedings, in consultation with the parties.
15(3)	All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.	<u>At any appropriate stage of the proceedings, the Arbitral Tribunal may meet or confer with the parties on any issue relating to the conduct of the proceedings, having due regard to the UNCITRAL Notes on Organizing Arbitral Proceedings.</u>	At any appropriate stage of the proceedings, the Arbitral Tribunal may meet or confer with the parties on any issue relating to the conduct of the proceedings, having due regard to the UNCITRAL Notes on Organizing Arbitral Proceedings.
15(4)		<u>Where two or more claims which involve the same (and no other) parties and have a question of law or fact in common are the subject of separate arbitration proceedings under these</u>	Where two or more claims which involve the same (and no other) parties and have a question of law or fact in common are the

Article	Existing Rule	Proposed Changes	Proposed Rule
		<p><u>Rules, the Arbitral Tribunal may, after hearing the parties, by reasoned order:</u></p> <p><u>(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or</u></p> <p><u>(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.</u></p>	<p>subject of separate arbitration proceedings under these Rules, the Arbitral Tribunal may, after hearing the parties, by reasoned order:</p> <p>(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or</p> <p>(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.</p>
15(5)		<p><u>Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Arbitral Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.</u></p>	<p>Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Arbitral Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.</p>
15(6)		<p><u>After consulting with the parties, the Arbitral Tribunal may conduct such enquiries as may appear to it to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law</u></p>	<p>After consulting with the parties, the Arbitral Tribunal may conduct such enquiries as may appear to it to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>applicable to the arbitration, the merits of the parties' dispute, and the arbitration agreement.</u>	initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute, and the arbitration agreement.
15(7)		<u>After consulting with the parties, the Arbitral Tribunal may order any party to make any property, site, or thing under that party's control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, another party, its expert, or any expert appointed by the Arbitral Tribunal.</u>	After consulting with the parties, the Arbitral Tribunal may order any party to make any property, site, or thing under that party's control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, another party, its expert, or any expert appointed by the Arbitral Tribunal.
15(8)		<u>After consulting with the parties, the Arbitral Tribunal may allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.</u>	After consulting with the parties, the Arbitral Tribunal may allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.
15(9)		<u>The Arbitral Tribunal may, having consulted with the parties, and determined that it would contribute to overall cost-effectiveness by relieving the arbitrators of certain tasks, designate a secretary to the Arbitral Tribunal. Any such designation shall be by written notice to the parties, identifying the person concerned and describing the tasks that may be entrusted to him or her by the Arbitral Tribunal and under its responsibility. The secretary to the Arbitral Tribunal shall provide to the parties a signed statement of independence</u>	The Arbitral Tribunal may, having consulted with the parties, and determined that it would contribute to overall cost-effectiveness by relieving the arbitrators of certain tasks, designate a secretary to the Arbitral Tribunal. Any such designation shall be by written notice to the parties, identifying the person concerned and describing the tasks that may be entrusted to him or her by the Arbitral

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>conforming to article 9.</u>	Tribunal and under its responsibility. The secretary to the Arbitral Tribunal shall provide to the parties a signed statement of independence conforming to article 9.
15bis(1)		[Existing article 15(2)] Upon request of any party or if either party so requests at any stage of the proceedings, the Arbitral Tribunal shall hold hearings at an appropriate stage of the proceedings 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 exclusively on the basis of documents and other materials. Upon request of any party, the Arbitral Tribunal shall hold hearings at an appropriate stage of the proceedings for the presentation of evidence by witnesses, including expert witnesses, or for 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 exclusively on the basis of documents and other materials.	Upon request of any party, the Arbitral Tribunal shall hold hearings at an appropriate stage of the proceedings for the presentation of evidence by witnesses, including expert witnesses, or for 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 exclusively on the basis of documents and other materials.
15bis(2)		[Existing article 15(3)] All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.	All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.
15ter		Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in bona fide legal proceedings before a state court or other judicial authority in relation to an award. Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in bona fide legal proceedings before a state court or other judicial authority in relation to	Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in bona fide legal proceedings before a state court or other judicial authority in relation to

