Unveiling the 2010 UNCITRAL Arbitration Rules

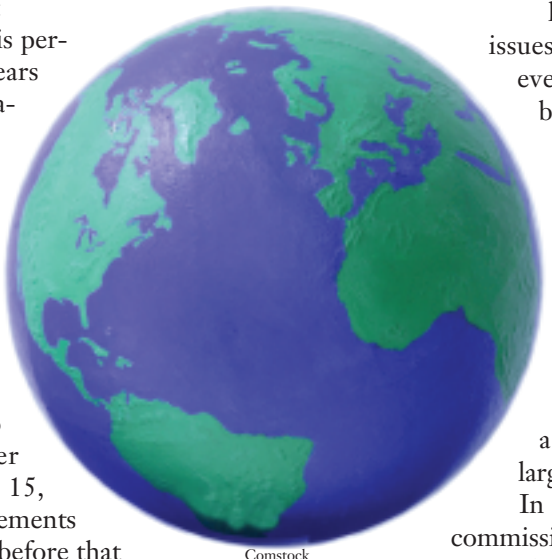
BY JAMES E. CASTELLO

At long last, the United Nations Commission on International Trade Law, better known as UNCITRAL, has adopted a new version of the UNCITRAL Arbitration Rules, which took effect on Aug. 15, 2010 (the 2010 Rules). These rules were approved by the commission at its annual meeting in late June of this year after a week of discussion and a few final changes.

The commission's adoption of the 2010 Rules is noteworthy for at least two reasons. The first reason is perhaps paradoxical: by waiting 34 years to adopt a new version of its arbitration rules, UNCITRAL has confirmed the huge success of the original rules, which have worked effectively since their adoption in 1976 (the 1976 Rules). Indeed, it is likely that the 1976 Rules will continue to be used in some arbitrations for years to come. The reason is that the 2010 Rules only *presume* to govern[1] arbitrations arising under contracts entered into after Aug. 15, 2010. Thus, unless parties to agreements or investment treaties entered into before that date specify the version of the UNCITRAL rules that they wish to use, arbitral tribunals will have to decide which version the parties intended.[2] In many instances, the tribunals are likely to choose the rules in effect when the parties agreed under those contracts or treaties that they would submit to arbitration, which would be the 1976 Rules.

The adoption of the 2010 Rules is also noteworthy since it concludes four years of drafting and redrafting work by UNCITRAL's Arbitration Working Group (the Working Group), which produced some important additions to the text and debated the revisions during eight weeks of meetings. The Working Group comprised delegates from the 60 large and small nations that are members of the U.N. Commission on International Trade Law (I was one of the U.S. delegates), as well as many "observers" from U.N. countries that are not currently commission members[3] and from non-governmental organizations (e.g., bar associations and arbitration institutions) whose work relates to arbitration. This article highlights the changes that practitioners are most likely to notice—and benefit from—in future arbitrations.

James Castello is a partner in King & Spalding International LLP, Paris. He was a member of the U.S. delegation to the UNCITRAL Arbitration Working Group and to the Commission during each session that deliberated upon the revisions to the UNCITRAL Arbitration Rules. The views expressed herein are the author's and do not necessarily reflect those of the U.S. government.



Comstock

The Working Group's approach to its task contributed to the length of the revision process: no revision was adopted unless it garnered virtually unanimous support among delegates. This rule of consensus led to lengthy debates on many issues. While this sometimes frustrated everyone, it was crucial to obtaining broad acceptance of the revisions within the international community. Future users of the 2010 Rules can take comfort from the fact that representatives from a wide range of legal and economic systems have approved them.

People who are familiar with the 1976 Rules will note that the overall approach of the 2010 Rules and many key provisions remain largely unchanged. That is by design. In launching the revision project, the commission cautioned the Working Group not to overdo it: "[A]ny revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex," the commission wrote in its first report on the project.[4]

The Working Group took that admonition to heart, confining changes to those that all delegates agreed were important to modernizing the rules. One measure of the group's fidelity to this conservative approach is that the number of articles in the rules has only grown from 41 to 43 (the new additions are Articles 4 and 16; Article 4 provides that the respondent must submit a "response" after receiving the notice of arbitration and Article 16 shields arbitrators and appointing authorities from most legal liability for the performance of their arbitral functions). Allowing for the reordering of a few clauses, the subject matter of the remaining articles largely matches the sub-

(Continued on page 147)

Unveiling the 2010 UNCITRAL Arbitration Rules

(Continued from page 21)

jects treated in corresponding articles in the 1976 Rules.

