



# UNCITRAL Arbitration Rules 2010: A Review

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## Abstract

The United Nations Commission on International Trade Law Arbitration Rules, 1976 has been in vogue for more than a quarter century. Its success can be gauged from the range of its use in different types of arbitration. After more than thirty years of use, the UNCITRAL Arbitration Rules, 1976 were revised in 2010. In revising the rules, the UNCITRAL has followed a conservative approach but has taken into consideration the demands and developments of international arbitration. This paper analyses the revisions made to the 2010 rules.

**Keywords:** Ad Hoc Arbitration, International Commercial Arbitration, Investment Arbitration, UNCITRAL, UNCITRAL Arbitration Rules

## Introduction

For over three decades, the United Nations Commission on International Trade Law Arbitration Rules, 1976 (*hereinafter referred to as "old rules" or "UNCITRAL"*) have provided the procedural framework for ad hoc arbitrations throughout the world. Due to their popularity, several arbitral institutions have either based their rules on, or have agreed to administer arbitration or act as

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appointing authorities under, the UNCITRAL Arbitration Rules.<sup>1</sup> The old rules have also been used in several investment treaties<sup>2</sup> and in well known arbitrations.<sup>3</sup> For a long time, legal practitioners and academicians have wondered why UNCITRAL did not revise its Arbitration Rules, 1976 even though several arbitration institutions revised their rules from time to time.<sup>4</sup> According to Paulsson and Petrochilos, there were four reasons that necessitated a revision of the old rules<sup>5</sup>: (a) advances in arbitration practice since 1976; (b) the old rules were based on arbitration rules that are no longer in force<sup>6</sup>; (c) use of the old rules in context that were not

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<sup>1</sup> VIVIENNE M. ASHMAN, *THE UNCITRAL ARBITRATION RULES AND A REVIEW OF CERTAIN PRACTICES AND PROCEDURES*, 648 *PLI/Lit* 765, 795 (2001) (for a list of such institutions administering arbitration under the 1976 Rules).

<sup>2</sup> United Nations Conference on Trade and Development, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005), available at [http://www.unctad.org/en/docs/iteiit20054\\_en.pdf](http://www.unctad.org/en/docs/iteiit20054_en.pdf) (last visited Mar. 10, 2011) (suggesting that as of 2005, more than 74% of the Non-ICSID (International Centre for Settlement of Investment Disputes) investment disputes used the UNCITRAL Arbitration Rules, 1976.); see also *Energy Charter Treaty, 1994*; see also Chapter 11 of the *North American Free Trade Agreement, 1994*.

<sup>3</sup> US-Iran Claims Tribunal, The Hague, *UNCITRAL Arbitration Rules, 1976*, available at <http://www.iusct.org/tribunal-rules.pdf> (last visited Mar. 14, 2011).

<sup>4</sup> See Peiter Sanders, *Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?*, 20 *ARB. INT'L.* 243 (2004).

<sup>5</sup> Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (last visited Apr. 11, 2011).

<sup>6</sup> While preparing a draft version of the 1976 Rules, the Arbitration Rules of the United Nations Economic Commission of Europe, 1976 and the Rules of International Commercial Arbitration of the United Nations Economic Commission for Asia and the Far East were relied on. United Nations Commission on International Trade Laws, Report of the Secretary-General: Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade 164,

strictly “commercial” and consequent issues such as transparency, consolidation of claims etc. arose of out such use; and (d) the rules had to be consistent with the procedural standards that was developed in international arbitration in 1976.<sup>7</sup> Recognising this deficiency, the UNCITRAL decided to accord priority to the revision of the arbitration rules in its 39<sup>th</sup> session and mandated the Working Group on International Commercial Arbitration and Conciliation (*hereinafter referred to as “working group”*) to work on the same.<sup>8</sup> In its 45<sup>th</sup> session, the working group compared the UNCITRAL Arbitration Rules, 1976 with the arbitration rules of several other institutions and identified possible areas which required revision.<sup>9</sup> The working group examined the Arbitration Rules, 1976 in eight sessions and completed the UNCITRAL Arbitration Rules, 2010 (*hereinafter referred to as ‘2010 rules’*) after four years of deliberation. The 2010 rules were adopted by the UNCITRAL on June 25, 2010 and by the General Assembly of the United Nations on December 6, 2010.<sup>10</sup>

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A/CN.9/97, (Nov. 4, 1974), *available at* <http://www.uncitral.org/uncitral/en/commission/sessions/8th.html> (last visited Feb. 4, 2012).

<sup>7</sup> Paulsson & Petrochilos, *supra* note 5 at 1-3.

<sup>8</sup> United Nations Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session*, ¶ 184, A/61/17 (Jul. 14, 2006), *available at* <http://www.uncitral.org/uncitral/en/commission/sessions/39th.html> (last visited Feb. 6, 2013).

<sup>9</sup> See Andrew Ness, *Updating the UNCITRAL Arbitration Rules*, KLUWER CONSTRUCTION BLOG (Aug. 20, 2010), *available at* <http://kluwerconstructionblog.com/2010/08/30/updating-the-uncitral-arbitration-rules/> (last visited Feb. 6, 2013) (“The three purposes that the 2010 Rules seek to achieve are (i) ensure a speedier arbitral process, (ii) remove the defects under the Old Rules, and (iii) update the rules to take into considerations technological improvements.”).

<sup>10</sup> United Nations Commission on International Trade Law, 2010 – *UNCITRAL Arbitration Rules (as revised in 2010)*, *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html) (last visited Jan. 1, 2011).

The purpose of this paper is to comment on the distinctive features of the 2010 rules. The paper also attempts to elucidate the rationale underlying the new provisions of the 2010 rules by relating the same to the Travaux Préparatoires of the 2010 rules. The paper does not discuss those provisions of the 2010 rules which were in existence under the old regime.

2010 rules can be broadly classed into eight heads: provisions relating to (1) applicability of the rules, (2) submissions made in arbitration, (3) constitution of the arbitral tribunal, (4) conduct of arbitral proceedings, (5) applicable law, (6) interim measures, (7) arbitral award, and (8) costs.

## **Applicability of the Arbitration Rules**

### **Contractual Nature of Disputes**

Article 1(1) of the old rules declared that the rules were to be applicable when the parties to a contract had agreed that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, 1976. Although Article 1(1) restricted the applicability of the rules to contractual disputes, the old rules were used in a variety of non-contractual contexts such as disputes between investors and state<sup>11</sup>, and disputes between states.<sup>12</sup> Considering the extensive use of the rules in non contractual contexts, the working group was of the view that the rules should not unduly restrict their applicability to contractual disputes alone.<sup>13</sup> Accordingly, Article 1(1) of the 2010 rules clarifies that it would apply to the entire gamut of disputes between parties having defined legal relationships whether such relationships are contractual or not.

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<sup>11</sup> ASHMAN, *supra* note 1 at 795.

<sup>12</sup> United Nations Conference on Trade and Development, *supra* note 2.

<sup>13</sup> United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session ¶ 17, 32-34 A/CN.9/614, (Oct. 5, 2006), available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2A/rbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2A/rbitration.html) (last visited Jan. 1, 2012).

## Arbitration Agreement

The new arbitration rules contain a model clause, which is virtually similar to the model clause contained in the old rules. Additionally, the model clause in the 2010 rules contains a declaration by which the parties agree to waive any recourse against the arbitral award to the extent such waiver is valid under applicable law.<sup>14</sup> A note in the waiver statement explains that the waiver statement is effective only to the extent permitted by the applicable law.<sup>15</sup>

Article 1(1) of the old rules expressly required the parties to agree in writing that contractual disputes between them should be resolved in accordance with the UNCITRAL Arbitration Rules, 1976. The UNCITRAL had asked the working group to examine if the revised rules should contain the writing requirement, considering that arbitration rules of several institutions do not contain such a requirement.<sup>16</sup> During the initial stages of deliberations of the working group, it was suggested that the writing requirement should not be retained for four reasons. One, the question regarding the validity of an arbitration agreement was different from the question as to the applicability of the UNCITRAL Arbitration Rules, 2010 to resolve disputes. The UNCITRAL Arbitration Rules, 2010 only dealt with the latter and

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<sup>14</sup> UNCITRAL Arbitration Rules (The Waiver Statement Waiver: The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law).

