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ARTICLE 10—REPLACEMENT OF AN ARBITRATOR (ARTICLES 10 AND 11)

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ARTICLE 10

If an arbitrator withdraws after a challenge, or the administrator sustains the challenge, or the administrator determines that there are sufficient reasons to accept the resignation of an arbitrator, or an arbitrator dies, a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

I. Introduction

Following the creation of a vacancy on the tribunal addressed in Articles 8 and 9, Articles 10 and 11 address the replacement of an arbitrator and its consequences, such as a repetition of prior proceedings. This involves a delicate balancing act: a substitute arbitrator must be able to consider all of the details of the case, while the parties may want to avoid starting the case over or repeating significant portions of the proceedings, because doing so creates time and cost burdens.¹ Article 11 further provides for the possibility of a truncated tribunal in certain circumstances. **10.01**

Other leading institutional rules adopt a similar approach to filling vacancies on the arbitral tribunal. For example, the 2010 UNCITRAL Rules provide that such vacancies shall be filled in the same manner as the arbitrators were **10.02**

¹ F Schwarz and N Allen, *Groundhog Day: Repeating Proceedings After the Replacement of An Arbitrator* (in publication); GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,583–86.

originally selected.² To ensure that a party is not deprived of its opportunity to select an arbitrator, the same original selection provisions employed will apply to fill a vacancy.³ It is said that any other rule would risk creating an incentive for a party to challenge and remove an arbitrator tactically to disadvantage the party who lost its nominee.⁴ However, where an arbitrator is removed for bias, there are serious doubts about whether the same party, having already appointed a biased arbitrator, can be trusted with the appointment of a substitute. In such cases, it may be preferable to afford the institution the option to make a direct substitute appointment without recourse to the originally agreed method of arbitrator selection.⁵

10.03 Following the structure of Articles 10 and 11, the discussion in this and the following chapter focuses on three broad issues.

- (1) What process or mechanism applies when replacing an arbitrator who has withdrawn, resigned, or is removed after a challenge? (Addressed in this chapter.)
- (2) May the remaining arbitrators on the tribunal continue the proceedings without the third arbitrator (in a so-called ‘truncated tribunal’)? (Addressed in the context of Article 11.)
- (3) Finally, how much discretion do the remaining arbitrators have to determine whether, and to what extent, to repeat previous proceedings if an arbitrator is replaced? (Also addressed in the context of Article 11.)

II. Textual commentary

10.04 An arbitrator may be unable to serve from the beginning of the arbitration through to its conclusion for any number of reasons. As discussed above in Article 8, an arbitrator’s mandate stems from his or her contractual relationship with the parties.

² Article 14(1) of the 2010 UNCITRAL Rules provides that ‘[i]n any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 [of the UNCITRAL Rules] that was applicable to the appointment or choice of the arbitrator being replaced’.

³ The drafters of the 1976 UNCITRAL Rules, for example, considered alternatives to appointing new arbitrators, such as permitting the institutional authority or national courts to appoint a new arbitrator. These initial proposals were rejected as causing substantial and disproportionate damage to the party whose nominee was removed or resigned. See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 251; *Report of the UNCITRAL on the Summary of Discussion of the Preliminary Draft*, Eighth Session, UN Doc A/10017, para 83, VIY.B. UNCITRAL 24, 33 (1975).

⁴ See Caron, Caplan, and Pellonpää, op cit, 251 (2006); GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,561.

⁵ This option is available, for example, to the ICC Court pursuant to Art 12(4) of the ICC Rules (‘When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process’).

The contract may be subject to early termination if it is violated, much like any other contract.⁶ Accordingly, Article 10 addresses the replacement of an arbitrator when such a vacancy arises. The application of Article 10 is limited to certain specified circumstances:

- (1) an arbitrator's voluntary withdrawal after a challenge pursuant to Article 8(3);
- (2) an arbitrator's removal after a successful challenge under Article 9;
- (3) a justified resignation, as determined by the ICDR administrator; or
- (4) the arbitrator's death.

These grounds trigger Article 10, resulting in the appointment of a substitute arbitrator in accordance with the appointment procedure in Article 6 (unless the parties agree otherwise).