Nevertheless, there are some significant changes in the 2010 Rules. These changes tend to fall into two broad categories. The first category responds to lessons learned over the past 34 years about how arbitration actually occurs under the rules, or how the context in which arbitration functions has changed. Contextual changes include technological advances that have made submission of arbitral pleadings by electronic means an increasingly common occurrence. The second category of changes seeks to augment efficiency or prevent possible causes of delay. Although one might consider the second category to be a subset of the first (changes that respond to lessons learned about how arbitrations may otherwise be stymied), it is useful to consider them a separate category because preventing delay was a distinct and recurring justification for revisions of certain rules.

The revisions discussed below are the more significant ones in these two categories.

Responding to Lessons Learned

The first category of revisions to the 2010 Rules seeks to respond to experience with international arbitration over three decades and to changes in technology and other aspects of the environment. These revisions are grouped below under three major subheadings within the 2010 Rules that correspond to stages of an arbitration.

Changes to Section I. Introductory Rules

Written form. Article 1.1 of the 1976 UNCITRAL Rules requires the parties' agreement to arbitrate under those rules, and any agreement to modify those rules, to be "in writing." The Working Group decided that this was an outmoded approach. First, requirements as to the form of an agreement to arbitrate are generally left to applicable law, rather than to rules. Second, many national laws—including an optional provision included in the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006[5] (the Amended UNCITRAL Model Law)—no longer impose requirements as to the form of an enforceable arbitration agreement. Thus, an "in writing" requirement would conflict with such laws.

Accordingly, Article 1.1 of the 2010 Rules now omits any "in writing" requirement for agreements to arbitrate or for the purpose of modifying the rules.

Article 1.1 of the 2010 Rules now omits any "in writing" requirement for agreements to arbitrate or for the purpose of modifying the rules.

Scope of application. Article 1.1 of the 1976 Rules seems to limit the application of the rules to "disputes in relation to that contract," meaning the contract that the parties were assumed to have entered into.[6] However, 34 years of subsequent experience have shown that the rules have also been successfully applied to disputes that are not based on a contract. For example, they have governed adjudications of claims for wrongful expropriation presented to the Iran-U.S. Claims Tribunal,[7] and claims for violation of investment protections presented under bilateral investment treaties. Indeed, it appears that more than a quarter of all disputes arising under investment treaties have been resolved under the 1976 Rules,[8] notwithstanding that there is often no contract linking the investor to the host State in these cases. Of course the parties themselves remain free, in any given case, to delete the phrase limiting the rules' application to contract disputes. But, since the entire premise of this restrictive language seems wrong, the Working Group decided to replace this language with much broader wording[9] taken from the Amended UNCITRAL Model Law. This language provides that the 2010 Rules may be used to settle "disputes between [the parties] in respect of a defined legal relationship, whether contractual or not." The phrase "defined legal relationship" readily accommodates the relationship between a host State and an investor whose investment is allegedly protected by the State's investment treaty.

Electronic communications. Article 2 of the 1976 Rules defines when "notices" (including pleadings and other arbitral submissions) are deemed received. It equates "deemed receipt" with the notice's delivery either directly to the receiving party or to certain addresses, including the party's "mailing address." The Working Group

sought to allow the contemporary practice of transmitting notices electronically (e.g., by e-mail with attachments), without suggesting that the 1976 Rules exclude such means of communication.[10] The group also recognized that electronic addresses were much more prone to be abandoned or superseded than physical addresses.