Article	Existing Rule	Proposed Changes	Proposed Rule
			an award.
16(1)	<p>PLACE OF ARBITRATION</p> <p>Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.</p>	<p>PLACE OF ARBITRATION<u>JURIDICAL SEAT</u></p> <p>Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.</p> <p><u>If the parties have agreed on a place of arbitration, that place shall be the juridical seat of the arbitration. Otherwise, this determination shall be made by the Arbitral Tribunal, in accordance with article 31, paragraph 1. The Arbitral Tribunal shall nevertheless have the discretion to conduct hearings or other meetings in any other place. With the exception of provisions which the national procedural law of the juridical seat of the arbitration explicitly defines as mandatory, the Arbitral Tribunal shall not be required to apply that national law to the conduct of the arbitration.</u></p>	<p>JURIDICAL SEAT</p> <p>If the parties have agreed on a place of arbitration, that place shall be the juridical seat of the arbitration. Otherwise, this determination shall be made by the Arbitral Tribunal, in accordance with article 31, paragraph 1. The Arbitral Tribunal shall nevertheless have the discretion to conduct hearings or other meetings in any other place. With the exception of provisions which the national procedural law of the juridical seat of the arbitration explicitly defines as mandatory, the Arbitral Tribunal shall not be required to apply that national law to the conduct of the arbitration.</p>
16(2)	<p>The arbitral tribunal may determine the locale of the arbitration within the country agreed by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.</p>	<p>The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.</p> <p><u>Having regard to the circumstances of the arbitration and subject to any specific contrary agreement of the parties, the Arbitral Tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.</u></p>	<p>Having regard to the circumstances of the arbitration and subject to any specific contrary agreement of the parties, the Arbitral Tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.</p>
16(3)	<p>The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or</p>	<p>The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such</p>	<p>Any award, decision or order of the Arbitral Tribunal shall be considered made at the juridical seat, even if it is not physically</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	documents. The parties shall be given sufficient notice to enable them to be present at such inspection.	inspection. [Existing article 16(4)] The Any award, decision or order of the Arbitral Tribunal shall be considered made at the place-judicial seat of arbitration, even if it is not physically signed there.	signed there.
16(4)	The award shall be made at the place of arbitration.	<u>Reference to a place of arbitration shall ordinarily be construed as defining the juridical seat of arbitration. Any controversy in this regard shall be resolved by the Arbitral Tribunal.</u>	Reference to a place of arbitration shall ordinarily be construed as defining the juridical seat of arbitration. Any controversy in this regard shall be resolved by the Arbitral Tribunal.
17(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.	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, in consultation with the parties. 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. <u>The initial language of the arbitration shall be the language in which the agreement to arbitrate has been expressed. Upon the formation of the Arbitral Tribunal and unless the parties have reached agreement in that respect, the Arbitral Tribunal shall decide upon the language of the arbitration.</u>	The initial language of the arbitration shall be the language in which the agreement to arbitrate has been expressed. Upon the formation of the Arbitral Tribunal and unless the parties have reached agreement in that respect, the Arbitral Tribunal shall decide upon the language of the arbitration.
17(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	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 <u>all texts relied upon by a party and submitted 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 pursuant to</u>	The Arbitral Tribunal may order that all texts relied upon by a party and submitted 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 pursuant to paragraph 1.

Article	Existing Rule	Proposed Changes	Proposed Rule
	agreed upon by the parties or determined by the arbitral tribunal.	<u>paragraph 1.</u>	
18(1)	Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.	Unless the statement of claim was contained in the notice of arbitration, W within a period of time to be determined by the <u>A</u> rbital <u>T</u> ribunal, the <u>C</u> laimant shall communicate his <u>s</u> its <u>S</u> tatement of <u>C</u> elaim in writing to the <u>R</u> espondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto. <u>The Claimant may elect to treat its Notice of Arbitration (article 3, para. 3) as a Statement of Claim.</u>	Within a period of time to be determined by the Arbitral Tribunal, the Claimant shall communicate its Statement of Claim in writing to the Respondent and to each of the arbitrators. The Claimant may elect to treat its Notice of Arbitration (article 3, para. 3) as a Statement of Claim.
18(2)	<p>The statement of claim shall include the following particulars:</p> <p>(a) The names and addresses of the parties;</p> <p>(b) A statement of the facts supporting the claim;</p> <p>(c) The points at issue;</p> <p>(d) The relief or remedy sought.</p> <p>The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.</p>	<p>The <u>S</u>tatement of <u>C</u>elaim shall include the following particulars:</p> <p>(a) The names and addresses of the parties;</p> <p>(b)<u>A</u> statement of the facts <u>and legal principles</u> supporting the claim;</p> <p>(c)<u>(b)</u> The points at issue;</p> <p>(d)<u>(c)</u> The relief or remedy sought.</p> <p>The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.<u>The Statement of Claim shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Claimant, or by references to them. If the documentary evidence is especially voluminous, the Claimant may list any further documents it deems relevant.</u></p>	<p>The Statement of Claim shall include the following particulars:</p> <p>(a) A statement of the facts and legal principles supporting the claim;</p> <p>(b) The points at issue;</p> <p>(c) The relief or remedy sought.</p> <p>The Statement of Claim shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Claimant, or by references to them. If the documentary evidence is especially voluminous, the Claimant may list any further documents it deems relevant.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
19(1)	Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.	Within a period of time to be determined by the <u>A</u> rbital Tribunal, the <u>R</u> espondent shall communicate his <u>S</u> tatement of <u>D</u> efence in writing to the <u>C</u> laimant and to each of the arbitrators. <u>The Respondent may elect to treat its Response to the Notice of Arbitration (article 3bis, para. 2) as a Statement of Defence.</u>	Within a period of time to be determined by the Arbitral Tribunal, the Respondent shall communicate its Statement of Defence to the Claimant and to each of the arbitrators. The Respondent may elect to treat its Response to the Notice of Arbitration (article 3bis, para. 2) as a Statement of Defence.
19(2)	The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.	The <u>S</u> tatement of <u>D</u> efence shall reply to the particulars <u>(a)</u> , <u>(b)</u> (e) and (d) <u>(c)</u> of the <u>s</u> tatement of <u>C</u> laim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit. <u>The Statement of Defence shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Respondent, or by references to them. If the documentary evidence is especially voluminous, the Respondent may list any further documents it deems relevant.</u>	The Statement of Defence shall reply to the particulars (a), (b) and (c) of the Statement of Claim (article 18, para. 2). The Statement of Defence shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Respondent, or by references to them. If the documentary evidence is especially voluminous, the Respondent may list any further documents it deems relevant.
19(3)	In his 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 arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.	In his <u>S</u> tatement of <u>D</u> efence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the <u>R</u> espondent may make a counter-claim <u>provided that it falls within the scope of an agreement between the parties to arbitrate under these Rules arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.</u>	In its Statement of Defence the Respondent may make a counter-claim provided that it falls within the scope of an agreement between the parties to arbitrate under these Rules.
19(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.	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.	The provisions of article 18, paragraph 2, shall apply to a counter-claim.

