Commentary from Mexico in connection with the appointing authority in expedited arbitration

1. The best solution is that the parties agree on its designation. But the loopholes need to be considered.

2. The option towards which the working group seems to have leaned is for the Permanent Court of Arbitration (PCA) to be the default appointing authority. The Mexican Delegation has the following observations:

2.1. The PCA has functioned quite well as appointing authority. However, it may not be the best option in the case of expedited arbitration. When the Rules were adopted for the first time in 1976, the arbitration practice and culture were very different.

2.2. The complexity, amount in dispute and number of arbitrations back then, was very different. Arbitration was not as common as it is today, the arbitrations were few, located in countries with arbitration practice and which entailed considerable complexity on issues of international trade. Nowadays the growth of arbitration and the number of proceedings, may create problems due to the procedures and lack of immediacy between the PCA, parties and the seat of arbitration. Similar considerations may be made with respect to the multiplicity of issues submitted to arbitration.

2.3. Also, due to the time and costs of the procedure before PCA, it may not be the best solution in an expedited arbitration, in which the purpose is to have a low cost and accelerated procedure.

2.4. In 1976, when the Rules were issued, the world lacked a uniform legal system, which we have today as a consequence of the Model Law. Back then, it would have been quite imprudent to designate the national authority of the seat of arbitration as the appointing authority.

2.5. In 1985, when the Model Law was adopted, it was decided to convey the functions of the appointing authority, to the entity designated by each State when adopting the Model Law. The system has functioned quite well, as a consultation of the CLOUT or 2012 Digest demonstrates.

2.6. In addition to the foregoing, a considerable number of arbitral institutions with regional or global presence, have acquired a considerable experience as appointing authorities under the Rules.

3. In coherence with previous interventions, the Mexican Delegation suggests to adopt the system of the Model Law; and not to bypass the role that could be covered by certain arbitral institutions. Some revisions would need to be made.

3.1. The appointing authority would be the entity with similar or compatible functions of an appointing authority at the seat of arbitration.
3.2. In case that no such authority exists in terms of paragraph 3.1., the appointing authority would be: [Option A. The arbitral institution designated by the first party referring to an appointing authority] [Option B. The PCA].

4. The argument that we should not be modifying the regime of the Rules, is inconsistent. In the drafting of these provisions, we are discussing variations to the provisions of the Rules.

5. Any of the solutions proposed by the Mexican Delegation, may be implemented without requiring to modify the Rules.