To avoid unfair surprise, the Working Group sought to regulate the use of such addresses for notice purposes. Thus, the 2010 Rules add a new paragraph to Article 2, allowing notices to be sent to an electronic address only if it "has been designated by a party specifically for this purpose or authorized by the tribunal." This language envisions that an e-mail address might be agreed upon for receipt of notices under the parties' contract. Such an agreement would put the designating party on notice of the need to monitor the e-mail account, or to update adverse parties if that e-mail address is replaced or even abandoned. The language in Article 2.2 also contemplates that an e-mail address might be designated for receiving notices in a given arbitration pursuant to a tribunal's procedural order.

The 2010 Rules add a new paragraph to Article 2, allowing notices to be sent to an electronic address only if it "has been designated by a party specifically for this purpose or authorized by the tribunal."

Changes to Section II. Composition of the Arbitral Tribunal

Multiple parties and tribunals of irregular number. The 1976 Rules reflect an assumption that each arbitration has only one claimant, one respondent, and one arbitrator or three. However, an increasing number of arbitrations in recent years have involved multiple parties and, in certain cases (for example, arbitrations arising from trading in certain commodities), a different number of arbitrators. Article 10 of the 2010 Rules provides for these possibilities and explains how tribunals will be selected in such cases.

The basic rule is that, if the tribunal is not selected in accordance with either the procedure agreed to by the parties or the procedure stated in the rules for selection of a tribunal by multiple parties (e.g., if the two respondents in a case cannot agree jointly on a party-appointed member of a three-person tribunal), then the entire tribunal will be chosen by the appointing authority. This provision is intended to preserve equality of the parties and to remove any grounds for a later successful attack on the ultimate award, as happened in the famous *Dutco*[11] case, in which France's highest court invalidated an award because the claimant had chosen its party-appointed arbitrator, but the two respondents had divergent preferences for their party-appointed arbitrator yet were required by the arbitral institution to compromise on a joint appointment.

Arbitrator disclosures. Under the 1976 Rules, a prospective arbitrator under consideration for appointment must disclose to any persons or entity contemplating such appointment "any circumstances likely to give rise to justifiable doubts as to his [or her] impartiality and independence." If appointed, this arbitrator must then disclose the same information to all other parties. Some practitioners assume that this becomes an ongoing duty during the arbitration,[12] but the 1976 Rules are silent on a continuing disclosure obligation and so Article 11 of the 2010 Rules expressly provides that this duty continues "throughout the arbitral proceedings." The Annex to the 2010 Rules also contains model statements of independence and impartiality that arbitrators can use in making their disclosure statement.

Arbitrator liability. The drafters of the 1976 Rules probably could not have imagined that a losing party in an arbitration might sue a sole arbitrator or the members of an arbitral tribunal for alleged derogation of duty. Regrettably, such lawsuits are not unknown, with the result that most institutional arbitration rules contain a provision seeking to forestall such litigation.

A new article has been added to the 2010 Rules—Article 16—to do the same. It provides that parties who adopt the 2010 Rules thereby "waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration." There is one exception; this waiver does not apply to cases of "intentional wrongdoing."

Changes to Section III. Arbitral Proceedings

Joinder of parties. The 1976 Rules do not pro-

vide for additional parties to be joined in the arbitration once an arbitration commences. But because commercial transactions increasingly involve multiple parties, the Working Group recognized that commercial disputes often also implicate more than two parties. To address this circumstance, the Working Group added a clause in Article 4, which provides that the respondent can assert in its "response" a claim against not only the claimant but also any other party to the arbitration agreement.

Article 17 provides that, subsequently, the tribunal may allow a party to bring another party to the arbitration agreement into the arbitration unless, after hearing from all parties, the tribunal decides not to permit this because of prejudice to any party (including the one to be joined).

Scope of permissible counterclaims. Article 19.3 of the 1976 Rules limits a respondent's counterclaims or claims in the nature of set-off to those "arising out of the same contract." The Working Group found this limitation to be problematic for at least two reasons. First, it is another example of the assumption in the 1976 Rules that all disputes are contractual—a premise abandoned in the 2010 Rules.[13] Second, the Working Group noted that "claims for set-off and counterclaims were matters of procedural domestic law, and it might not be appropriate to provide substantive universal rules on those questions."[14] Indeed, "the arbitral tribunal's competence [over those questions] ... could be understood in a variety of manners under different legal systems."[15] Accordingly, the Working Group decided to delete from the 2010 Rules any separate limitation on counterclaims or claims for set-off. Article 21.3 of the 2010 Rules now allows a respondent to make any counterclaim or claim for the purpose of set-off "provided that the arbitral tribunal has jurisdiction over it." This essentially leaves the matter to applicable law.