<sup>15</sup> UNCITRAL Arbitration Rules (The Note appended to the Waiver Statement reads "Note: If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested [in the Waiver Statement] considering, however, that the effectiveness and conditions of such exclusion depend on the applicable law.").

<sup>16</sup> United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules: Note by the Secretariat ¶ 12-18, A/CN.9/WG.II/WP.143 (Jul. 20, 2006), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2A/rbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2A/rbitration.html) (last visited Jan. 21, 2012).

the former was defined in the applicable law. Two, several arbitral institutions did not provide for such a writing requirement. Three, if the revised rules prescribed that the agreement to apply UNCITRAL arbitration rules should be in writing, what amounted to agreement in writing had to be clearly defined. Such a definition of the form of arbitration agreement was 'beyond the usual scope of arbitration rules'.<sup>17</sup> Four, the working group felt that requiring the agreement to be in writing resulted in substantial amount of litigation on the nature of the requirement.<sup>18</sup> Against the deletion of the writing requirement, it was argued that such a provision would serve to remind the parties of the requirement in the applicable law that the validity of the arbitration agreement could depend on whether the agreement was in writing and that such a requirement would serve as the basis of the power of the appointing authority to appoint arbitrators.<sup>19</sup> In view of the considerable support to the deletion of the writing requirement<sup>20</sup>, the same has not been retained in the 2010 rules.<sup>21</sup> Although the 2010 rules do not require the arbitration agreement to be in writing, parties should take due care and has to set forth their agreement to arbitrate in writing as the applicable law might mandate the agreement to be in writing. It may be noted that Article 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (*hereinafter referred to as "New York Convention"*) requires that arbitration agreement should be in

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<sup>17</sup> United Nations Commission on International Trade Law, *supra* note 13 at 28- 30.

<sup>18</sup> United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth Session ¶ 29, A/CN.9/619 (Mar. 20, 2007), *available at* [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Feb. 6, 2013).

<sup>19</sup> United Nations Commission on International Trade Law, *supra* note 13 at 30.

<sup>20</sup> United Nations Commission on International Trade Law, *supra* note 18 at 31.

<sup>21</sup> UNCITRAL Arbitration Rules art. 1(1).

writing.<sup>22</sup> Therefore, absence of an agreement in writing to arbitrate might result in refusal to recognise or enforce the arbitral award.<sup>23</sup>

### **Applicable Version of the Rules**

When there was only one version of UNCITRAL Rules, 1976 it was not problematic insofar as reference to such rules were concerned. However, after the adoption of the 2010 rules, it became problematic when the parties failed to mention the version of the rules that they wished to adopt in their contract.<sup>24</sup> Article 1(2) of the 2010 Rules addresses this problem.

Accordingly, if the arbitration agreement is concluded after August 15, 2010, the UNCITRAL rules in force on the date of commencement of arbitration would govern the arbitration and even if the arbitration agreement is concluded after August 15, 2010, the parties might agree to apply a particular version of the UNCITRAL Rules (i.e., the old rules). Such a choice would be binding.

Where the arbitration agreement is concluded before August 15, 2010 without mentioning the applicable version of the UNCITRAL Rules, the old rules would apply.

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<sup>22</sup> New York Convention, art. II ("1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.").

<sup>23</sup> Matthew Skinner, Sam Luttrell et.al, *The UNCITRAL Arbitration Rules 2010*, 7 ASIAN INT'L ARB. J. 76, 79 (2011).

<sup>24</sup> Paulsson & Petrochilos, *supra* note 5 at 13-14 (stating that most investment treaties providing for resolution of disputes under the UNCITRAL Arbitration Rules do not make a mention of whether the Rules then in force would apply).

Where the arbitration agreement is concluded before August 15, 2010 but the arbitration agreement provides that the version of the UNCITRAL Rules, 2010 in force on the date of commencement of arbitration would apply, the 2010 rules would apply.<sup>25</sup>

Where the offer to arbitrate is made prior to August 15, 2010 but without mentioning the version of the rules and the acceptance is subsequent to August 15, 2010, the old rules would nevertheless apply.

## **Revisions relating to Submissions before Arbitration Tribunal**

### **Electronic Transmission of Notices and Communications**

The old rules did not contain provisions relating to valid transmission of notices, communications etc through electronic means as the technology was not in use in 1976. The 2010 rules lay down the framework of transmitting notices through such means. Paulsson & Petrochilos have suggested that delivery could be by an 'electronic means of communication' if it provided a 'durable record of dispatch and receipt'.<sup>26</sup> In this context, the influence of other UNCITRAL instruments on the 2010 rules needs to be noted.

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<sup>25</sup> See *Guaracachi America & Rurelec PLC v. Plurinational State of Bolivia* (Nov. 24, 2010), available at [http://www.italaw.com/sites/default/files/case-documents/ita0386\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0386_0.pdf) (last visited Oct. 9, 2010) (the Claimant invoked arbitration under the provisions of the US-Bolivia and the UK-Bolivia BITs and invited the parties to apply the 2010 Rules in respect of the arbitration, note 1, Notice of Arbitration); see also The UK-Bolivia BIT provided for the application of the UNCITRAL Rules in force on the date of expiry of six months from the Notice of Claim. As on that date, the 2010 Rules were in force. Consequently, the Tribunal applied the 2010 Rules; see also Terms of Appointment and Procedural Order No. 1, (Dec. 9, 2011), available at [http://www.italaw.com/sites/default/files/case-documents/ita0393\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0393_0.pdf) (last visited Oct. 9, 2012); see Paulsson & Petrochilos, *supra* note 5 at 15, for example, the Hong Kong SAR – Italy BIT (1995); United Kingdom of Great Britain and Northern Ireland – Bosnia and Herzegovina BIT (2002); and art. 8(2)(c) of the United Kingdom Model BIT (1991).

<sup>26</sup> Paulsson & Petrochilos, *supra* note 5 at 23.



The UNCITRAL rules have been updated keeping in mind the terminologies and the phrases used in the UNCITRAL Model Law on International Commercial Arbitration, 1985 (*hereinafter referred to as "model law"*) as well as the other texts/ instruments of UNCITRAL. As regards electronic transmission of notices, the working group was of the view that the revised rules should be "consistent with the terminology used in the existing instruments".<sup>27</sup> Therefore, the UNCITRAL decided to use the term 'electronic communication' as the same was used in the United Nations Convention on the Use of Electronic Communications in International Contracts. Thus, the 2010 rules require that the notice could be transmitted by any means whatsoever, provided such means of communication provided or allowed for a record of its transmission.<sup>28</sup>

### **Notice to Arbitration and Response**

Under the old rules, there was no option for the respondent to file a reply to the notice invoking arbitration. This, at times, denied the respondent an opportunity to comment on the jurisdiction, claim or the counter claim<sup>29</sup> and led to improper understanding of the dispute. The absence of such a provision also had an adverse impact on the possibility of amicable settlement of the dispute.<sup>30</sup> Hence, it was decided to allow the respondent to reply to the said notice. Accordingly, Article 4(3) of the 2010 rules provides that the respondent should communicate to the claimant the response to the notice of arbitration within thirty days from the receipt of the latter. The content of the response is virtually the same as that of the notice. In addition, the rules provide that the response may also include pleas objecting to the jurisdiction of the tribunal, proposal for designating the appointing authority, proposal for appointment

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<sup>27</sup> United Nations Commission on International Trade Law, *supra* note 18 at 50.