As a textual matter, *only* the grounds expressly mentioned in Article 10 trigger the replacement process. However, Article 10 must logically also apply if the parties have agreed, pursuant to Article 8(3), that the arbitrator should be replaced. Indeed, Article 10 itself, in its closing words, allows the parties to agree on any procedure to fill a vacant arbitrator position with a substitute. **10.05**

The express grounds for replacement under Article 10 are mainly self-explanatory, but the voluntary resignation of an arbitrator, as a particular feature of the ICDR Rules, deserves additional discussion. Article 8 permits an arbitrator to resign if he or she is challenged. Article 10 extends the opportunity for resignation to other circumstances, but limits the arbitrator's freedom to resign by making it conditional. Before considering what limits an arbitrator's right to resign, it is important to note that judicial authorities are sceptical about the value of holding an arbitrator to serve after he or she has chosen to withdraw from office. As one US appellate court explained: **10.06**

There are certainly circumstances under which, although a party could not successfully mount a charge of evident partiality against an arbitrator, the arbitrator may wish to resign. That decision is better left to the discretion of the individual arbitrator . . . There is, therefore, no basis, statutory or otherwise, for a court to review an arbitrator's earlier resignation, and we know of no authority that grants courts the power to force unwilling arbitrators to continue to serve.⁷

However, absent a ground for withdrawal that is recognized under either the ICDR Rules or applicable mandatory law, an arbitrator's resignation may constitute a breach of his or her undertaking of the appointment.⁸ Yet, unlike a national court's **10.07**

⁶ Born, *op cit*, 1,612 (noting that an arbitrator's contractual relationship might also end by party agreement, with no reasons necessary).

⁷ *Florasynth, Inc v Pickholz*, 750 F2d 171, 173–74 (2d Cir 1984).

⁸ See P Sanders, 'Commentary on the UNCITRAL Arbitration Rules', II Ybk Comm Arb 172, 191 (1977) (noting that the rules do not—and could not—outline specific grounds that would justify resignation, but also noting that '[o]nce the arbitrator has agreed to function, he should fulfil his task.

involvement in the context of challenges to the arbitrators, there is no role for a judicial intervention when an arbitrator chooses to resign.⁹ This is perhaps unsurprising, because at least one commentator stressed that '[n]othing would be less conducive to the proper administration of justice than the conduct of a reference by a recalcitrant arbitrator'.¹⁰ However, an unjustified resignation may have implications for the arbitrator's entitlement to fees, and may, in some jurisdictions, give rise to the arbitrator's liability for breach of contract.¹¹ In line with this reasoning, all leading institutional rules allow arbitrators to resign,¹² at least in limited circumstances. Article 10 effectively limits an arbitrator's right to resign to cases in which justifiable grounds exist. It is thus for the ICDR administrator to determine whether to accept the resignation. This mechanism is designed to deter obstructive arbitrators from delaying the process by forcing the parties to seek a replacement. Thus, where the resignation of an arbitrator is deemed unjustified by the administrator, no substitute arbitrator will be appointed; rather, the rules for truncated tribunals pursuant to Article 11 will apply. By the same token, the ICDR Rules also do not permit a party to seek a replacement arbitrator if the grounds for resignation are insufficient; instead, the parties must invoke Article 11 procedures for a truncated tribunal.

10.08 The fact that Article 10 gives the ICDR administrator discretion to approve the grounds for resignation is by no means unique. Indeed, several institutions limit an arbitrator's freedom to resign by requiring institutional acceptance of

Exceptionally there may be good reasons for not continuing, such as a heart attack. If not, an arbitrator who resigns may possibly be sued for damages consequent upon his resignation').

⁹ Born, *op cit*, 1,575.

¹⁰ M Mustill and S Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London, 1989) 231.

¹¹ FT Schwarz and CW Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, The Hague, 2009) paras 7-148, 17-006, 18-0011.