Interim measures. The 1976 Rules confirm in Article 26.1 that a tribunal may issue interim measures "it deems necessary in respect of the subject matter of the dispute," but they provide no guidance on the scope of that authority. The Working Group confronted a similar lack of guidance in the UNCITRAL Model Law several years ago. Recognizing that it would be better to provide more specificity as to how the tribunal's power might be exercised,[16] the drafters of the Amended UNCITRAL Model Law added expansive new provisions regarding interim measures.[17] Large portions of those provisions have now been incorporated into Article 26 of the 2010 Rules. This was needed "to provide necessary guidance and legal certainty to the arbitrators and the parties." It was also deemed "particularly important in respect of many legal systems, which were unfamiliar with the use of interim measures in the context of international arbitration."[18]

As expanded, Article 26.2 lists four broad categories of interim measures a tribunal might issue: (i) one category is for measures that would direct a party to maintain or restore the status quo pending determination of a dispute, (ii) a second is for measures directing a party to take action that would prevent current or imminent harm or prejudice to the arbitral process itself, (iii) the third encompasses measures that would preserve assets out of which a subsequent award may be satisfied, and (iv) the fourth comprises measures that would preserve evidence that may be relevant and material to the resolution of the dispute.

In addition, Article 26.3 sets forth three conditions the party seeking interim measures must meet: the requesting party shall "satisfy the arbitral tribunal" that: (i) harm not adequately reparable by damages is likely to result if the interim measure is not granted, (ii) such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if it is granted, and (iii) there is a reasonable possibility that the requesting party will prevail on the merits of its claim. However, the determination of this possibility is not supposed to affect the tribunal's discretion in resolving the rest of the dispute.

Article 26 also addresses such topics as the provision of security for issuance of the measure (Article 26.6), the requesting party's potential liability for costs and damages caused by the measure if the tribunal later determines the measure should not have been issued (Article 26.8), and the tribunal's power to modify or rescind the measure at any time (Article 26.5).

Party witnesses. The 1976 Rules contemplate that the parties may call witnesses to testify at the hearing but they are silent on the question of who may be a factual or expert witness. It was noted during the revision process that, "the reference to witnesses might be problematic in some legal systems, where the parties themselves, and their senior officers or employees cannot be characterized as witnesses."[19]

The Working Group favored an "international standard to overcome these national differences."[20] Accordingly, Article 27.2 of the 2010 Rules now clarifies that a fact or expert witness "may be any individual, notwithstanding that the individual is a party to the arbitration or in any

way related to a party." The same approach has been endorsed in the International Bar Association's (IBA) original Rules on the Taking of Evidence in International Commercial Arbitration and in the recent IBA revision of those rules.[21]

Article 25.4 of the 1976 Rules permits the tribunal to require the retirement of a witness during the testimony of another witness. Article 28.3 of the 2010 Rules maintains this authority but adds an exception providing that a witness who is a party to the arbitration shall not, in principle, be asked to retire. The rationale for the exception is to prevent interference with a party's ability to conduct its case.

Tribunal-appointed experts. Article 27.1 of the 1976 Rules authorizes the tribunal to appoint one or more experts and Article 27.3 provides the parties with an opportunity to review and challenge any report produced by such an expert. But Article 27 does not provide for any input by the parties into the tribunal's selection of an expert. The Working Group concluded that this should be changed.

It decided that Article 29 of the 2010 Rules should provide for party input, as well as a structured procedure for evaluating the qualifications and independence of any expert a tribunal proposes to retain. In this regard, the Working Group again took its cue from the IBA Rules on the Taking of Evidence in International Arbitration.[22] Thus, Article 29 requires a tribunal-appointed expert to provide—"in principle before accepting appointment"—a description of his or her qualifications and a statement of impartiality and independence, which the parties may then challenge. Any such challenge will be resolved by the tribunal.