<sup>28</sup> UNCITRAL Arbitration Rules art. 2(1).

<sup>29</sup> United Nations Commission on International Trade Law, *supra* note 16 at 33.

<sup>30</sup> Paulsson & Petrochilos, *supra* note 5 at 5-6.

of sole arbitrator, brief description of counter-claims or claims for the purpose of set off, etc.<sup>31</sup>

### **Incomplete Notice/ Response**

While discussing the issue of incomplete notice or response, the working group was in favour of leaving its consequences to the arbitral tribunal rather than dealing with the same in the rules.<sup>32</sup> Therefore, the rules provide that a deficiency in the notice or the response would not affect the process of constitution of the arbitral tribunal. Once the tribunal is constituted, it would decide on the sufficiency of the notice of arbitration or the response to the notice of arbitration, as the case may be, and the consequence of incomplete notice or response.<sup>33</sup>

### **Legal Grounds in the Statement of Claim**

The 2010 rules require the statement of claim to contain particulars of arguments supporting the claim, apart from facts, questions at issue and the relief sought.<sup>34</sup> This requirement was not existent in the old rules. During the deliberations of the working group, it was initially suggested that the statement of claim should be accompanied by legal principles supporting the claim.<sup>35</sup> However, it was felt that the term 'legal principles' was too vague. Therefore, the working group decided to add the requirement of furnishing the legal grounds in the statement of claim.<sup>36</sup>

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<sup>31</sup> UNCITRAL Arbitration Rules art. 4(2).

<sup>32</sup> United Nations Commission on International Trade Law, *supra* note 13 at 54.

<sup>33</sup> UNCITRAL Arbitration Rules art. 3(5) and Art. 4(3).

<sup>34</sup> UNCITRAL Arbitration Rules art. 20(2).

<sup>35</sup> Paulsson & Petrochilos, *supra* note 5 at 90.

<sup>36</sup> United Nations Commission on International Trade Law, *supra* note 18 at 149-151.

## Basic Pleadings

As per Article 20(1) of the 2010 rules, the claimant has the option to treat the notice of arbitration as the statement of claim provided it complied with the requirements specified in Article 20(2) of the 2010 rules.<sup>37</sup> Similarly, Article 21(1) allows the respondent to treat its response to notice of arbitration as the statement of defence provided it complied with the requirement of statement of defence as laid down in Article 21(2).<sup>38</sup> The parties might adopt such a strategy to quickly resolve the dispute. Although the old rules allowed the claimant to treat the notice of arbitration as the statement of claim<sup>39</sup>, the 2010 rules makes it explicit that the notice of arbitration or the response, as the case may be, has to comply with the requirements of the rules relating to content of pleadings.

## Documents Relied upon in Pleadings

Under the Old Rules, it was not obligatory for the parties to annex the essential documents upon which they rely in their pleadings, the rationale being that the parties, especially the claimant, would be interested in concluding the proceedings as early as possible and would therefore annex such documents to their pleadings. The Secretariat of the UNCITRAL requested the working group in July 2006 to consider whether the parties should mandatorily annex all

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<sup>37</sup> The requirements stipulated in Article 20(2) explain that that the Statement of claim has to include the following: a) the names and contact details of the parties; (b) a statement of the facts supporting the claim; (c) the points at issue; (d) the relief or remedy sought; and (e) the legal grounds or arguments supporting the claim.

<sup>38</sup> The requirements stipulated in Article 21(2) explain that the Statement of Defence shall contain reply to the following: (i) a statement of the facts supporting the claim, (ii) the points at issue, (iii) the relief or remedy sought in the claim; and (iv) the legal grounds or arguments supporting the claim.

<sup>39</sup> UNCITRAL Arbitration Rules art. 18(1) (the Old Rules did not contain a provision whereby the Response to the Notice of Arbitration could be treated as the Statement of Defence as the old rules did not provide for a Response to the Notice of Arbitration).

documents along with their respective pleadings.<sup>40</sup> The Secretariat referred to the rules of World Intellectual Property Organisation<sup>41</sup> and the London Court of International Arbitration (*hereinafter referred to as "LCIA"*).<sup>42</sup> There were advantages in mandating the parties to produce the documents relied on by the parties along with their pleadings. Delays could be minimised and parties could easily determine their final positions which may result in eventual settlement. However, there might be justifiable reasons for a party to produce certain documents subsequent to exchange of pleadings. Considering this, the working group was of the following view:

“Concern was expressed that the use of the word “shall” suggest that the claimant would be obliged to communicate a comprehensive statement of claimant and would be precluded from providing subsequent materials. To address that concern, it was suggested that the word “shall” be replaced by “should” in order to establish a standard for the

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<sup>40</sup> United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶ 6- 7, A/CN.9/WG.II/WP.143/Add.1 (July 20, 2006) [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Jan. 21, 2012).

<sup>41</sup> Rules of the World Intellectual Property Organisation art. 41(c) (“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.”); Rules of the World Intellectual Property Organisation, art. 42(b) (“The Statement of Defense shall be accompanied by the corresponding documentary evidence described in Article 41(c).”).

<sup>42</sup> London Court of International Arbitral Rules art. 15.6, 1998 (“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 and exhibits.”).

contents of the statement of claim without imposing rigid consequences for departures from that standard.”<sup>43</sup>

Therefore, although the 2010 rules provide that the pleadings should be accompanied by the documents relied upon by the parties; they do not compel the parties to produce at the outset all the documents relied upon by them.<sup>44</sup>

### **Counter Claim to be Made in Respect of the Same Contract**

In the old rules, Article 19(3) imposed a condition that a counter claims or a claim for set off should be based on the contract in respect of which the claim was made.<sup>45</sup> The Secretariat to the UNCITRAL, citing Article 21(5) of the Swiss Rules<sup>46</sup>, suggested that the tribunal should have the power, especially in investment disputes, to consider counter claims and claims for set off even beyond the contract in respect of which the dispute is referred to the tribunal.<sup>47</sup> Ultimately, the requirement under Article 19(3) of the old rules was done away with.

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<sup>43</sup> United Nations Commission on International Trade Law, *supra* note 18 at 153.

<sup>44</sup> UNCITRAL Arbitration Rules art. 20(4) & art. 21(2).

<sup>45</sup> See *Polis Fondi Immobiliari Di Banche Popolare Sgr. P.A v. International Fund for Agricultural Development* at 191, available at [www.pca-cpa.org/showfile.asp?fil\\_id=1510](http://www.pca-cpa.org/showfile.asp?fil_id=1510) (last visited Mar. 15, 2011); see also Alson Dundes Renteln, *Encountering Counterclaims*, 15 DENV. J. INT'L L. & POL'Y 379, 389-390 (1986-1987); see Paulsson & Petrochilos, *supra* note 5 at 92-93.

<sup>46</sup> Swiss Rules of International Arbitration art. 21(5) (“The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.”).

<sup>47</sup> United Nations Commission on International Trade Law, *Possible Future Work in the Area of International Commercial Arbitration*, ¶ 76, A/CN.9/460 (Apr. 6, 1999), available at <http://www.uncitral.org/uncitral/en/commission/sessions/32nd.html> (last visited Feb. 6, 2013); United Nations Commission on International Trade Law, *supra* note 16 at 8-10.

