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

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ARTICLE 11

1. *If an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.*

2. *If a substitute arbitrator is appointed under either Article 10 or Article 11, the tribunal shall determine at its sole discretion whether all or part of any prior hearings shall be repeated.*

I. Introduction

Articles 11(1) addresses whether, and in what circumstances, two arbitrators are permitted to continue the proceedings without the third member of the tribunal in a so-called ‘truncated tribunal’. Article 11(2) affords the newly constituted tribunal, **11.01**

whenever a substitute arbitrator has been added, the discretion to determine whether, and to what extent, to repeat previous proceedings.

II. Textual commentary

A. The authority of a truncated tribunal to render an award (Article 11(1))

ARTICLE 11(1)

If an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.

11.02 Only when an arbitrator on a three-member tribunal is removed or withdraws from office on the grounds specified in Article 10 will a substitute arbitrator be appointed. In all other cases, the two remaining arbitrators are entitled to proceed under Article 11 in what is sometimes referred to as a ‘truncated’ tribunal. Instances in which the arbitrators decide to proceed as a truncated tribunal are rare, but significant.¹

11.03 The threshold question of who decides whether the tribunal proceeds as ‘truncated’ is under Article 11(1) answered by the tribunal itself. Not all institutional rules adopt the same approach. The ICC Rules, for example, do not leave it to the remaining arbitrators to determine whether to proceed as a truncated tribunal or replace the missing arbitrator. Instead, the ICC Rules require the ICC Court to decide in certain circumstances.²

¹ A well-documented example is *Himpurna California Energy Ltd v Republic of Indonesia* (2000) 25 YB Comm Arb 186, in which the respondent’s arbitrator could not attend the tribunal in The Hague because he was kidnapped. The remaining arbitrators, acting under the 1976 UNCITRAL Rules, continued with the proceedings and sat as a truncated tribunal.

² ICC Rules, Art 12(5) provides:

Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court

Whether to continue an arbitration with a truncated tribunal can trigger a debate over the correct balance between avoiding delays and excessive costs when an arbitrator withdraws and, conversely, potentially hindering a party's ability to participate effectively in the arbitration, because its co-arbitrator has disappeared.³ On the one hand, allowing a truncated tribunal to proceed with the arbitration could be an unfair and disproportionate response to a co-arbitrator's withdrawal from the proceedings. In addition, operating with a truncated tribunal departs from the parties' original agreement to have at minimum a three-arbitrator tribunal. There is thus an argument that to do so is unfaithful to the underlying principle of party autonomy in arbitration.⁴ On the other hand, provisions such as Article 11 ensure that the arbitration proceeds even if an arbitrator, without proper justification, fails to participate—in particular when this occurs for obstructive reasons. Thus Article 11 may save the parties the delay of a replacement process, and the potentially greater delay and cost of having to repeat part of the proceedings under Article 11(2). **11.04**

In light of these issues, some arbitration institutions expressly permit truncated tribunals to proceed to an award in limited circumstances, such as after the tribunal has formally closed the proceedings—that is, when the submission of further evidence is precluded, but before the award has issued.⁵ Other rules do not confer such powers on a truncated tribunal, but instead provide for the replacement of the defaulting arbitrator.⁶ **11.05**

The ICDR Rules adopt a broader approach than other institutions by permitting a truncated tribunal to act. Article 11, which entitles the two remaining arbitrators to proceed with the arbitration and to 'make any decision, ruling or award' without the third arbitrator, provides significant possibilities for a truncated tribunal to make an award.⁷ The two remaining arbitrators enjoy significant discretion in determining whether they want to stay the proceedings (and invoke Article 6 procedures for nominating a replacement) or whether they want to proceed with **11.06**

may decide, when it considers appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters as it considers appropriate in the circumstances.

³ GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,589.

⁴ *Ibid.*

⁵ *See eg* ICC Rules, Art 12(5) (leaving it to the discretion of the ICC Court to decide whether the remaining arbitrators shall continue with the arbitration). Therefore, prior to the close of the proceedings under the ICC Rules, the solution for an obstructing co-arbitrator is removal and replacement either by the ICC Court or by the party that nominated the original co-arbitrator: Y Derains and E Schwarz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International, The Hague, 2005) 205–06.

⁶ *See eg* LCIA Rules, Art 11.

⁷ *See* Born, *op cit.*

the case to an award. The truncated tribunal must take into account, however, whether the arbitration has already proceeded to an advanced stage, in accordance with Article 11. The more advanced the arbitration proceeding is, the more likely a delay without good justification will be (perceived as) disruptive, and as frustrating an efficient and expedient proceeding. The arbitrators are also asked to consider the justification offered by the defaulting arbitrator who fails to participate.

- 11.07** When exercising their discretion and considering the circumstances of the case, the remaining arbitrators may insist upon continuing only with a replacement arbitrator. In that case, the administrator is compelled ('shall') to appoint a replacement arbitrator pursuant to Article 6 (unless the parties agree otherwise). Although the administrator must do so only upon receiving 'proof satisfactory to it', suggesting that the last word in the matter is for the administrator, not for the truncated tribunal, in practice, the administrator follows the directions of the remaining arbitrators if it is evident that the third arbitrator will no longer participate in the arbitration.