Changes to Section IV. The Award

Choice of law. If the parties have not specified the law governing the substance of the dispute, Article 33 of the 1976 Rules provides that the tribunal will determine the applicable law by first determining the "choice of laws rules which it considers applicable" and then identifying the substantive law on that basis—a method often described as the *voie indirecte*. The Working Group concluded that this approach should be modernized and made more flexible.[23]

Accordingly, Article 35 of the 2010 Rules now provides that, if the parties have not designated the "rules of law" governing the dispute, the tribunal shall simply "apply the law which it determines to be appropriate." This provision observes a distinction already adopted in the UNCITRAL Model Law between the "rules of law" that parties may choose (which may include such anational legal regimes as *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts) and "the law" that the tribunal may otherwise determine will apply, which is understood to be limited to a national law.[24]

Arbitration fees and expenses. Article 38 of the 1976 Rules authorizes the tribunal to determine all costs of arbitration, which are defined to include the tribunal's own fees and expenses, the expenses of tribunal experts and all other witnesses, and the legal fees incurred by the parties. This authority of the tribunal is continued in Article 40.1 of the 2010 Rules.

Articles 40.2(b)–(e) and Article 41.1 together require that each element of arbitral costs be "reasonable" in amount.

Article 39.1 of the 1976 Rules requires the arbitrators' fees to be "reasonable," but there is no similar requirement for other costs of arbitration that the tribunal will determine. This is changed in the 2010 Rules. Articles 40.2(b)-(e) and Article 41.1 together require that each element of arbitral costs be "reasonable" in amount.

Anecdotal evidence, of which the Working Group took notice,[25] suggests that a few tribunals have taken advantage of their ability to set their own fees by adopting excessive rates. Article 41 of the 2010 Rules now contains an elaborate mechanism to forestall such behavior. First, Article 41.3 now requires the arbitrators to inform the parties, at the outset of each arbitration, how they propose to determine their fees and expenses. A party may seek the appointing authority's review of the tribunal's proposal, and the authority may revise the proposal if necessary to ensure it is "reasonable." Then, Article 41.4 permits any party to seek the appointing authority's review of the tribunal's final determination of its fees and expenses. If the appointing authority (or the Secretary-General of the PCA, if there is no appointing authority, or if that authority fails or refuses to review) finds the amounts are either inconsistent with the tribunal's original proposal or are "manifestly excessive," the appointing authority or Secretary-General may, within 45 days, revise the fees and expenses to ensure they are "reasonable." The revised fees and expenses will be incorporated into the award as a "correction."

Revisions to Enhance Efficiency and Prevent Delay

A second category of revisions to the 2010 Rules seek to accelerate the arbitral process or to forestall possible delays. Many of these changes are small, but it is hoped that cumulatively they may enhance the arbitral process. They are grouped below according to the three major stages of an arbitration that they affect, as again indicated by section headings in the 2010 Rules.

Changes to Section I. Introductory Rules

Requiring an earlier pleading from the respondent. Under the 1976 Rules, the respondent need not comment on the claims made against it for perhaps several months, since the claimant's filing of the notice of arbitration is followed by the constitution of the tribunal, which is followed by the submission of the claimant's Statement of Claim. Only then must the respondent file its Statement of Defense.

The Working Group recognized that the delay in hearing from the respondent could make the constitution of a tribunal more difficult (particularly if an appointing authority becomes involved) since the respondent's view of the disputed issues and even the question of whether it has jurisdictional objections are often unknown.[26] The absence of any statement from the respondent could also complicate the tribunal's prompt adoption of a provisional timetable for the arbitration. Thus, new Article 4 requires a respondent to file a new document—a "response"—within 30 days after it receives the notice of arbitration. This can be a relatively skeletal document, matching what is often a fairly basic notice of arbitration.

Limiting the consequences of disputed pleadings. New language in Articles 3 and 4 also makes clear that if a party disputes the adequacy of either a notice of arbitration or a response, or if the respondent fails to submit a response, this cannot delay the constitution of the tribunal. Moreover, it is up to the tribunal to resolve any dispute concerning the sufficiency of these submissions.

