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FROM PAST TO PRESENT: THE RULES OF ARBITRATION UNDER THE UNITED
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

By
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I. THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

As a subsidiary of the General Assembly of the United Nations, the United Nations Commission on International Trade Law (“UNCITRAL”) oversees international trade law and drafts and adopts texts that govern the legal practice of international trade.¹ UNCITRAL consists of sixty member states elected to represent an assortment of geographic regions and distinct economic and legal schemes.² The process of drafting the governing legal texts involves input from member states, observer states, which are non-member states, and various organizations, including inter-governmental and non-governmental entities.³

A majority of UNCITRAL’s authority to regulate international trade derives from the UNCITRAL Arbitration Rules, which establish the standards under which arbitral proceedings are conducted. UNCITRAL determined in 2006 that in order to conform with modern arbitration procedures, the UNCITRAL Arbitration Rules would have to be revised.⁴ Eight sessions and four years later, the UNCITRAL Working Group on International Arbitration, with interested organizations, drafted revised arbitration rules that were adopted by UNCITRAL on June 25, 2010.⁵ This marked the first time the Rules had been updated since

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¹ United Nations Commission on International Trade Law, UNCITRAL FAQ, *available at* http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited Feb. 27, 2011) [hereinafter *UNCITRAL FAQ*].

² *Id.*

³ *Id.*

⁴ Press Release, United Nations Information Service, Revised UNCITRAL Arbitration Rules Adopted (June 29, 2010), *available at* <http://www.unis.unvienna.org/unis/pressrels/2010/unisl139.html> [hereinafter *UNIS*].

⁵ *Id.*

their initial adoption on April 28, 1976.⁶ The Rules enable disputes in international trade, including commercial, investor-to-state, and state-to-state disputes, to be resolved by arbitration.⁷ Any party to the dispute can invoke the Rules so long as all parties to the dispute agreed to be bound by the Rules.⁸ UNCITRAL does not, however, participate in the settlement of a dispute beyond its rulemaking role and ultimately remains uninvolved in the arbitration proceedings.⁹ Nor does the commission aid in interpreting the Rules.¹⁰ As compared to the previous version of the Rules, the revised Rules have rendered UNCITRAL arbitration far more procedurally efficient,¹¹ a result that compliments UNCITRAL's goal of achieving the harmonization, unification, and modernization of international trade law.¹²

II. REVISIONS OF THE ARBITRATION RULES

The 2010 version of the UNCITRAL Arbitration Rules consists of four sections, forty-three articles, and an annex that features a model arbitration clause, waiver statement, and a statement of independence.¹³ The pre-revised 1976 version consisted of four sections, forty-one articles, and lacked an annex that featured all

⁶ See United Nations Commission on International Trade Law, 1976 – UNCITRAL Arbitration Rules, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited Feb. 27, 2011) [hereinafter *UNCITRAL Arbitration Rules 1976*].

⁷ *UNIS*, *supra* note 4.

⁸ United Nations Commission on International Trade Law, UNCITRAL and Private Disputes/Litigation, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html (last visited Feb. 27, 2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *UNIS*, *supra* note 4.

¹² *UNCITRAL FAQ*, *supra* note 1.

¹³ United Nations Commission on International Trade Law, UNCITRAL ARBITRATION RULES available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited Feb. 27, 2011) [hereinafter *UNCITRAL ARB. RULES*].

of the aforementioned model provisions.¹⁴ A comparison of the two texts provides evidence of UNCITRAL's additions to the UNCITRAL Arbitration Rules and supports the notion that the 2010 version modernizes the Rules to effectuate efficiency.¹⁵

A. Section I: Introductory Rules

Section I of the UNCITRAL Arbitration Rules, as amended in 2010, contains provisions that address the establishment of arbitral proceedings.¹⁶ Article 1 concerns the scope of application of the UNCITRAL Arbitration Rules.¹⁷ Article 1, paragraph 1, removes the writing requirement from the parties' agreement to pursue arbitration under UNCITRAL.¹⁸ Article 1, paragraph 2, is entirely new and establishes a presumption that arbitration agreements made after August 15, 2010 reference the UNCITRAL Arbitration Rules *unless* the parties stipulate a reference to the 1976 version of the Rules.¹⁹ The presumption is not applicable to arbitration agreement made prior to August 15, 2010, regardless of whether the agreement is accepted after the date.²⁰

Article 2 introduces new notice and timing procedural requirements.²¹ Article 2, paragraph 1, updates the methods by which notice is to be communicated and states that any means is acceptable if the means records the transmission, or allows for the transmission to be recorded.²² Article 2, paragraph 5, expands on the recordation of transmissions by allowing the notice to be electronically

¹⁴ See *UNCITRAL Arbitration Rules 1976*.