Article	Existing Rule	Proposed Changes	Proposed Rule
19bis		<u>Where the Respondent's Statement of Defence includes a counter-claim, the Claimant may, within thirty days, submit a reply to the counter-claim.</u>	Where the Respondent's Statement of Defence includes a counter-claim, the Claimant may, within thirty days, submit a reply to the counter-claim.
20	During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.	During the course of the arbitral proceedings either any party may amend or supplement his its claim, or defence <u>or counter-claim</u> unless the A arbitral T ribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim <u>or counter-claim</u> falls outside the scope of the arbitration clause or separate arbitration agreement.	During the course of the arbitral proceedings any party may amend or supplement its claim, defence or counter-claim unless the Arbitral Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim or counter-claim falls outside the scope of the arbitration clause or separate arbitration agreement.
21(1)	The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.	The A arbitral T ribunal shall have the power to <u>may rule on its own jurisdiction, including</u> objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.	The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
21(2)	The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement	The A arbitral T ribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the A arbitral T ribunal that the contract is null and void shall not entail	The Arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral

Article	Existing Rule	Proposed Changes	Proposed Rule
	independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail <i>ipso jure</i> the invalidity of the arbitration clause.	<i>ipso jure</i> the invalidity of the arbitration clause.	Tribunal that the contract is null and void shall not entail <i>ipso jure</i> the invalidity of the arbitration clause.
21(3)	A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.	A plea that the A arbitral T ribunal does not have jurisdiction shall be raised not later than in the S statement of D efence or, with respect to a counter-claim, in the <u>first opportunity to submit a reply to the counter-claim. 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.</u>	A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence or, with respect to a counter-claim, in the first opportunity to submit a reply to the counter-claim. 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.
21(4)	In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.	In general, the A arbitral T ribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the A arbitral T ribunal may proceed with the arbitration and rule on such a plea in their final award <u>as it considers appropriate in the circumstances. Any request to a domestic court to decide on the Arbitral Tribunal's jurisdiction may only be made after the Arbitral Tribunal has rendered its award on jurisdiction. While such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award.</u>	In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in the final award as it considers appropriate in the circumstances. Any request to a domestic court to decide on the Arbitral Tribunal's jurisdiction may only be made after the Arbitral Tribunal has rendered its award on jurisdiction. While such a request is pending, the Arbitral Tribunal

Article	Existing Rule	Proposed Changes	Proposed Rule
			may continue the arbitral proceedings and make an award.
22	The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.	The A arbitral T ribunal shall decide which further written statements, in addition to the S statement of C elaim and S statement of D eefence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.	The Arbitral Tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.
23	The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statements of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.	The periods of time fixed by the A arbitral T ribunal for the communication of written statements (including the S statement of C elaim and S statement of D eefence) should not exceed forty-five days. However, the A arbitral T ribunal may extend the time-limits if it concludes that an extension is justified.	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 forty-five days. However, the Arbitral Tribunal may extend the time-limits if it concludes that an extension is justified.
24(1)	Each party shall have the burden of proving the facts relied on to support his claim or defence.	Each party shall have the burden of proving the facts relied on to support his its claim or defence.	Each party shall have the burden of proving the facts relied on to support its claim or defence.
24(2)	The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.	The A arbitral T ribunal may, if it considers it appropriate, require a party to deliver to the A rbital T ribunal and to the other parties y, within such a period of time as the A arbitral T ribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his its S statement of C elaim or S statement of D eefence.	The Arbitral Tribunal may, if it considers it appropriate, require a party to deliver to the Arbitral Tribunal and to the other parties, within such a period of time as the Arbitral Tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in its Statement of Claim or Statement of Defence.