Parties' choice of representation. Whereas the 1976 Rules provide that parties "may be represented or assisted by persons of their choice," this has been slightly modified in Article 5 of the 2010 Rules so that a party only has the right to be represented or assisted "by persons chosen by it." This subtle change is meant to prevent a party from insisting, for example, that it must switch to newly chosen counsel who cannot accommodate the pleading and hearing schedule already established by the tribunal.[27]

Changes to Section II: Composition of the Arbitral Tribunal

Encouraging early designation of an appointing authority. The 1976 Rules do not mention an appointing authority except at critical junctures where that authority is needed to move the arbitration forward. (For example, Article 12 of the 1976 Rules provides that, when an arbitrator is challenged and the challenge is not accepted by the other party and the challenged arbitrator does not withdraw, the challenge must be resolved by the appointing authority.)

To discourage parties from waiting until a critical juncture to establish an appointing authority, the Working Group placed all provisions relating to designation of an appointing authority within Article 6 of the 2010 Rules, to focus attention on this issue early in the proceedings and encourage the parties to complete the selection of the appointing authority as soon as possible after an arbitration commences.[28]

Availability of arbitrators. The new Annex to the Rules, which contains model disclosure statements for use by arbitrators, suggests that parties may also wish to ask the arbitrators to disclose their availability to serve by affirming that: "I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules."

Time limit for referring challenges. According to the 1976 Rules, when a party challenges an arbitrator, it is under no time pressure to refer that challenge for decision by an appointing authority, even though a cloud may hang over the arbitration, inhibiting its progress.

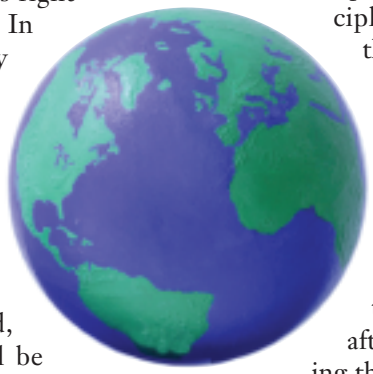
Article 13.4 of the 2010 Rules eliminates this problem by imposing a time limit on the referral to an appointing authority. This article provides that if, within 15 days of being notified of a challenge to an arbitrator, all other parties have not agreed to the challenge or the challenged arbitrator has not withdrawn, the challenging party has a further 15 days to refer the challenge for decision by an appointing authority.

Delayed challenge decisions: The 1976 Rules impose no time limit on the appointing authority's decision with regard to a referred arbitrator challenge. A change has now been made so that, under Article 6.4 of the 2010 Rules, if an appointing authority "fails to decide upon a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing author-

ity." This provision avoids adding a specific time limit since challenges to arbitrators are sufficiently varied in complexity that no one period is workable.

Limiting abuses in the replacement of arbitrators. Like the 1976 Rules, the 2010 Rules provide that, if an arbitrator needs to be replaced, this will be accomplished pursuant to whatever method governed appointment of the arbitrator being replaced. However, there have been unusual cases in which an arbitrator resigned or was removed for failure to act and the circumstances suggested that the appointing party was complicit in that arbitrator's delaying conduct.[29]

To address that problem, Article 14.2 of the 2010 Rules provides that, upon the request of a party, the appointing authority may find, "in exceptional circumstances," that "it would be justified for a party to be deprived of its right to appoint a substitute arbitrator." In that case, the appointing authority would make the appointment or, if the merits hearing has already occurred, the authority could allow the remaining two arbitrators to make the award.



No presumption of replayed hearings. Under the 1976 Rules, if a sole or presiding arbitrator is replaced, "any hearings held previously shall be repeated," but if other arbitrators are replaced, hearings may be repeated "at the discretion of the arbitral tribunal." This seems to mandate repetition of some proceedings even if the state of the record may not otherwise support that requirement. Therefore, Article 15 now provides as a default rule that hearings shall resume "at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise."