## Revisions relating to Constitution of the Arbitral Tribunal

### Appointing Authority

Under the old rules, in case of failure of the party-appointed procedure for constituting the arbitral tribunal, the parties could approach the Secretary General of the Permanent Court of Arbitration (*hereinafter referred to as "PCA"*) at The Hague for aiding the parties in constituting the tribunal.<sup>48</sup> The role of the Secretary General of the PCA was to designate an appointing authority which would complete the process of constitution of the arbitral tribunal. While the UNCITRAL was working on the revision of the rules, there were proposals, supported by the representatives of the PCA in the working group, for making the PCA as the default appointing authority rather than mandating the PCA to designate an appointing authority.<sup>49</sup> Need for a simple, efficient, and streamlined procedure was the argument given in support of the said proposal. Conversely, the working group felt that the existing procedure had been in vogue for several decades and "the proposal [to make the PCA the appointing authority] constituted a major and unnecessary departure from the existing UNCITRAL Arbitration".<sup>50</sup> The working group also viewed it as a 'political' issue and considered the UNCITRAL to be the appropriate body to take such a decision. The UNCITRAL felt that the PCA should not be the default appointing authority for three reasons; one, the PCA did not have the experience as compared to other arbitral institutions in administering international commercial arbitrations; two, several arbitral institutions were administering arbitrations based on the UNCITRAL arbitration rules, considering its appeal across legal cultures; three, the existing procedure did not appear

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<sup>48</sup> UNCITRAL Arbitration Rules art. 6 and art. 7.

<sup>49</sup> United Nations Commission on International Trade Law, *Report of the Working Group II (Arbitration and Conciliation) on the Work of its Forty-Ninth Session*, ¶ 46-50, A/CN.9/665, available at [http:// www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (Sep. 30, 2008).

<sup>50</sup> *Id.* at 49.

to create drastic delays.<sup>51</sup> UNCITRAL's conclusion does not appear to be guided by lack of confidence in the PCA but "by concerns about a loss of flexibility in choosing appointing authorities that are able to identify the best arbitrators for particular cases or in particular regions."<sup>52</sup> The working group clarified that the Secretary General of the PCA could appoint himself as the appointing authority if one of the parties proposed his name as one of the appointing authorities.<sup>53</sup>

It makes sense from the perspective of efficiency and economy for the parties to designate an appointing authority in case they opt for UNCITRAL Arbitration Rules, 2010.<sup>54</sup> This is the reason why the Model Arbitration Clause for the UNCITRAL Arbitration Rules, 1976 expressly provides for the designation of the appointing authority.

### **Time Limit for Constituting the Tribunal**

The old rules granted sixty days time for the appointing authority nominated by the parties to appoint the arbitrator.<sup>55</sup> This time limit has been reduced to thirty days.<sup>56</sup> Further, the old rules did not provide for a time limit within which the appointing authority

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<sup>51</sup> James Castello, *Plus ça change, plus c'est la même chose: Eight Revisions not Adopted in the 2010 UNCITRAL Rules*, 28 ASA BULL. 855 (2010).

<sup>52</sup> *Id.* at 857.

<sup>53</sup> See United Nations Commission on International Trade Law, *supra* note 49 at 51; see also UNCITRAL Arbitration Rules art. 6(1) (it allows the Secretary General of the PCA to appoint himself as the appointing authority if requested by one of the parties).

<sup>54</sup> Thomas H. Oehmke, *Appendix B5. Procedures for Cases under the UNCITRAL Arbitration Rules*, CMLARB APP B5 (2005) (arguing that cases under the UNCITRAL Arbitration Rules will proceed more efficiently when parties designated an appointing authority in their contract).

<sup>55</sup> UNCITRAL Arbitration Rules art. 6(2), 1976.

<sup>56</sup> UNCITRAL Arbitration Rules art. 6(4); Stephen L. Drymer, *The Revised 2010 UNCITRAL Arbitration Rules: New Rules / New Roles for Designating and Appointing Authorities*, 28(4) ASA BULL. 869, 873 (2010).

designated by the PCA should appoint the arbitrator.<sup>57</sup> This omission was regarded as a drafting error.<sup>58</sup> The 2010 rules provide for a thirty day time limit for the appointing authority to act on the request for appointment.<sup>59</sup>

It appears that the 2010 rules offer a prominent role to the appointing authority as compared to the old rules.<sup>60</sup> This has, according to commentators, led to 'semi institutionalisation' of arbitration under the 2010 rules.<sup>61</sup>

### **Opportunity to Present Views on Appointment**

Article 6(5) of the 2010 rules empowers the appointing authority and the Secretary General of the PCA to require any party and the arbitrators to furnish information they deem necessary. This provision also mandates the appointing authority and the Secretary General of the PCA to give an opportunity to the parties and the arbitrators to present their views on any relevant matter such as the number of arbitrators, appointment of arbitrators, challenges to arbitrators, replacement of arbitrators and resolution of issues relating to the fees and expenses of arbitrators.<sup>62</sup> Further, Article 6(5) requires that the communications to and from the appointing authority and the Secretary General of the PCA are to be provided by the sender to all the other parties to the arbitration agreement.

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<sup>57</sup> John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2236-2237 (1994).

<sup>58</sup> *Id.*

<sup>59</sup> UNCITRAL Arbitration Rules art. 6(4).

<sup>60</sup> See *infra* notes 199-207.

<sup>61</sup> Justice Clyde Croft, *The Revised UNCITRAL Arbitration Rules of 2010: A Commentary*, VIC. J. SCHOL. 12, 6 (2010), available at [www.austlii.edu.au/au/journals/VicJSchol/2010/12.pdf](http://www.austlii.edu.au/au/journals/VicJSchol/2010/12.pdf) (last visited Feb. 25, 2012); see Drymer, *supra* note 56 at 877; see Skinner, Luttrell, et.al, *supra* note 23 at 79.

<sup>62</sup> Drymer, *supra* note 56 at 873.



## Number of Arbitrators

Like in the previous version of the rules, the default number of arbitrators in the present rules is three. The working group deliberated on the suggestion to have one arbitrator as the default arbitrator.<sup>63</sup> It was suggested that a single arbitrator tribunal was less expensive than a three member tribunal. Another advantage was that the constitution of the tribunal became simpler and swifter with a single arbitrator.<sup>64</sup> The working group also considered the practice of arbitral institutions like LCIA, American Arbitration Association (*hereinafter referred to as "AAA"*), etc. which gave preference to sole arbitrators. It may be noted that in the previous rules, the default number was three. The same practice was retained in the model law as well. The UNCITRAL felt that a three member tribunal was in vogue for several decades and therefore ought to be continued in the 'interests of familiarity'. Hence, Article 7(1) provides for a three member arbitral tribunal by default, subject to the agreement between the parties for appointment of a sole arbitrator.<sup>65</sup>

Article 7(2) is a novel provision intended to reduce the burden of costs on the claimant in case where the dispute is such that a resolution of the same by a single arbitrator tribunal would be more appropriate. The appointing authority would help constitute a sole arbitrator instead of a three member tribunal on the satisfaction of the following conditions: (i) the party issuing the notice of arbitration proposes a single member tribunal; (ii) the

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<sup>63</sup> United Nations Commission on International Trade Law, *supra* note 13 at 59-61; *see* United Nations Commission on International Trade Law, *supra* note 16 at 42-44.

<sup>64</sup> DAVID D. CARON, LEE M. CAPLAN, et. al., THE UNCITRAL ARBITRATION RULES 171-172 (2006) (arguing that a three member tribunal was preferable to a single member tribunal).

<sup>65</sup> Castello, *supra* note 51 at 859 ("Not only has this provision of the Rules remained essentially unchanged, but the same debate underlying it has persisted for more than three decades!") (it appears that the same debate on the number of arbitrators took place even at the time of drafting of the 1976 Rules).

recipient of the notice invoking arbitration neither responds to the proposal for appointment of the sole arbitrator nor appoints the second arbitrator; (iii) a request is made by a party to the appointing authority to consider appointing a sole arbitrator; and (iv) the appointing authority comes to a conclusion that it would be more appropriate to appoint a sole arbitrator instead of constituting a three member tribunal. The UNCITRAL Arbitration Rules, 1976 are used in several *ad hoc* arbitration agreements and disputes that may arise in respect of such agreements which would not require a three member tribunal. In such cases, this provision affords a certain amount of flexibility and enables the parties to have a cost effective arbitration.