¹⁵ *UNIS*, *supra* note 4.

¹⁶ UNCITRAL ARB. RULES § I (2010).

¹⁷ UNCITRAL ARB. RULES art. 1.

¹⁸ *Id.* at art. 1 ¶ 1.

¹⁹ *Id.* at art. 1 ¶ 2.

²⁰ *Id.*

²¹ UNCITRAL ARB. RULES art. 2.

²² *Id.* at art. 2 ¶ 1.

transmitted.²³ Under that rule, the notice is technically received once it is delivered to the electronic address of the receiver.²⁴ Article 3 also discusses notice.²⁵ Article 3, paragraph 3, requires that the notice of arbitration identify any legal instrument that relates to the dispute, although a brief explanation of the relevant relationship between the legal instrument and the dispute is permissible in the absence of the legal instrument.²⁶ Article 4 was added by the 2010 amendments, and it concerns the required response to the arbitration notice.²⁷ The respondent must, within thirty days of receiving the notice for arbitration, reply to the claimant.²⁸ Article 4 provides a list of the information that must be included within the reply,²⁹ and a list of the information that may be included.³⁰

Article 5 discusses representation and assistance, and, unlike the 1976 version, states that if a party employs a representative, the arbitral tribunal may require proof that the representative is bestowed with the authority to represent the party.³¹ The arbitral tribunal may require proof upon a party's request, or by its own initiative.³² The form of proof is to be determined by the arbitral tribunal.³³ Article 6 is another new article, and it outlines the designation and appointment of authorities to the arbitral proceeding.³⁴ In the absence of a mutual agreement regarding the appointment of an arbitrator, a party may at any point in time suggest an arbitrator, or arbitrators, for the appointment.³⁵ If the parties fail to agree on an arbitrator within thirty days of such a suggestion, either party may issue a request with the Permanent Court of Arbitration at The Hague ("PCA"), namely the

²³ *Id.* at art. 2 ¶ 5.

²⁴ *Id.*

²⁵ UNCITRAL ARB. RULES art. 3.

²⁶ *Id.* at art. 3 ¶ 3(d).

²⁷ UNCITRAL ARB. RULES art. 4.

²⁸ *Id.* at art. 4 ¶ 1.

²⁹ *Id.*

³⁰ *Id.* at art. 4 ¶ 2.

³¹ UNCITRAL ARB. RULES art. 5.

³² *Id.*

³³ *Id.*

³⁴ UNCITRAL ARB. RULES art. 6.

³⁵ *Id.* at art. 6 ¶ 1.

Secretary General, to appoint an authority; the appointed authority must then appoint an arbitrator.³⁶ A substitute appointing authority may be designated by the PCA in the event that the first authority fails to make a timely appointment of an arbitrator.³⁷ The appointing authority may request from the parties any information that it determines is necessary,³⁸ and may consider any information in appointing an arbitrator, including the nationalities of the arbitrator and the interested parties.³⁹

B. Section II. Composition of the Arbitral Tribunal

Section II addresses the arbitrators of the UNCITRAL arbitrations.⁴⁰ Article 7 deals with the number of arbitrators appointed to oversee the arbitral proceedings.⁴¹ Paragraph 1 of Article 7 states that, if within thirty days of receipt of the notice to arbitrate the dispute, the parties are unable to agree “on the number of arbitrators,” a panel of three arbitrators will be automatically appointed.⁴² The 1976 version of the rules included a similar requirement, except that the deadline was fifteen days following receipt of notice,⁴³ rather than the current thirty-day deadline.⁴⁴ Paragraph 2 was added to Article 7 by the 2010 amendments and permits the appointing authority, upon a party’s request, to appoint a sole arbitrator, notwithstanding the prohibition against doing so in paragraph 1.⁴⁵ Article 8, paragraph 2 of the revised version removes the requirement that the parties must issue a request prior to the appointing authority’s determination of a

³⁶ *Id.* at art. 6 ¶ 2.

³⁷ *Id.* at art. 6 ¶ 4.

³⁸ *Id.* at art. 6 ¶ 5.

³⁹ UNCITRAL ARB. RULES art. 6 ¶ 7.

⁴⁰ UNCITRAL ARB. RULES § II.

⁴¹ UNCITRAL ARB. RULES art. 7.

⁴² *Id.* at art. 7 ¶ 1.

⁴³ *UNCITRAL Arbitration Rules 1976* at art. 5.