Changes to Section III. Arbitral Proceedings

Adopting efficiency as a principle for conducting arbitral proceedings. Article 15 of the 1976 Rules has been called the Magna Carta of the UNCITRAL Rules because it gives the arbitrators broad discretion to conduct the proceedings as they wish, provided they honor certain principles, including: (1) that "the parties are treated with equality"; (2) that "at any stage of the proceedings each party is given a full opportunity of presenting his case"; and (3) that "at any stage of the proceedings, the arbitral tribunal shall hold hearings" if a party so requests.

Although such principles are fundamental to the proper conduct of arbitration, parties could invoke them for an abusive purpose—for example, to delay an award by seeking an unnecessary additional hearing very late in the proceedings. Thus, the existing principles have been modified in Articles 17.1 and 17.3 of the 2010 Rules to provide that parties have "a reasonable opportunity" rather than "a full opportunity" to present their case and that they are promised hearings only at "an appropriate stage" rather than at "any stage" of the proceeding.

The Working Group also decided that these due process principles should be complemented by other objectives, such as the swift resolution of the dispute. Accordingly, Article 17.1 of the 2010 Rules states that proceedings shall be conducted "so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." The Working Group explained that though this "principle was otiose ... it might nevertheless be useful to provide leverage for arbitral tribunals to take certain steps both vis-à-vis the other arbitrators and the parties."[30]

To reinforce the goal of an "efficient process," Article 17.2 of the 2010 Rules obliges the tribunal "as soon as practicable after its constitution and after inviting the parties to express their views ... [to] establish the provisional timetable of the arbitration." Finally, the same provision authorizes the tribunal, after hearing from the parties, to "extend or abridge any period of time prescribed under the Rules or agreed by the parties."

Foreclosing delayed submission of evidence. The 1976 Rules provide in Articles 18.2 and 19.4 that, in submitting a Statement of Claim or of Defense, a party "may annex ... all documents he deems relevant or may add a reference to the documents or other evidence *he will submit*" (emphasis added). This appears to permit some or all evidence to be submitted for the first time at the hearing. This will usually render post-hearing briefs necessary so that each party can comment in writing on the other party's evidence. To avoid this protracted procedure, Articles 20.4 and 21.2 of the 2010 Rules provide that the Statements of Claim and of Defense should "as far as possible, be accompanied by all documents and other evidence relied upon by the [claimant or respondent, as the case may be]...."

Eliminating the preference for bifurcated proceedings. Article 21.4 of the 1976 Rules provides that, "in general, the arbitral tribunal should rule on a

plea concerning its jurisdiction as a preliminary question." When first adopted, this no doubt seemed like a provision that would enhance efficiency. However, as the Iran U.S. Claims Tribunal discovered, if jurisdictional objections have no merit, it is wasteful to establish a separate phase of the proceedings for briefing such issues and issuing a separate award on them.[31] The same conclusion may also apply even where jurisdictional objections have merit, if they overlap significantly with the merits of the case, making it more efficient for the tribunal to receive submissions on both jurisdiction and the merits of the case concurrently.[32]

For these reasons, Article 23.3 of the 2010 Rules simply permits the tribunal to rule on a jurisdictional defense as a preliminary matter if it wishes, or in an award on the merits. The rule does not establish any presumption favoring bifurcation of issues.

Conclusion

It may be too much to hope that the 2010 Rules will last another 34 years before requiring revision. Rules today are probably being used to resolve a greater diversity of disputes all over the world and therefore must satisfy users from a broader range of legal and economic systems than was the case three decades ago. And the pace of change during the next 30 years may well exceed what has been experienced since 1976.

Nevertheless, the manner in which the recent revision of the UNCITRAL Rules was undertaken should maximize its longevity. The Working Group strove to preserve the Rules' flexibility, to prefer general provisions, where possible, over specific prescriptions that could quickly become outdated, and to address new challenges without introducing radical changes that could be unacceptable to the global arbitration community.

Ultimately, the success of the 2010 Rules will be determined by their continued use by parties who need to resolve international commercial disputes and disputes under investment treaties in international arbitration. And that, above all, is why the Working Group took four years to complete this revision: it sought to meet the needs of potential parties to arbitration around the world. ■

ENDNOTES

[1] See Article 1(2) of the 2010 Rules ("The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date." The type of agreement described in the latter sentence could arise, for example, if an investor "accepted" a host State's open offer to arbitrate disputes under an investment treaty by filing a notice of arbitration in, say, 2011, pursuant to an investment treaty that entered into force in 2005.