Article	Existing Rule	Proposed Changes	Proposed Rule
24(3)	<p>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.</p>	<p>At any time during the arbitral proceedings the Aarbitral Tribunal may, <u>on the application of any party or of its own motion and having given the parties a reasonable opportunity to state their views</u>, require <u>any of</u> the parties to produce documents, exhibits,materials or other evidence <u>in their possession, custody or control</u> within such a period of time as the Arbitral Tribunal shall determine. <u>The Arbitral Tribunal's decision under this article shall be made pursuant to article 31, paragraph 1.</u></p>	<p>At any time during the arbitral proceedings the Arbitral Tribunal may, on the application of any party or of its own motion and having given the parties a reasonable opportunity to state their views, require any of the parties to produce documents, materials or other evidence in their possession, custody or control within such a period of time as the Arbitral Tribunal shall determine. The Arbitral Tribunal's decision under this article shall be made pursuant to article 31, paragraph 1.</p>
24(4)		<p><u>The Arbitral Tribunal may exercise its power under paragraph 3 when it determines that such documents, materials or other evidence are relevant and material to the outcome of the case, provided that none of the following reasons is extant:</u></p> <p><u>(a) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;</u></p> <p><u>(b) unreasonable burden to produce the requested evidence;</u></p> <p><u>(c) loss or destruction of the document that has been reasonably shown to have occurred;</u></p> <p><u>(d) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;</u></p> <p><u>(e) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or</u></p> <p><u>(f) considerations of fairness or equality of the parties that the</u></p>	<p>The Arbitral Tribunal may exercise its power under paragraph 3 when it determines that such documents, materials or other evidence are relevant and material to the outcome of the case, provided that none of the following reasons is extant:</p> <p>(a) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;</p> <p>(b) unreasonable burden to produce the requested evidence;</p> <p>(c) loss or destruction of the document that has been reasonably shown to have occurred;</p> <p>(d) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;</p> <p>(e) grounds of special political or institutional</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>Arbitral Tribunal determines to be compelling.</u>	sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (f) considerations of fairness or equality of the parties that the Arbitral Tribunal determines to be compelling.
25(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.	In the event of an oral hearing, the A arbitral T ribunal shall give the parties adequate advance notice of the date, time and place thereof.	In the event of an oral hearing, the Arbitral Tribunal shall give the parties adequate advance notice of the date, time and place thereof.
25(2)	If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.	If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony. <u>Witnesses may be heard under conditions set by the Arbitral Tribunal, including time limits for their identification and a requirement of prior submission of signed statements containing the substance of their testimony. Any individual testifying 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 was or is an officer, employee or shareholder of any party.</u>	Witnesses may be heard under conditions set by the Arbitral Tribunal, including time limits for their identification and a requirement of prior submission of signed statements containing the substance of their testimony. Any individual testifying 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 was or is an officer, employee or shareholder of any party.
25(3)	The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed	The A arbitral T ribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the Arbitral T ribunal under the circumstances of the case, or if the parties have agreed thereto and	The Arbitral Tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the Arbitral Tribunal under

Article	Existing Rule	Proposed Changes	Proposed Rule
	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 fifteen days before the hearing.	have communicated such agreement to the <u>Arbitral Tribunal</u> at least fifteen days before the hearing.	the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the Arbitral Tribunal at least fifteen days before the hearing.
25(4)	Hearings shall be held <i>in camera</i> unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.	Hearings shall be held <i>in camera</i> unless the parties agree otherwise. The Arbitral Tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined. <u>After consulting the parties and having regard to the circumstances and article 15, paragraph 1, the Arbitral Tribunal may allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangements. The Arbitral Tribunal shall for such cases issue necessary directions under article 15, paragraph 1 for the protection of proprietary or privileged information.</u>	Hearings shall be held <i>in camera</i> unless the parties agree otherwise. The Arbitral Tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. After consulting the parties and having regard to the circumstances and article 15, paragraph 1, the Arbitral Tribunal may allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangements. The Arbitral Tribunal shall for such cases issue necessary directions under article 15, paragraph 1 for the protection of proprietary or privileged information.
25(5)	Evidence of witnesses may also be presented in the form of written statements signed by them.	Evidence of witnesses may also be presented in the form of written statements signed by them. [Existing article 25(6)] The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.	The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.
25(6)	The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.		
26(1)	At the request of either party, the arbitral	ALTERNATIVE ONE	ALTERNATIVE ONE