B. Repeating previous hearings (Article 11(2))

ARTICLE 11(2)

If a substitute arbitrator is appointed under either Article 10 or Article 11, the tribunal shall determine at its sole discretion whether all or part of any prior hearings shall be repeated.

- 11.08** Article 11(2) allows the newly constituted tribunal to decide if, and to what extent, prior hearings should be repeated. The newly constituted tribunal can require the parties to repeat prior hearings, including witness examinations and oral arguments. The newly constituted tribunal has the sole discretion to decide and is likely to consider, but is under no obligation to solicit, the views of the parties.
- 11.09** As a general matter, leaving the discretion to the tribunal is a feature of the ICDR Rules that should preempt the application of any peculiar or nuanced procedural rules that might otherwise apply under national laws, such as the default rule in New York that would require a tribunal to be constituted anew upon the death of an arbitrator before the final award is rendered, as discussed above.⁸

⁸ US decisions under the FAA (which is silent regarding the consequences of replacing an arbitrator) have held that the death of an arbitrator before an award is rendered required repeating the entire arbitral process. See *eg Marine Prods Exp Corp v MT Globe Galaxy*, 977 F2d 66, 68 (2d Cir 1992) (requiring the panel to begin anew after the death of one of the arbitrators); *Cia de Navegacion Omsil, SA v Hugo Neu Corp*, 359 FSupp 898 (SDNY 1973) (holding that a new proceeding was appropriate upon the death of an arbitrator where the parties had not explicitly agreed on a method for replacing an arbitrator).

The recent discussion about replacement in the New York courts⁹ highlights the importance of parties' desire to choose their decision-makers and the potential abuse that can result from resignation. Clearly, a replacement arbitrator needs an opportunity to address and personally consider prior witness testimony and cross-examination. Merely consulting hearing transcripts and prior submissions poses problems of interpretation, denies the newly instated arbitrator an equal opportunity to weigh the credibility of such evidence and/or testimony, and is a second-best solution. **11.10**

Purely as a textual matter, Article 11(2) enables the newly constituted tribunal to decide what 'prior hearings' shall be 'repeated'. It is not as broadly worded as some other institutional rules that authorize the newly constituted tribunal to revisit prior 'proceedings'.¹⁰ While Article 11(2) is open to interpretation, it appears to allow the newly constituted tribunal to reconsider and repeat all procedural acts, and may permit it to revisit prior decisions or awards.¹¹ This may depend on the effects associated with the award or decision under the applicable *lex arbitri*, although Article 11(2) could also be interpreted as a contractually agreed-upon exception to any principle of *res judicata*.¹² **11.11**

With similar language, the 1976 UNCITRAL Rules required that all hearings previously held shall be repeated if the presiding (or sole) arbitrator is replaced.¹³ At least one commentator has interpreted this provision to mean that, while proceedings may be *repeated*, they are not to begin anew, and thus no new evidence or submissions may be presented.¹⁴ **11.12**

⁹ See also *Ins Co of North Am v Public Serv Mutual Ins Co*, No 09–3640-cv (2d Cir 23 June 2010); *Sec Ins Co of Hartford v Commercial Risk Reinsurance Co*, 2007 WL 4917787 (SDNY 8 May 2007) (acknowledging that the 'start over' rule applies in the context of resignation, but ultimately refusing to constitute a new panel because the resignation occurred prior to any substantive proceedings); *Home Ins Co v Banco de Seguros del Estado (Uruguay)*, 1999 US Dist LEXIS 22478, *4 (SDNY 17 February 1999) (stating, without analysis, that when an 'arbitrator dies or becomes incapacitated *in medias res* and the parties disagree as to how to proceed, the parties should begin arbitration anew'); *Nissho-Iwai Co v Chem Carrier, Inc*, 1993 WL 485614 (SDNY 23 November 1993) (holding that the entire panel must be reconstituted due to the resignation of one of the arbitrators, but without further analysis).

¹⁰ ICC Rules, Art 12(4) (stating that the newly constituted tribunal shall 'determine if and to what extent prior proceedings shall be repeated'); VIAC Rules, Art 18.2.

¹¹ Article 11(2) is based on Art 14 of the 1976 UNCITRAL Rules, providing that if the sole or presiding arbitrator is replaced, any prior hearings must be repeated, but if a party-appointed arbitrator is replaced, 'such prior hearings may be repeated at the discretion of the arbitral tribunal'.

¹² See ICC Case No 6476, 8(1) ICC Ct Bull 59 (1997); F Schwarz and N Allen, *Groundhog Day: Repeating Prior Proceedings After the Replacement of an Arbitrator* (in publication).

¹³ 1976 UNCITRAL Rules, Art 14. The 2010 UNCITRAL Rules, Art 15, simply provided that: 'If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.'

¹⁴ D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 325.

- 11.13** The reasons for removing the previous arbitrator may affect the nature and extent of the evidence needed to be re-presented. Accordingly, the newly constituted tribunal may also consider whether an arbitrator has been removed for lack of impartiality or independence, or some other misconduct, that may have tainted the previously conducted proceedings and thus justify their repetition.¹⁵
- 11.14** In any event, however, the newly constituted tribunal will need to balance the additional time and cost incurred through repeating hearings against the tribunal's duty to respect each party's right to be heard by an impartial, independent, and fully functioning tribunal, and to ensure, in so far as possible, that any award that it delivers is enforceable at law.

¹⁵ Ibid.