### **Appointment of Arbitrators in Multi Party Arbitration**

Article 10 of the 2010 rules deals with multi-party arbitration. In agreements with more than two parties<sup>66</sup>, constitution of the arbitral tribunal through consensus becomes a challenge in view of the number of parties involved. Parties might feel it expensive to have an arbitral tribunal with more than three members, with each party to the agreement appointing the arbitrators and the arbitrators so appointed nominate arbitrators leading to a tribunal having odd number of arbitrators. The 2010 rules provide the most common solution to deal with the constitution of arbitral tribunal in multi party arbitrations; appointment of a three member tribunal in which the joint claimants would appoint one arbitrator, the joint respondents appoint another and the arbitrators so appointed would appoint the third arbitrator.<sup>67</sup>

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<sup>66</sup> Paulsson & Petrochilos, *supra* note 5 at 7 (between 2002 and 2005, about one-third of the cases that ICC's International Court of Arbitration administered were multi-party arbitrations).

<sup>67</sup> UNCITRAL Arbitration Rules art. 10(1). (such a clause is known as the "Pertamina Clause").

## **Power of the Tribunal to Revoke and Reappoint**

At times, parties to a multipartite agreement might have agreed for more than three arbitrators.<sup>68</sup> In such a case, parties have to necessarily specify the procedure for appointment in their arbitration agreements.<sup>69</sup> If no such procedure is agreed, the appointing authority would constitute the entire arbitral tribunal by itself and designate one arbitrator so appointed as the presiding arbitrator.<sup>70</sup> In doing so, the tribunal has the power to revoke an appointment made earlier by a party or reappoint an arbitrator already appointed earlier by a party.<sup>71</sup>

## **Impartiality and Independence of the Arbitral Tribunal**

The provisions on independence and impartiality of the arbitral tribunal have undergone substantial revision in the 2010 rules. The revisions are given below:

- a) Under the old rules the prospective arbitrator was only bound to disclose circumstances that were likely to give justifiable doubts as to his or her independence or impartiality to the parties.<sup>72</sup> Additionally, the 2010 rules

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<sup>68</sup> This is common in the case of tripartite agreements where each party to the tripartite agreement appoints one arbitrator and the three arbitrators so appointed appoint two arbitrators, resulting in a five member tribunal. Such clauses are found typically in agreements with high stakes. In tripartite agreements of a smaller scale, it is better to adopt a procedure similar to Article 10(1) of the 2010 Rules, primarily because it is relatively less expensive.

<sup>69</sup> UNCITRAL Arbitration Rules art. 10(2).

<sup>70</sup> UNCITRAL Arbitration Rules art. 10(3); *see* Skinner, Luttrell, et. al., *supra* note 23 at 84-85 (criticizing such a clause as affording incentive to the respondent not to appoint an arbitrator and making the tribunal constitute the entire tribunal thereby denying the Claimant the right to appoint an arbitrator of its choice).

<sup>71</sup> UNCITRAL Arbitration Rules art. 10(3).

<sup>72</sup> UNCITRAL Arbitration Rules art. 9, 1976.

mandate the prospective arbitrator to disclose such circumstances to all the members of the arbitral tribunal.

- b) Further, the 2010 rules clarifies that the above said obligation subsists right from the time when a party approaches the prospective arbitrator till the end of arbitral proceedings.<sup>73</sup>
- c) Unlike the model law<sup>74</sup>, the old rules were not clear as to whether such obligation was a continuing obligation. The 2010 rules clarify that the obligation is ongoing.<sup>75</sup>
- d) The working group also thought it fit to consider if the disclosure of such circumstances should be in writing.<sup>76</sup> It was proposed to have a model statement of declaration of disclosure of circumstances likely to give justifiable doubts as to the independence or impartiality of the arbitrator.<sup>77</sup> The working group accepted the proposal and adopted two statements, one containing a declaration that there was no such circumstance to disclose, and the other providing that notwithstanding any past circumstances, the arbitrator

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<sup>73</sup> UNCITRAL Arbitration Rules art. 11.

<sup>74</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 12(1).

<sup>75</sup> See United Nations Commission on International Trade Law, *supra* note 13 at 64; United Nations Commission on International Trade Law, *supra* note 16 at 48 (for the views of the UNCITRAL and the Working Group on the continuing obligation to disclose); see Skinner, Luttrell, et.al., *supra* note 23 at 86 (tracing the origins of the continuing obligation to disclose and arguing that such a provision would improve efficiency and fairness of the arbitral proceedings).

<sup>76</sup> United Nations Commission on International Trade Law, *supra* note 16 at 48.

<sup>77</sup> United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶ 49-50, A/CN.9/WG.II/WP.145 (Dec. 6, 2006), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Feb. 6, 2013).

would act in an independent and impartial manner.<sup>78</sup> The purpose of the second statement was that even if there were circumstances that were likely to give justifiable suspicions of independence or impartiality of the arbitrator, the parties could decide whether to appoint a new arbitrator or to continue with the existing arbitrator.

- e) In the fifty second session of the working group, a proposal was mooted to have a statement by the arbitrator of the readiness to conduct the arbitration diligently, efficiently and in accordance with the UNCITRAL Rules, 2010.<sup>79</sup> The proposal was accepted and the statement was incorporated as a part of the annex to the rules.<sup>80</sup>

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<sup>78</sup> UNCITRAL Arbitration Rules (“Model statements of independence pursuant to Article 11 of the Rules:

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.”).

<sup>79</sup> United Nations Commission on International Trade Law, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat* ¶ 33, A/CN.9/WG.II/WP.157/Add.2 (Dec. 10, 2009), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2A\\_arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2A_arbitration.html) (last visited Feb 6, 2013).

<sup>80</sup> UNCITRAL Arbitration Rules (the Model Statements provided for in Article 11 are as follows: “Model statements of independence pursuant to Article 11 of the Rules: Any party may consider requesting from the

## Challenge of Appointment of Arbitrator

The provisions in the 2010 rules relating to the challenge of an arbitrator are virtually similar to the old rules. However, there is an addition to the 2010 rules. Where an appointment of an arbitrator is challenged by a party and the challenge is notified to the tribunal and to other parties, fifteen days time has been given under the 2010 rules for (a) the parties to agree to the challenge, and (b) the challenged arbitrator to withdraw. If neither of these happens, the challenging party is free to pursue the challenge and seek a decision from the tribunal on the challenge within thirty days from the date of the notice of the challenge.<sup>81</sup>

## Replacement of Arbitrator

The provisions pertaining to replacement of arbitrator have been streamlined. The procedure of appointment of the substitute arbitrator would be the same as that of the appointment of an arbitrator. However, if the appointing authority is of the opinion that it ought to deprive a party of its right to appoint a substitute arbitrator, it may do so. In that case, the appointing authority might, after giving opportunity of being heard to the parties and after obtaining the views of the arbitrators, either appoints a substitute arbitrator or if the need for replacement arises after the hearing is complete, authorise the existing tribunal to continue with the arbitral proceedings without appointing another arbitrator.<sup>82</sup>

## Truncated Arbitral Tribunal

The position under the old rules was that the hearing would have to commence afresh if the sole arbitrator or the presiding arbitrator

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arbitrator the following addition to the statement of independence: I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.”).

<sup>81</sup> UNCITRAL Arbitration Rules art. 13(4).