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.</p>	<p>At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.</p> <p><u>Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure, whether in the form of an [interim] award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Arbitral Tribunal orders a party to:</u></p> <p><u>(a) Maintain or restore the status quo pending determination of the dispute;</u></p> <p><u>(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;</u></p> <p><u>(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or</u></p> <p><u>(d) Preserve evidence that may be relevant and material to the resolution of the dispute.</u></p> <p>ALTERNATIVE TWO</p> <p><u>At the request of either any party, the Arbitral Tribunal may take order any interim or conservatory measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.</u></p>	<p>Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure, whether in the form of an [interim] award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Arbitral Tribunal orders a party to:</p> <p>(a) Maintain or restore the status quo pending determination of the dispute;</p> <p>(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;</p> <p>(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or</p> <p>(d) Preserve evidence that may be relevant and material to the resolution of the dispute.</p> <p>ALTERNATIVE TWO</p> <p>At the request of any party, the Arbitral Tribunal may order any interim or conservatory measures it deems necessary.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
26(2)	Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.	<p>ALTERNATIVE ONE</p> <p>Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.</p> <p><u>The party requesting an interim measure under sub-paragraphs (a), (b) and (c) of paragraph 1 shall satisfy the Arbitral Tribunal that:</u></p> <p><u>(a) Harm not adequately reparable by an award of damages is likely to result if 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</u></p> <p><u>(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the Arbitral Tribunal in making any subsequent determination.</u></p> <p>ALTERNATIVE TWO</p> <p>Such interim measures may be established in the form of an interim award. The Arbitral Tribunal shall be entitled to require security for the costs of <u>in connexion with</u> such measures.</p>	<p>ALTERNATIVE ONE</p> <p>The party requesting an interim measure under sub-paragraphs (a), (b) and (c) of paragraph 1 shall satisfy the Arbitral Tribunal that:</p> <p>(a) Harm not adequately reparable by an award of damages is likely to result if 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</p> <p>(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the Arbitral Tribunal in making any subsequent determination.</p> <p>ALTERNATIVE TWO</p> <p>Such interim measures may be established in the form of an award. The Arbitral Tribunal shall be entitled to require security in connexion with such measures.</p>
26(3)	A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.	<p>ALTERNATIVE ONE</p> <p><u>With regard to a request for an interim measure under paragraph 1(d), the requirements in sub-paragraphs (a) and (b) of paragraph 2 shall apply only to the extent the Arbitral Tribunal considers appropriate.</u></p>	<p>ALTERNATIVE ONE</p> <p>With regard to a request for an interim measure under paragraph 1(d), the requirements in sub-paragraphs (a) and (b) of paragraph 2 shall apply only to the extent the</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
		<p>ALTERNATIVE TWO</p> <p>A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.</p>	<p>Arbitral Tribunal considers appropriate.</p> <p>ALTERNATIVE TWO</p> <p>A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.</p>
26(4)		<p>ALTERNATIVE ONE</p> <p><u>The Arbitral Tribunal may require the party requesting an interim measure to provide appropriate security in connexion with the measure.</u></p>	<p>ALTERNATIVE ONE</p> <p>The Arbitral Tribunal may require the party requesting an interim measure to provide appropriate security in connexion with the measure.</p>
26(5)		<p>ALTERNATIVE ONE</p> <p>[Existing article 26(3)]</p> <p>A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.</p>	<p>ALTERNATIVE ONE</p> <p>A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.</p>
27(1)	<p>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.</p>	<p>The Aarbitral Tribunal may, after consultation with the parties, appoint one or more experts to report to it, in writing, on specific issues to be determined by the <u>Arbitral T</u>ribunal. A copy of the expert's terms of reference, established by the <u>A</u>arbitral <u>T</u>ribunal, shall be communicated to the parties.</p>	<p>The Arbitral Tribunal may, after consultation with the parties, appoint one or more experts to report to it, in writing, on specific issues to be determined by the Arbitral Tribunal. A copy of the expert's terms of reference, established by the Arbitral Tribunal, shall be communicated to the parties.</p>
27(2)	<p>The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any</p>	<p>The parties shall give the expert any relevant information or produce for his <u>or her</u> inspection any relevant documents or goods that he <u>or she</u> may require of them. Any dispute between a party and such the expert as to the relevance of the required</p>	<p>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</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	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.	information or production shall be referred to the A arbitral T ribunal for decision. <u>The Arbitral Tribunal may direct a meeting between the expert appointed by the Arbitral Tribunal and any experts appearing for the parties for the purpose of identifying, discussing and, where possible, reaching an agreed opinion on, expert issues in the proceedings. The Arbitral Tribunal may also direct such a meeting between or among experts appearing for the parties.</u>	dispute between a party and the expert as to the relevance of the required information or production shall be referred to the Arbitral Tribunal for decision. The Arbitral Tribunal may direct a meeting between the expert appointed by the Arbitral Tribunal and any experts appearing for the parties for the purpose of identifying, discussing and, where possible, reaching an agreed opinion on, expert issues in the proceedings. The Arbitral Tribunal may also direct such a meeting between or among experts appearing for the parties.
27(3)	Upon receipt of the expert's report, the tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion of the report. A party shall be entitled to examine any document on which the expert has relied in his report.	Upon receipt of the expert's report, the <u>Arbitral</u> T ribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion of the report. A party shall be entitled to examine any document on which the expert has relied in his report.	Upon receipt of the expert's report, the Arbitral Tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion of the report. A party shall be entitled to examine any document on which the expert has relied in his report.
27(4)	At the request of either 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 either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.	At the request of either <u>any</u> 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 either <u>any</u> party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.	At the request of any party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing any party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.
28(1)	If, within the period of time fixed by the	If, within the period of time fixed by the A arbitral T ribunal, the	If, within the period of time fixed by the

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order the proceedings to continue.</p>	<p><u>Claimant has failed to communicate his Statement of Claim without showing sufficient cause for such failure, the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings, unless the Respondent has submitted a counter-claim. If, within the period of time fixed by the Arbitral Tribunal, the Respondent has failed to communicate his Statement of Defence without showing sufficient cause for such failure, the Arbitral Tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the Claimant's allegations.</u></p>	<p>Arbitral Tribunal, the Claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings, unless the Respondent has submitted a counter-claim. If, within the period of time fixed by the Arbitral Tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the Arbitral Tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the Claimant's allegations.</p>
28(2)	<p>If one of the parties, 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.</p>	<p>If one<u>any</u> of the parties, 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 <u>and make an award.</u></p>	<p>If any of the parties, 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 and make an award.</p>
28(3)	<p>If one of the parties, duly invited to produce documentary 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.</p>	<p>If anyone<u>any</u> of the parties, duly invited to produce documentary 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.</p>	<p>If any of the parties, duly invited to produce documentary 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.</p>
29(1)	<p>The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.</p>	<p>The Arbitral Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed. <u>When the parties have completed the presentation of the case, or of a phase of the case, the Arbitral</u></p>	<p>The Arbitral Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed. When the parties have</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
		<u>Tribunal shall declare the proceedings closed with respect to the whole case or its relevant phase.</u>	completed the presentation of the case, or of a phase of the case, the Arbitral Tribunal shall declare the proceedings closed with respect to the whole case or its relevant phase.
29(2)	The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.	The arbitral tribunal may, if <u>If it considers it necessary owing to exceptional circumstances, the Arbitral Tribunal may decide, on its own motion or upon application of a party, to reopen the hearings proceedings at any time before the an award is made pursuant to article 21, paragraph 4, article 31 or article 37, paragraph 2 and issue directions, pursuant to article 15, paragraph 1, with respect to further actions that the parties or the Arbitral Tribunal should take before an award is issued.</u>	If it considers it necessary owing to exceptional circumstances, the Arbitral Tribunal may, on its own motion or upon application of a party, reopen the proceedings at any time before an award is made pursuant to article 21, paragraph 4, article 31 or article 37, paragraph 2 and issue directions, pursuant to article 15, paragraph 1, with respect to further actions that the parties or the Arbitral Tribunal should take before an award is issued.
30	A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.	A party that knows <u>or ought to know</u> that any provision of, or requirement under <u>the arbitration agreement (including these Rules), or any directions given by the Arbitral Tribunal under these Rules,</u> has not been complied with and yet proceeds with the arbitration without promptly stating his its objection to such non-compliance, shall be deemed <u>irrevocably</u> to have waived his its right to object.	A party that knows or ought to know that any provision of, or requirement under the arbitration agreement (including these Rules), or any directions given by the Arbitral Tribunal under these Rules, has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed irrevocably to have waived its right to object.
31(1)	When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.	When there are three <u>(or more)</u> arbitrators, any award or other decision of the A arbitral T ribunal shall be made by a majority of the arbitrators. <u>If no majority is formed, any award or other decision shall be made by the presiding arbitrator alone.</u>	When there are three (or more) arbitrators, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators. If no majority is formed, any award or other decision shall be made by the