⁴⁴ UNCITRAL ARB. RULES art. 7 ¶ 1.

⁴⁵ *Id.* at art. 7 ¶ 2.

sole arbitrator.⁴⁶ The appointing authority must appoint the arbitrator, regardless of a request from a party, “as promptly as possible.”⁴⁷ The paragraph also replaces the former use of masculine pronouns, such as “he” and “his,” for “it” and “its.”⁴⁸ The practice of neutralizing pronouns is continued throughout the 2010 version of the UNCITRAL Arbitration Rules.

Article 11 concerns the disclosures to be made by the arbitrators, any challenges made to the arbitrator’s authority, and revises the requirement that the arbitrator disclose circumstances that may hinder the arbitrator’s ability to be impartial or independent.⁴⁹ The 2010 amendment to Article 11 states that disclosure must be made without delay.⁵⁰ Further, the annex to Article 11 provides a model example of a statement of independence.⁵¹ Article 14 discusses the procedure relating to the replacement of an arbitrator.⁵² While the 1976 version of the rules only addressed the replacement of an arbitrator in the event that a death or resignation occurs,⁵³ the revised version is applicable to any event resulting in the necessary replacement of an arbitrator.⁵⁴ Article 15, focusing on the repetition of hearings, states that following the replacement of an arbitrator, all proceedings must resume at the point at which the duties of the arbitrator ended due to the replacement.⁵⁵ The previous version of the rules called for a repeat,⁵⁶ rather than a continuance.⁵⁷ The previous rules also confined the application of the rule to hearings,⁵⁸ while the revised version addresses proceedings.⁵⁹

⁴⁶ UNCITRAL ARB. RULES art. 8 ¶ 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ UNCITRAL ARB. RULES art. 11.

⁵⁰ *Id.*

⁵¹ UNCITRAL ARB. RULES at 19-20 (pages wherein the “Model statements of independence pursuant to article 11 of the Rules” can be located).

⁵² UNCITRAL ARB. RULES art. 14.

⁵³ *UNCITRAL Arbitration Rules 1976* at art. 13 ¶ 1.

⁵⁴ UNCITRAL ARB. RULES art. 14 ¶ 1.

⁵⁵ UNCITRAL ARB. RULES art. 15.

⁵⁶ *UNCITRAL Arbitration Rules 1976* at art. 14.

⁵⁷ UNCITRAL ARB. RULES art. 15.

⁵⁸ *UNCITRAL Arbitration Rules 1976* at art. 14.

C. *Section III. Arbitral Proceedings*

Section III articulates the rules for conducting arbitral proceedings under UNCITRAL.⁶⁰ Article 17, paragraph 2 is new and requires that the arbitral tribunal establish a timetable of the proceedings, “as soon as practicable” following its formation and its granting of an opportunity for parties to voice their views.⁶¹ Paragraph 1 of Article 20 requires that the parties state the supporting legal grounds and arguments for their claim in the “statement of claim.”⁶² Paragraph 4 requires that the statement contain, or at the very least make reference to, to the farthest extent possible, all evidence upon which the claimant relies.⁶³ The 1976 version of the rules only stated that the claimant is able to provide evidence in the aforementioned manner.⁶⁴ Paragraph 4 of Article 28 was added to allow the arbitral tribunal to demand that witnesses be interviewed and cross-examined via telecommunication equipment.⁶⁵

D. *Section IV. The Award*

Section IV discusses the rendering and enforcement of arbitral awards.⁶⁶ Article 38 addresses the correction of arbitral awards and states that, upon a finding by the arbitral tribunal that a request from the parties to correct an award suffices to support a correction, the arbitral tribunal must make a correction no

⁵⁹ UNCITRAL ARB. RULES art. 15.

⁶⁰ UNCITRAL ARB. RULES § III.

⁶¹ UNCITRAL ARB. RULES art. 17 ¶ 2.

⁶² UNCITRAL ARB. RULES art. 20 ¶ 1(e).

⁶³ *Id.* at art. 20 ¶ 4 (2010).

⁶⁴ *UNCITRAL Arbitration Rules 1976* at art. 18 ¶ 2.

⁶⁵ UNCITRAL ARB. RULES art. 28 ¶ 4.