<sup>82</sup> UNCITRAL Arbitration Rules art. 14(2).

had to be replaced.<sup>83</sup> In case of replacement of other arbitrators, it was the discretion of the arbitral tribunal to decide to commence fresh proceedings or to continue with the proceedings.<sup>84</sup> During the deliberations of the working group, it was suggested that the new provisions pertaining to repetition of hearings due to replacement of arbitrators be based on Article 14 of the Swiss Rules of International Arbitration.<sup>85</sup> The suggestion was accepted and the relevant provision in the 2010 rules is based on the said provision of the Swiss rules. Thus, under the UNCITRAL Rules, 2010 the distinction between the presiding arbitrator and the other arbitrators has been abolished. The procedure under the 2010 rules is that the proceedings would continue from the stage when the replaced arbitrator ceased to perform his functions, unless the arbitral tribunal decides otherwise.<sup>86</sup>

## **Revisions on Conduct of Arbitral Proceedings**

### **Tribunal to act in a fair and efficient manner**

One of the most fundamental provisions under the old rules, was the directive in Article 15(1) to the tribunal to act fairly and give the parties full opportunity to present their case.<sup>87</sup> In its working, the

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<sup>83</sup> UNCITRAL Arbitration Rules art. 14, 1976 (Article 14 of the 1976 Rules did not provide for the entire arbitration proceedings to be repeated. For instance, it did not contemplate that the parties should exchange pleadings once again or lead evidence before the replaced arbitrator. It merely provided that the oral presentations made before the arbitrators were to be repeated before the sole or the presiding arbitrator); Caron, *supra* note 64 at 325.

<sup>84</sup> Caron, *supra* note 64 at 323-328 (for a discussion on the rationale in the 1976 Rules for providing for re-hearing in case of replacement of the sole arbitrator or the presiding arbitrator).

<sup>85</sup> Swiss Rules of International Arbitration art. 14 (“If an arbitrator is replaced, the proceedings shall as a rule resume at the stage where the arbitrator who was replaced ceased to perform his functions, unless the arbitral tribunal decides otherwise.”).

<sup>86</sup> UNCITRAL Arbitration Rules art. 15, 1976.

<sup>87</sup> UNCITRAL Arbitration Rules art. 15(1), 1976.

provision presented a problem: it mandated the tribunal to afford 'full opportunity' to the parties 'at any stage of the proceedings'. The rule could be interpreted to give a party the unbridled right to insist on hearings and emasculated the arbitral tribunal's power to decide on the appropriateness of a request for hearing.<sup>88</sup> If the tribunal rejected such a request on the ground that the hearing was unnecessary, the award could be challenged for denying the party 'full opportunity' to present its case.<sup>89</sup> The working group considered whether the term 'full' had to be deleted from the said provision.<sup>90</sup> Secondly, it was suggested that the phrase 'at any stage of the proceedings' implied that the tribunal should grant an opportunity to a party to present its case at any stage, even if such a request by that party was inappropriate.<sup>91</sup> Finally it was decided to use the term 'reasonable' in lieu of 'full' and the phrase 'at an appropriate stage of proceedings' in lieu of 'at any stage of the proceedings'. Further, the rules attempt to create a balance between fairness and efficiency by mandating the tribunal to avoid

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<sup>88</sup> Daria Kozłowska, *The Revised UNCITRAL Arbitration Rules Seen through the Prism of Electronic Disclosure*, 28 J. INT'L ARB. 51, 55 (2011) (the drafters intended that in case a party insisted on unnecessary hearings, the cost of the same would be assessed on such party. This, according to the drafters, acted as a negative incentive on such party.); see United Nations Commission on International Trade Law, *Report of the Secretary General (Addendum): Suggested Modifications to the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules)* ¶ 15, A/CN.9/97 Add. 2, (Mar. 6, 1975), <http://www.uncitral.org/uncitral/en/commission/sessions/8th.html> (last visited Feb. 17, 2012).

<sup>89</sup> Caron, *supra* note 64 at 47-48.

<sup>90</sup> *Supra* note 13 at 76-77.

<sup>91</sup> *Id.* (the phrase "at any stage of proceedings" was dropped in the analogous provision in the Model Law.); UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.").



unnecessary delay and expenses and provide for a fair and efficient arbitral process.<sup>92</sup>

### **Preliminary Hearing**

Arbitrators generally hold preliminary hearings<sup>93</sup> to determine several fundamental aspects pertaining to arbitration such as the language of arbitration, the governing law of arbitration, the law of contract, the procedure for arbitration, time limits for submissions of pleadings, fee of arbitrators etc. Sometimes, preliminary hearings are also useful in narrowing down the issues and enabling the parties in exploring the possibility of settlement.<sup>94</sup> Considering its usefulness, it was suggested that the revised rules should provide for preliminary hearing.<sup>95</sup> The 2010 rules provide for such a hearing to be conducted by the tribunal but merely for deciding the provisional time table of the arbitration, after hearing the views of the parties.<sup>96</sup> This provisional time table is not meant to be sacrosanct and the tribunal may, after hearing the parties, extend or shorten time periods specified in the provisional time table.

### **Waiver of Right to Object**

The provision pertaining to waiver of the right to object to any noncompliance has been substantially reworded in the 2010 rules.<sup>97</sup> Following are the changes:

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<sup>92</sup> UNCITRAL Arbitration Rules art. 17(1); Kozłowska, *supra* note 89 at 57.

<sup>93</sup> (Preliminary hearings are also known as preparatory meetings or preparatory consultations).

<sup>94</sup> Caron, *supra* note 64 at 49-50.

<sup>95</sup> Sanders, *supra* note 4 at 246-247; Paulsson & Petrochilos, *supra* note 5 at 66-67.

<sup>96</sup> UNCITRAL Arbitration Rules art. 17(2). *see* Kozłowska, *supra* note 89 at 61 (arguing that the provision in the 2010 Rules on preliminary hearing would result in identifying the real issues in the dispute and better co-operation between the parties).

<sup>97</sup> UNCITRAL Arbitration Rules art. 32.

- a) The provision relating to waiver of right to object to a noncompliance of the arbitration agreement was nonexistent in the old rules.<sup>98</sup> This has been incorporated in the 2010 rules.
- b) The relevant provision in the old rules has been reworded to align it with the corresponding provision in the model law on the waiver of right to object.<sup>99</sup>
- c) During the discussions in the working group, it was observed that the old rules and the model law did not contemplate a situation where there were legitimate grounds for a party not to object to noncompliance.<sup>100</sup> Views were expressed that in such a case, the party having legitimate grounds for not objecting to noncompliance should be protected. The working group suggested that in such cases, the party should have a reverse burden of proof of the existence of those legitimate grounds.<sup>101</sup> Thus, in case a party did not object to noncompliance, the arbitral tribunal would treat the same as a waiver, unless the said party can prove that there were legitimate grounds for not objecting to the noncompliance. After discussions, the working group decided to adopt the above proposal.

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<sup>98</sup> UNCITRAL Arbitration Rules art. 30, 1976.

<sup>99</sup> UNCITRAL Model Law on International Commercial Arbitration art. 4, 1985 (“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”).

<sup>100</sup> United Nations Commission on International Trade Law, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-First Session* ¶ 47 A/CN.9/684 (Nov. 10, 2009), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Feb. 6, 2013).

<sup>101</sup> *Id.* at 49.

## Joinder of Third Parties

Right from the beginning, the working group, inspired by the LCIA Arbitration Rules<sup>102</sup>, felt that the 2010 rules should contain a provision on joinder of third parties.<sup>103</sup> Considerable discussions took place on the necessity of consent of the party who is to be joined as a party (*hereinafter referred to as "proposed party"*). The working group was of the opinion that the consent of the proposed party must necessarily be taken in view of the fact that arbitration is consensual.<sup>104</sup> Hence, the working group noted that the proposed party must necessarily be a party to the arbitration agreement. The working group also noted that express consent of the proposed party independent of the arbitration agreement was unnecessary; by the mere fact of acceding to the rules, the party is deemed to have consented to joinder.<sup>105</sup> Apprehensions were raised that in the absence of express consent from the proposed party, it may lead to problems at the stage of enforcement of the award. Hence, the working group decided to incorporate a safety valve for the proposed party before the tribunal decide on the joinder, a party

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<sup>102</sup> London Court of International Arbitration Rules art. 22, 1998 ("Unless the parties at any time 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:... (h) to allow, only 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.").