Article	Existing Rule	Proposed Changes	Proposed Rule
			presiding arbitrator alone.
31(2)	In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.	In the case of questions of procedure, when there is no majority or when the A arbitral T ribunal so authorises, the presiding arbitrator may decide on his <u>or her</u> own, subject to revision, if any, by the A arbitral T ribunal.	In the case of questions of procedure, when there is no majority or when the Arbitral Tribunal so authorises, the presiding arbitrator may decide on his or her own, subject to revision, if any, by the Arbitral Tribunal.
31(3)		<u>The deliberations of the Arbitral Tribunal shall remain secret, save as may be necessary for a notice to be given pursuant to article 13, paragraph 5.</u>	The deliberations of the Arbitral Tribunal shall remain secret, save as may be necessary for a notice to be given pursuant to article 13, paragraph 5.
32(1)	In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.	In addition to making a final award <u>terminating the arbitral proceedings</u> , the A arbitral T ribunal shall be entitled to make interim, interlocutory, or partial awards <u>on the issues to be determined, as necessary to deal with every claim submitted to the Arbitral Tribunal.</u>	In addition to making a final award terminating the arbitral proceedings, the Arbitral Tribunal shall be entitled to make interim, interlocutory, or partial awards on the issues to be determined, as necessary to deal with every claim submitted to the Arbitral Tribunal.
32(2)	The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.	The award shall be made in writing and shall be final and binding on the parties. <u>The award shall be subject to no appeal or other recourse before any court or other authority [other than pursuant to articles 35, 36 and 37].</u> The parties undertake to carry out the award without delay.	The award shall be made in writing and shall be final and binding on the parties. The award shall be subject to no appeal or other recourse before any court or other authority [other than pursuant to articles 35, 36 and 37]. The parties undertake to carry out the award without delay.
32(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.	The A arbitral T ribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.	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.

Article	Existing Rule	Proposed Changes	Proposed Rule
32(4)	An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for absence of the signature.	An award shall be signed by the arbitrators and it shall state contain the date on which it was made and the juridical seat of arbitration as determined in accordance with article 16, paragraph 3 <u>and the place where the award was made</u> . Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.	An award shall be signed by the arbitrators and shall state the date on which it was made and the juridical seat of arbitration as determined in accordance with article 16, paragraph 3. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
32(5)	The award may be made public only with the consent of both parties.	The award may be made public only with the consent of both the <u>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 [bona fide] legal proceedings before a state court or other judicial authority.</u>	The award may be made public with the consent of the 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 [bona fide] legal proceedings before a state court or other judicial authority.
32(6)	Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.	Copies of the award signed by the arbitrators shall be communicated to the parties by the A arbitral T ribunal.	Copies of the award signed by the arbitrators shall be communicated to the parties by the Arbitral Tribunal.
32(7)	If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.	If the arbitration law of the country where the award is made requires that the award be filed or registered by the A arbitral T ribunal, the Arbitral T ribunal, <u>at the timely request of any party,</u> shall comply with this requirement within the period of time required by law.	If the arbitration law of the country where the award is made requires that the award be filed or registered by the Arbitral Tribunal, the Arbitral Tribunal, at the timely request of any party, shall comply with this requirement within the period of time required by law.
32(8)		<u>In all matters not expressly provided for in these Rules, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every effort to ensure that any decision or award is legally enforceable.</u>	In all matters not expressly provided for in these Rules, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every effort to ensure that any decision or award is legally enforceable.