⁶⁶ UNCITRAL ARB. RULES § IV.

later than forty-five days following the receipt of the request.⁶⁷ Under Article 39, additional awards must be rendered within sixty days following the receipt of such a request.⁶⁸ The revised rules introduce a caveat to that deadline by giving the tribunal the authority to extend the time if necessary.⁶⁹ Article 40 elaborates on the definition of costs and requires that the costs be reasonable.⁷⁰ Moreover, reasonable travel expenses are considered to be costs so long as the arbitral tribunal approves the expenses.⁷¹ Article 41 further addresses costs, namely arbitrator's fees.⁷² While the previous version of the rules did not establish timelines,⁷³ the revised rules establish a fifteen-day window for a party from the time that the party receives the arbitral tribunal's proposal of fees, to its referral of the proposal to the appointing authority.⁷⁴ The tribunal must make adjustments to the proposal, if necessary, no later than forty-five days following the time from which the referral is received.⁷⁵

III. CONCLUSION: REVIEWING THE RULES WITHIN THE SCOPE OF UNCITRAL'S GOAL TO HARMONIZE, UNIFY, AND MODERNIZE INTERNATIONAL TRADE LAW

Modern arbitration practice greatly impacted the UNCITRAL Arbitration Rules, as revised in 2010. This is reflected by its reincarnation as a document that strives to harmonize and unify international trade law.⁷⁶ The growth of technology appears to also play a role in the development of arbitration law under UNCITRAL. For example, a substantial number of rules abandon the notion that

⁶⁷ UNCITRAL ARB. RULES art. 38 ¶ 1.

⁶⁸ UNCITRAL ARB. RULES art. 39 ¶ 2.

⁶⁹ *Id.*

⁷⁰ UNCITRAL ARB. RULES art. 40 ¶ 2.

⁷¹ *Id.* at art. 40 ¶ 2(d).

⁷² UNCITRAL ARB. RULES art. 41.

⁷³ *See generally UNCITRAL Arbitration Rules 1976.*

⁷⁴ UNCITRAL ARB. RULES art. 41 ¶ 3.

⁷⁵ *Id.*

⁷⁶ *UNIS, supra* note 4.

documents and notices are only valid if communicated in writing.⁷⁷ In addition, the rules catch up with technological advancements by enforcing the view that any communication that is transmitted and recorded is appropriate.⁷⁸ Further, the rules welcome the use of telecommunications equipment, thereby expanding the possibilities in arbitral proceedings.⁷⁹ Another effect of modernization in the legal world is the neutralization of texts, which is evidenced in the rules by the replacement of gender pronouns for neutral pronouns.⁸⁰

The new rules balance clarifying certain aspects where clarification is needed, as seen by the implementation of deadlines and timelines,⁸¹ and providing a flexible system of dispute resolution. The rules permit parties to produce a description of the legal instrument from which the dispute arises,⁸² rather than its former procedure of drawing the line at requiring the presentation of the legal instrument.⁸³ Though the rules impose deadlines on both arbitrators and parties, caveats exist to maintain flexibility and achieve a workable balance.⁸⁴ Moreover, the reference to practicality and reasonability is common throughout the UNCITRAL Arbitration Rules.⁸⁵

That the goal of the rules is efficiency is evidenced by its practical approach to procedure; instead of following the prior version, which required a new arbitrator to repeat the proceedings of an arbitrator that was replaced,⁸⁶ the rules clarify that the incoming arbitrator must only resume the proceedings.⁸⁷ The result of this may be to trade accuracy for efficiency, since the incoming arbitrator

⁷⁷ See e.g. UNCITRAL ARB. RULES arts. 1 ¶ 1 & 2 ¶ 5.

⁷⁸ UNCITRAL ARB. RULES art. 2 ¶ 1.

⁷⁹ See e.g. UNCITRAL ARB. RULES art. 28 ¶ 4.

⁸⁰ See e.g. UNCITRAL ARB. RULES art. 8 ¶ 2.

⁸¹ See e.g. UNCITRAL ARB. RULES arts. 4 ¶ 1, 6 ¶ 2, 7 ¶ 1, 38 ¶ 1, 39 ¶ 2 & 41 ¶ 3.

⁸² UNCITRAL ARB. RULES art. 3 ¶ 3(d).

⁸³ *UNCITRAL Arbitration Rules 1976* at art. 3.

⁸⁴ See e.g. UNCITRAL ARB. RULES art. 39 ¶ 2.

⁸⁵ See e.g. UNCITRAL ARB. RULES arts. 6 ¶ 4, 17 ¶ 1, 17 ¶ 2, 40 ¶ 2(b), 41 ¶ 1 & 42 ¶ 1.

⁸⁶ See *UNCITRAL Arbitration Rules 1976* at art. 14.

⁸⁷ UNCITRAL ARB. RULES art. 15.

must step into the proverbial shoes of the former arbitrator. Essentially, the system created by the UNCITRAL Arbitration Rules not only achieves efficiency and modernization, but also harmonization with the modern arbitration techniques and practices.