<sup>103</sup> United Nations Commission on International Trade Law, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat* ¶ 6, A/CN.9/WG.II/WP.145/Add.1 (Dec. 6, 2006), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Feb. 6, 2013).

<sup>104</sup> United Nations Commission on International Trade Law, *supra* note 18 at 121-126.

<sup>105</sup> United Nations Commission on International Trade Law, *supra* note 49 at 128 -135.

(including the proposed party) is entitled to submit to the tribunal that the joinder would be prejudicial to its interests.<sup>106</sup>

Thus, as per Article 17(5) of the 2010 rules, three conditions must be satisfied to join one or more third parties to the arbitration proceedings: (i) there must be a request from one of the parties, (ii) the proposed party is a party to the arbitration agreement<sup>107</sup>, and (iii) after giving an opportunity of being heard to all parties (including the proposed party) the tribunal is of the opinion that the joinder would not prejudice any party.

### **Consolidation of Arbitration Proceedings**

The working group also deliberated on incorporating provisions relating to consolidation of arbitration proceedings. It was suggested that the rules should provide for consolidation of arbitrations for reasons of efficiency and prevention of inconsistent awards in cases where several distinct disputes arose between the same parties but under different agreements and in situations where a separate arbitration is invoked for distinct claims under the same agreement.<sup>108</sup> The suggestion was rejected as doubts were raised about the workability of such a provision considering the complex issues it raised and the unfair solutions it resulted in.<sup>109</sup>

### **Venue of Arbitral Proceedings**

The difference between the seat of arbitration and the location of the arbitration proceedings is firmly established in the jurisprudence of international commercial arbitration. Seat or the juridical seat of arbitration refers to the jurisdiction to which the

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<sup>106</sup> *Id.* at 134.

<sup>107</sup> London Court of International Arbitration Rules, 1998, art 22.1(h); Castello, *supra* note 51 at 860.

<sup>108</sup> United Nations Commission on International Trade Law, *supra* note 18 at 117; United Nations Commission on International Trade Law, *supra* note 13 at 79. Castello, *supra* note 51 at 861.

<sup>109</sup> United Nations Commission on International Trade Law, *supra* note 18 at 119.

arbitration is intrinsically connected. Arbitration cannot be delocalised i.e. it cannot be one which is unconnected to a legal jurisdiction.<sup>110</sup> It has to belong to a jurisdiction, which is either agreed to by the parties or in the absence of such agreement, determined by the arbitral tribunal. However, the tribunal may assemble for hearing in one or more locations during the course of arbitration for the sake of convenience. The latter affords certain amount of flexibility to the arbitral process. In practice, 'seat' and 'location' of arbitration are used interchangeably. Hence, the working group initially felt that the distinction must be clearly spelt out in the revised rules.<sup>111</sup> Subsequently, however, the working group expressed doubts as to whether the revised rules should contain terminology inconsistent with that of the model law.<sup>112</sup> Another concern raised against clarification of the difference was that it might have "unintended consequences to existing contractual drafting practices".<sup>113</sup> Therefore, the suggestion to clarify the difference between the juridical seat and the location of arbitration proceedings was not carried forward.

### **Discretion to Hold Proceedings in Places other than the Seat of Arbitration**

Under the old rules, the tribunal had the discretion to hold its proceedings at a location different from the seat for the purposes of (a) hearing witnesses, (b) consultation among members of the tribunal, and (c) inspection of goods, other property or documents.<sup>114</sup> Nevertheless, it has been argued that the old rules

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<sup>110</sup> Jan Paulsson, *Arbitration in Three Dimensions*, [http:// papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1536093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536093) (last visited on Feb. 17, 2012).

<sup>111</sup> United Nations Commission on International Trade Law, *supra* note 16 at 75-76; Paulsson and Petrochilos, *supra* note 5 at 80-81.

<sup>112</sup> United Nations Commission on International Trade Law, *supra* note 13 at 89.

<sup>113</sup> United Nations Commission on International Trade Law, *supra* note 18 at 141.

<sup>114</sup> UNCITRAL Arbitration Rules art. 16(2) and art. 16(3), 1976.

provided 'limited flexibility' as regards proceedings that could be held in places distinct from the seat.<sup>115</sup> Therefore, Article 18(2) of the 2010 rules is cast in a language wider than its predecessor and empowers the tribunal to hold any proceedings in places other than the seat.

### **Award Deemed to be made in Place of Arbitration**

The old rules required that the award be made in the place of arbitration.<sup>116</sup> This resulted in difficulty to arbitrators who were located in different places and for the parties as they had to bear the additional costs involved in the arbitrators making the award in the place of arbitration. In some instances, the arbitrators signed the award with the mention of the place of arbitration but did not actually make the award in the place of arbitration. This, obviously, led to uncertainties.<sup>117</sup> Therefore, the 2010 rules do not contain such a requirement.

### **Termination of Arbitral Proceedings**

The old rules provided that before the making of the final award if the tribunal considered it unnecessary or impossible to proceed with the arbitration, the tribunal would have the power to terminate the arbitration proceedings after informing the parties of its intention to do so unless the parties raise justifiable grounds against the termination.<sup>118</sup> In the 2010 rules, the justifiable grounds exception has been done away with. Instead, Article 36(2) of the 2010 rules provides that the tribunal shall have the power to issue an order terminating the proceedings unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate that those matters need to be decided.

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<sup>115</sup> Caron, *supra* note 64 at 95-97.

<sup>116</sup> UNCITRAL Arbitration Rules art. 16(4), 1976.

<sup>117</sup> Caron, *supra* note 64 at 97-98.

<sup>118</sup> UNCITRAL Arbitration Rules art. 34(2).

## Revisions on Law Applicable in the Arbitration

### Substantive Law of Contract

The old rules provided that in case the parties did not designate the substantive law of the contract, the tribunal had the power to decide the substantive law of contract based on the conflict of laws rules which the tribunal considered apposite.<sup>119</sup> The 2010 rules make no reference to conflict of laws rules. As regards the situation where the parties failed to designate the substantive law of contract, the working group considered two options. One was to retain the corresponding provision in the old law. The second option was to allow the tribunal to directly designate the substantive law of contract without any reference to conflict of laws rules. The rationale behind the second approach was that the tribunal must be given an opportunity to decide directly on the substantive law of contract, especially in view of the possibility of application of several non national instruments<sup>120</sup> where there would be no requirement of reference to conflict of laws rules.<sup>121</sup> The second approach received wide support. Consequently, the 2010 rules do not require the tribunal to refer to conflict of laws provisions in order to determine the substantive law of contract.<sup>122</sup>

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<sup>119</sup> UNCITRAL Arbitration Rules art. 33(1), 1976.

<sup>120</sup> Examples of such non-national instruments are the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Incoterms, the Uniform Customs and Practices for Documentary Credit, *lex mercatoria*, etc.

<sup>121</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session* ¶ 106-112, A/CN.9/641 (Sep. 25, 2007), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) (last visited Feb. 6, 2013).

<sup>122</sup> UNCITRAL Arbitration Rules art. 35.

## Power to Decide Ex Aqueo Et Bono as Amiable Compositeur

The old rules laid down two conditions for the tribunal to decide a dispute *ex aqueo et bono*<sup>123</sup> or as an *amiable compositeur*<sup>124</sup> :

- a) The parties expressly granted such power to the arbitral tribunal, and
- b) The procedural law of arbitration permitted the tribunal to decide a dispute *ex aqueo et bono* or as an *amiable compositeur*.<sup>125</sup>

The Secretariat of the UNCITRAL proposed the deletion of the second condition<sup>126</sup> citing the then existing provisions of the ICC Rules<sup>127</sup>, the LCIA Rules<sup>128</sup> and the AAA Rules.<sup>129</sup> The said condition has not been retained in the 2010 rules.<sup>130</sup>

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<sup>123</sup> Leon Trakman, *Ex Aequo et Bono: De-mystifying An Ancient Concept*, (2008), available at <http://law.bepress.com/unswwps/flrps/art39> (last visited Feb. 26, 2012) (analysing the concept of *Ex Aequo et Bono*).