Article	Existing Rule	Proposed Changes	Proposed Rule
33(1)	The arbitral tribunal shall apply the 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 determined by the conflict of laws rules which it considers applicable.	The A arbitral T ribunal shall decide the dispute in accordance with such rules of law as are chosen apply the law designated by the parties as applicable to the substance of the dispute. Failing any such designation by the parties, the A arbitral T ribunal shall apply the law determined by the conflict of laws rules, which it considers applicable.	The Arbitral Tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Failing any designation by the parties, the Arbitral Tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable.
33(2)	The arbitral tribunal shall decide as <i>amiable compositeur</i> or <i>ex aequo et bono</i> only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.	The A arbitral T ribunal shall decide as <i>amiable compositeur</i> or <i>ex aequo et bono</i> only if the parties have expressly authorized the A arbitral T ribunal to do so and if the law applicable to the arbitration arbitral procedure permits such arbitration.	The Arbitral Tribunal shall decide as <i>amiable compositeur</i> or <i>ex aequo et bono</i> only if the parties have expressly authorized the Arbitral Tribunal to do so and if the law applicable to the arbitration permits such arbitration.
33(3)	In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.	In all cases, the A arbitral T ribunal shall decide in accordance with the terms of the <u>parties' contract, if any,</u> and shall take into account the usages of the trade applicable to the transaction.	In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the parties' contract, if any, and the usages of the trade applicable to the transaction.
34(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 both 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.	If, before the award is made, the parties agree on a settlement of the dispute, the A arbitral T ribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by all both parties and accepted by the Arbitral Tribunal, record the settlement in the form of an arbitral award on agreed terms. The A arbitral T ribunal is not obliged to give reasons for such an award.	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 all parties and accepted by the Arbitral Tribunal, record the settlement in the form of an arbitral award on agreed terms. The Arbitral Tribunal is not obliged to give reasons for such an award.

Article	Existing Rule	Proposed Changes	Proposed Rule
34(2)	<p>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.</p>	<p>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.</p> <p>[Current article 34(3)]</p> <p>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 <u>Arbitral Tribunal</u> to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.</p>	<p>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 7, shall apply.</p>
34(3)	<p>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 7, shall apply.</p>		
35(1)	<p>Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.</p>	<p><u>If a dispute arises between the parties as to the meaning or scope of the ruling contained in an award,</u> Wwithin thirty days after the receipt of the award, either any party, with notice to the other party<u>ies,</u> may request that the <u>Arbitral Tribunal</u> give an interpretation of <u>the specific point in the award in respect of which the dispute has arisen.</u></p>	<p>If a dispute arises between the parties as to the meaning or scope of the ruling contained in an award, within thirty days after the receipt of the award, any party, with notice to the other parties, may request that the Arbitral Tribunal give an interpretation of the specific point in the award in respect of which the dispute has arisen.</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
35(2)	The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.	<u>The Arbitral Tribunal, if it considers the request to be justified, shall give an interpretation. The interpretation shall be given in writing within forty-fivethirty days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 8, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its interpretation under this article.</u>	The Arbitral Tribunal, if it considers the request to be justified, shall give an interpretation in writing within thirty days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 8, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its interpretation under this article.
36(1)	Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.	Within thirty days after the receipt of the award, either any party, with notice to the other parties, may request the Arbitral Tribunal to correct in the award (a) <u>any errors in computation, any clerical or typographical errors, or any errors of similar nature;</u> or (b) <u>the omission of the juridical seat, the date on which the award was made and the reasons for an arbitrator's failure to sign.</u>	Within thirty 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 (a) any errors in computation, any clerical or typographical errors, or any errors of similar nature; or (b) the omission of the juridical seat, the date on which the award was made and the reasons for an arbitrator's failure to sign.
36(2)	Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.	<u>If the Arbitral Tribunal considers a request pursuant to paragraph 1 to be justified, it shall make the necessary corrections within thirty days of such request. The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall make a correction, by giving written notice to the parties.</u>	If the Arbitral Tribunal considers a request pursuant to paragraph 1 to be justified, it shall make the necessary corrections within thirty days of such request. The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall make a correction, by giving written notice to the parties.

Article	Existing Rule	Proposed Changes	Proposed Rule
36(3)		[Part of existing article 36(1)] The A arbitral T ribunal may within thirty days after the communication of the award make such corrections <u>such as described in paragraph 1</u> on its own initiative.	The Arbitral Tribunal may within thirty days after the communication of the award make corrections such as described in paragraph 1 on its own initiative.
36(4)		[Existing article 36(2)] Such <u>Corrections pursuant to paragraph 1 or 3 shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its correction under this article.</u>	Corrections pursuant to paragraph 1 or 3 shall be in writing, and the provisions of article 32, paragraphs 2 to 8, shall apply, save that an arbitrator who has not agreed with an award shall not be involved in its correction under this article.
37(1)	Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.	Within thirty days after the receipt of the award, either any party, with notice to the other party <u>ies</u> , may request the A arbitral T ribunal to make an additional award as to claims <u>(including counter-claims)</u> presented in the arbitral proceedings but omitted from the award.	Within thirty days after the receipt of the award, any party, with notice to the other parties, may request the Arbitral Tribunal to make an additional award as to claims (including counter-claims) presented in the arbitral proceedings but omitted from the award.
37(2)	If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.	If the A arbitral T ribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence , it shall complete its award within sixty days after the receipt of the request. <u>The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall complete its award, by giving written notice to the parties.</u>	If the Arbitral Tribunal considers the request for an additional award to be justified, it shall complete its award within sixty days after the receipt of the request. The Arbitral Tribunal may, if and to the extent it considers it necessary, extend the period of time within which it shall complete its award, by giving written notice to the parties.
37(3)	When an additional award is made, the provisions of article 32 paragraphs 2 to 7, shall apply.	When an additional award is made, the provision of article 32, paragraphs 2 to 8 <u>7</u> , shall apply.	When an additional award is made, the provision of article 32, paragraphs 2 to 8, shall apply.