¹² See *eg* 2010 UNCITRAL Rules, Art 13(3) ('When an arbitrator has been challenged by a party . . . [t]he arbitrator may also, after the challenge, withdraw from his or her office'); ICC Rules, Art 12(1) ('An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon the request of all the parties'); LCIA Rules, Art 10(1) ('If . . . any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators . . .'); ICSID Arbitration Rules, Rule 8(2) ('An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. . .'); CIETAC Rules, Art 27(1) (. . . 'The arbitrator may also withdraw from [*sic*] his/her office'); Permanent Court of Arbitration (PCA) Rules, Art 13(1) (adopting the identical UNCITRAL provision); Swiss Rules of International Arbitration, Art 13(1) ('. . . This rule also applies if an arbitrator has been successfully challenged, has been otherwise removed or has resigned'); SIAC Rules, Arts 12(1) ('If the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily within 7 days of receipt of the notice of challenge . . .') and 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 in accordance with the procedure applicable to the appointment of the arbitrator being replaced'); Japan Commercial Arbitration Association (JCAA) Rules, Art 31(1) ('If an arbitrator resigns or dies, the Association shall, without delay, notify the parties and the remaining arbitrator(s) thereof').

the resignation.¹³ For example, the ICC Rules require the ICC Court to accept the resignation for it to be valid.¹⁴ Others, such as the Swiss Rules of International Arbitration, appear to permit general resignation as no such qualifying language exists.¹⁵

National laws similarly provide for resignation, usually in specified circumstances.¹⁶ Even so, national laws, like institutional rules, are mostly silent regarding when an arbitrator may properly withdraw. **10.09**

Under the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, an arbitrator's resignation without just cause violates his or her contractual obligations to the parties.¹⁷ Thus resignation should occur only when serving would be nearly impossible.¹⁸ Circumstances that might justify resignation include an unforeseen increase in the workload,¹⁹ the addition of new parties or substantive claims that give rise to conflicts, the failure of the parties to cooperate in the arbitrator's efforts to conduct the arbitration in an efficient and professional manner, or misconduct by the parties in relation to the arbitration.²⁰ In addition, should the parties fail to compensate the arbitrators, they are not required to serve. **10.10**

Particularly at advanced stages of the proceedings, an arbitrator's obligation to discharge his or her judicial function to the parties binds him or her to avoid the disruption associated with having to appoint a replacement. Other commentators, **10.11**

¹³ See *eg* ICC Rules, Art 12(1) (arbitrator's resignation effective upon acceptance by the ICC Court); Belgian Centre for Arbitration and Mediation (CEPANI) Rules, Art 18(4) (the institution must accept the arbitrator's resignation).

¹⁴ ICC Rules, Art 12(1) (arbitrator's resignation effective upon acceptance by the ICC Court). See also CEPANI Rules, Art 18(4) (the institution must accept the arbitrator's resignation).

¹⁵ See Swiss Rules of International Arbitration, Art 13(1).

¹⁶ See *eg* UNCITRAL Model Law, Arts 13(2) (permits withdrawal if challenged) and 14(1) (permits withdrawal if unable to perform duties); English Arbitration Act 1996, s 25 (permits resignation by party agreement or upon approval of the court based on the reasonableness of 'all of the circumstances'); French New Code of Civil Procedure, art 1462 ('arbitrators are to continue their mission until it has been completed').

¹⁷ AAA/ABA Code of Ethics for Arbitrators in Commercial Arbitrations, Canon I(E):

When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.

¹⁸ *Ibid*, Canon I(H): 'Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.'

¹⁹ A point that is perhaps controversial: an increase in workload can typically be avoided by refusing to accept further work that conflicts with existing commitments.

²⁰ GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,636.

considering several major institutional rules, have noted this contractual obligation on the part of the arbitrators to complete their duties to the parties.²¹

- 10.12** Once a tribunal has a vacancy, Article 10 calls for the substitute arbitrator to be, in principle, appointed according to the same procedure that governed the appointment of the arbitrator that is being replaced.²² The parties, however, can agree otherwise and provide, for example, that the substitute arbitrator is appointed directly by the ICDR administrator. As discussed, this approach varies from that adopted by the ICC Rules, which vests the ICC Court with the power to override the originally agreed-upon appointment procedure and make a direct appointment if the Court deems this appropriate in the circumstances of the case.²³

²¹ See J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 281; Y Derains and E Schwarz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International, The Hague, 2005) 128; Born, *op cit*, 1,611–18.

²² Born, *op cit*.

²³ ICC Rules, Art 12.