<sup>124</sup> William Tetley, *Glossary of Conflict of Laws*, <http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/> (last visited Feb. 25, 2012) (defining “amiable compositeurs”).

<sup>125</sup> UNCITRAL Arbitration Rules art. 33(2), 1976.

<sup>126</sup> United Nations Commission on International Trade Law, *supra* note 40 at 31.

<sup>127</sup> International Criminal Court Rules art. 17.3 (“The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers.”).

<sup>128</sup> London Court of International Arbitration Rules art. 22.4 (“The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from “*ex aequo et bono*”, “amiable composition” or “honorable engagement” where the parties have so agreed expressly in writing.”).

<sup>129</sup> American Arbitration Association Rules art. 28.3 (“The tribunal shall not decide as amiable compositeur or *ex aequo et bono* unless the parties have expressly authorized it to do so.”).

<sup>130</sup> UNCITRAL Arbitration Rules art. 35(2).



## **Tribunal to Decide in Accordance with Contract**

Article 33(3) of the old rules mandated the tribunal to decide the dispute in accordance with the terms of the contract and to take into account the usages of the trade applicable to the relevant transaction. During the discussions, it was suggested that the UNCITRAL Arbitration Rules 2010 has been used in contexts where contract did not form the basis of the dispute.<sup>131</sup> Considering the generic nature of the rules, it was decided to alter the provision in the rules by inserting 'if any' after 'contract' thereby requiring the tribunal to "decide in accordance with the terms of the contract, if any..."<sup>132</sup>

## **Other Powers of the Tribunal**

The tribunal is also empowered under the 2010 rules:

- a) to order the applicant to provide appropriate security with respect to the measure.<sup>133</sup>
- b) to order the applicant to promptly disclose any material change in the circumstances on the basis of which interim measure was sought or was ordered by the tribunal.<sup>134</sup>
- c) to order the applicant to pay costs and damages where the tribunal is of the opinion, subsequent to granting interim measure, that interim measure should not have been granted in the circumstances then prevailing.<sup>135</sup>

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<sup>131</sup> United Nations Commission on International Trade Law, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat* ¶ 32, A/CN.9/WG.II/WP.151/Add.1 (Aug. 6, 2008), available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2A\\_arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2A_arbitration.html) (last visited Feb.6, 2013).

<sup>132</sup> UNCITRAL Arbitration Rules art. 35(3).

<sup>133</sup> UNCITRAL Arbitration Rules art. 26(6).

<sup>134</sup> UNCITRAL Arbitration Rules art. 26(7).

<sup>135</sup> UNCITRAL Arbitration Rules art. 26(8) ("The power to order such costs and damages is couched in permissive language unlike the

## Revisions relating to Arbitral Award

### Disclosure of Award

The old rules provided that an arbitral award could be made public only with the consent of both the parties. The Secretariat to the UNCITRAL proposed that the working group should consider a situation where a party is under a legal duty to disclose the award.<sup>136</sup> The Secretariat suggested two possible approaches. The first was to retain the provision in the old rules.<sup>137</sup> The second option was to provide that in addition to making the award public with the consent of the parties, a party could make the award public for protecting or pursuing a legal right or in relation to legal proceedings before a court or other competent authority.<sup>138</sup> During the discussions by the working group, a third approach was suggested. The proposal was to delete Article 32(5) altogether and add a provision in the next sub clause that the arbitral tribunal shall not disclose the award to any third party and thereby leave the issue of disclosure of the award to national laws.<sup>139</sup> Ultimately, the second proposal suggested by the Secretariat was adopted as it received the widest support.<sup>140</sup>

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analogous provision in the Model Law which casts it in a mandatory language. The reason for the permissive language is to empower the tribunal to pass such an order when law contemplates imposition of such liability.”); *see also* Paulsson & Petrochilos, *supra* note 5 at 886-887.

<sup>136</sup> United Nations Commission on International Trade Law, *supra* note 40 at 26.

<sup>137</sup> UNCITRAL Arbitration Rules art. 32(5), 1976.

<sup>138</sup> United Nations Commission on International Trade Law, *supra* note 18 at 31.

<sup>139</sup> *Id.* at 95-99.

<sup>140</sup> *Id.* at 27.

## Filing/ Registering Award

The old rules contained a provision to the effect that in case the law of the country in which the award is made required the award to be filed or registered by the arbitral tribunal within the time specified, the tribunal was under an obligation to comply with the requirement.<sup>141</sup> During the initial stages of the revision, the working group considered the option of providing a time limit within which a party is to request the tribunal to comply with the filing/ registration requirements.<sup>142</sup> Views were expressed that the provision was unnecessary for the reason that it cast an onerous obligation on the arbitral tribunal to file or register the award when in many cases the tribunal would be unfamiliar with the applicable law.<sup>143</sup> The working group also referred to the Swiss Rules which did not contain such a requirement. Therefore, the working group decided not to retain the said provision in the revised rules.<sup>144</sup>

## Correction of Arbitral Awards

Article 35 of the old rules gave the tribunal forty five days to give an interpretation to the award on a request to do so. However, it did not provide for any time limit to the tribunal for correction of the award.<sup>145</sup> The working group considered whether a time limit should be fixed for the tribunal to correct minor errors in the award. Wide support was given for such a proposal but there was divergence of opinion regarding the time period. Ultimately, it was decided that the tribunal should correct such minor errors within forty five days.<sup>146</sup> Thus, under the 2010 rules, the tribunal is under

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<sup>141</sup> UNCITRAL Arbitration Rules art. 32(7), 1976.

<sup>142</sup> United Nations Commission on International Trade Law, *supra* note 13 at 117.

<sup>143</sup> *Id.* at 101- 105.

<sup>144</sup> *Id.* at 105.

<sup>145</sup> UNCITRAL Arbitration Rules art. 36(1), 1976 (it provided thirty days' time for the tribunal to *suo motu* correct errors in the award).

<sup>146</sup> United Nations Commission on International Trade Law, *supra* note 100 at 106-107.

an obligation to decide on any request for correction of computational, clerical or typographical errors, or other errors or omissions of a similar nature within forty five days from the date of request.<sup>147</sup> The term 'omissions' was added in the 2010 rules to include situations such as omission by the arbitrator to put his signature or the date in the award.<sup>148</sup>

## Conclusion

A perusal of the *Travaux Préparatoires* of the 2010 rules would show that the working group deliberately adopted a conservative approach in revising the arbitration rules.<sup>149</sup> As early as in 2006, the Secretariat of the UNCITRAL was of the view that the revised rules should retain the structure and the flexibility of the old rules and the working group should refrain from making the revised rules 'more complex'.<sup>150</sup> Although the UNCITRAL has shown restraint in adopting inventive practices or recommendations specific to certain kinds of disputes, it has taken into consideration the demands and developments of the international arbitration.<sup>151</sup> Examples are revisions relating to pleadings, multi party arbitration, joinder of parties, cost and fees in arbitration, interim measures, prominent role for appointing authorities, etc. It remains to be seen if the 2010 rules will be as successful as its predecessor and outshine its innovative counterparts.

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<sup>147</sup> UNCITRAL Arbitration Rules art. 37(2).

<sup>148</sup> United Nations Commission on International Trade Law, *supra* note 13 at 127; United Nations Commission on International Trade Law, *supra* note 40 at 33.

<sup>149</sup> Castello, *supra* note 51 at 855.

<sup>150</sup> United Nations Commission on International Trade Law, *supra* note 16 at 5; Drymer, *supra* note 56 at 870.

<sup>151</sup> Croft, *supra* note 61 at 18; See Skinner, Luttrell et al, *supra* note 23 at 95.