Article	Existing Rule	Proposed Changes	Proposed Rule
38	<p>The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:</p> <p>(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;</p> <p>(b) The travel and other expenses incurred by the arbitrators;</p> <p>(c) The costs of expert advice and of other assistance required by the arbitral tribunal;</p> <p>(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;</p> <p>(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;</p> <p>(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.</p>	<p>The Aarbitral Tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:</p> <p>(a) The fees of the Aarbitral Tribunal to be stated separately as to each arbitrator and to be fixed by the <u>Arbitral Tribunal</u> itself in accordance with article 39;</p> <p>(b) The <u>reasonable</u> travel and other expenses incurred by the arbitrators;</p> <p>(c) The <u>reasonable</u> costs of expert advice and of other assistance required by the Aarbitral Tribunal, <u>including the fees and expenses of any secretary appointed pursuant to article 15, paragraph 9;</u></p> <p>(d) The <u>reasonable</u> travel and other expenses of witnesses to the extent such expenses are approved by the Aarbitral Tribunal;</p> <p>(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the Aarbitral Tribunal determines that the amount of such costs is reasonable;</p> <p>(f) Any fees of the Aappointing Aauthority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.</p>	<p>The Arbitral Tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:</p> <p>(a) The fees of the Arbitral Tribunal to be stated separately as to each arbitrator and to be fixed by the Arbitral Tribunal itself in accordance with article 39;</p> <p>(b) The reasonable travel and other expenses incurred by the arbitrators;</p> <p>(c) The reasonable costs of expert advice and of other assistance required by the Arbitral Tribunal, including the fees and expenses of any secretary appointed pursuant to article 15, paragraph 9;</p> <p>(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;</p> <p>(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable;</p> <p>(f) Any fees of the Appointing Authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.</p>
39(1)	<p>The fees of the arbitral tribunal shall be reasonable in amount, taking into account</p>	<p>The fees of the Aarbitral Tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the</p>	<p>The fees of the Arbitral Tribunal shall be reasonable in amount, taking into account the</p>

Article	Existing Rule	Proposed Changes	Proposed Rule
	the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.	subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.	amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
39(2)	If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued 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.	<p>If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued 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.</p> <p><u>If any party disagrees when the Arbitral Tribunal fixes its fees, the fees shall be fixed by the Appointing Authority. If the Appointing Authority is unwilling or unable to do so, the fees shall be fixed by the Secretary-General of the Permanent Court of Arbitration at The Hague or by another institution or person selected by the Secretary-General for that purpose.</u></p>	If any party disagrees when the Arbitral Tribunal fixes its fees, the fees shall be fixed by the Appointing Authority. If the Appointing Authority is unwilling or unable to do so, the fees shall be fixed by the Secretary-General of the Permanent Court of Arbitration at The Hague or by another institution or person selected by the Secretary-General for that purpose.
39(3)	If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the	<p>If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.</p>	

Article	Existing Rule	Proposed Changes	Proposed Rule
	case.		
39(4)	In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.	In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.	
40(1)	Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.	Except as provided in paragraph 2, t The costs of arbitration shall in principle be borne by the unsuccessful party. However, the A arbitral T ribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.	The costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
40(2)	With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.	With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. [Existing article 40(3)] When the A arbitral T ribunal 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.	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.
40(3)	When the arbitral tribunal issues an order		

Article	Existing Rule	Proposed Changes	Proposed Rule
	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.		
40(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.	No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.	
41(1)	The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).	The A arbitral T ribunal, on its establishment <u>[or thereafter]</u> , may request each party <u>the parties</u> to deposit an equal amount as an advance <u>advances</u> for the costs referred to in article 38, paragraphs (a), (b) and (c). <u>In principle such advances shall be in equal shares, subject to different proportions if the Arbitral Tribunal deems it appropriate, particularly in the case of multi-party arbitrations.</u>	The Arbitral Tribunal, on its establishment [or thereafter], may request the parties to deposit advances for the costs referred to in article 38, paragraphs (a), (b) and (c). In principle such advances shall be in equal shares, subject to different proportions if the Arbitral Tribunal deems it appropriate, particularly in the case of multi-party arbitrations.
41(2)	During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.	During the course of the arbitral proceedings the A arbitral T ribunal may request supplementary deposits from the parties.	During the course of the arbitral proceedings the Arbitral Tribunal may request supplementary deposits from the parties.
41(3)	If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the	If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, 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	If the required deposits are not paid in full within thirty days after the receipt of the request, the Arbitral Tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitral Tribunal may order any sanctions it considers

Article	Existing Rule	Proposed Changes	Proposed Rule
	<p>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.</p>	<p>appropriate concerning the amount of such deposits and supplementary deposits.</p> <p>[Existing article 41(4)]</p> <p>If the required deposits are not paid in full within thirty days after the receipt of the request, the Aarbitral Tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Aarbitral Tribunal may order <u>any sanctions it considers appropriate, including</u> the suspension or termination of the arbitral proceedings.</p>	<p>appropriate, including the suspension or termination of the arbitral proceedings.</p>
41(4)	<p>If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another 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.</p>	<p>[Existing article 41(5)]</p> <p>After the award has been made, the Aarbitral Tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.</p>	<p>After the award has been made, the Arbitral Tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.</p>
41(5)	<p>After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.</p>		