[2] See Report of WGII on the work of its 46th session (Feb. 5-9, 2007) ¶ 37, UN Doc A/CN.9/619 ("It was widely felt that, in case of disagreement or doubt regarding the chosen version of the Rules, it would be for the arbitral tribunal to interpret the will of the parties").

[3] States serve for six-year terms on UNCITRAL, which may be renewed, and a third of those terms expire every two years.

[4] Report on the work of UNCITRAL at its 39th session (June 19-July 7, 2006) ¶ 184, UN Doc A/61/17.

[5] The Model Law, as recently amended by UNCITRAL, contains two alternative provisions for the definition of arbitration agreements covered by the Model Law, and legislatures may choose which alternative to adopt. One option continues to require such agreements to be "in writing"; the second option contains no "in writing" requirement. See Art. 7, Option II in the Model Law (2006).

[6] See Pieter Sanders, "Commentary on the UNCITRAL Arbitration Rules" in (1977) *II Yearbook Commercial Arbitration* 172, 174 ("there is no doubt that the UNCITRAL Arbitration Rules were designed to facilitate the arbitration of disputes arising out of international trade transactions").

[7] The Claims Settlement Declaration by which the United States and Iran established the Iran-U.S. Claims Tribunal conferred jurisdiction on that tribunal over claims not only arising "out of debts, contracts" but also based on "expropriations or other measures affecting property rights." See Art. II of the Claims Settlement Declaration, reprinted in G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 546 (Clarendon Press, Oxford, 1996).

[8] See U.N. Conference on Trade & Development, "Latest Developments in Investor-State Dispute Settlement," IIA Monitor No. 1, p. 2 International Investment Agreements (U.N. 2009), available at UNCTAD/WEB/DIAE-IA/2009/6/Rev1.

[9] See Report of WGII on the work of its 46th session (Feb. 5-9, 2007) ¶ 23, UN Doc A/CN.9/619 (recording the Working Group's desire to "put beyond doubt that a broad range of disputes, whether or not arising out of a contract, could be submitted to arbitration under the Rules").

[10] Report of WGII on the work of its 45th session (Sept. 11-15, 2006) ¶ 39, UN Doc A/CN.9/614.

[11] *Sociétés BKMI et Siemens c/ société Dutco*, Cour de cassation (7 Jan. 1992), Rev. Arb. 1992, 470, 472.

[12] See, e.g., S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* 46 (Kluwer, Deventer 1992).

[13] See Report of WGII on the work of its 45th session, *supra* n. 10, at ¶ 96 (noting that, "especially in the context of investment disputes ... it might be necessary to adopt a particularly broad understanding of the range of counter-claims and set-off that could be dealt with in the same proceedings").

[14] Report of WGII on the work of its 50th session (Feb. 5-9, 2009) ¶ 29, UN Doc A/CN.9/669.

[15] *Id.* at ¶ 31.

[16] See, e.g., Report of WGII on the work of its 34th session (May 21-June 1, 2001) ¶¶ 65-66, UN Doc. A/CN.9/487.

[17] See UNCITRAL Model Law art. 17(A-G) (2006).

[18] Report of WGII, 50th session,

supra n. 14, at ¶ 88.

[19] UNCITRAL Secretariat, Note, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules (Dec. 6 2006) ¶ 24, UN Doc.A/ CN.9/WGII/WP.145/Add.1.

[20] Report of WGII on the work of its 47th session (Sept. 10-14, 2007) ¶ 30, UN Doc A/CN.9/641.

[21] See art. 4.2 of the 1999 and 2010 IBA Rules.

[22] See art. 6.2 of the 1999 IBA Rules (requiring statement of independence before expert's appointment) and art. 6.2 of the 2010 IBA Rules (requiring description of qualifications and statement of independence before expert's appointment).

[23] Report of WGII on the work of its 51st session (Sept. 14-18, 2009) ¶ 94, UN Doc A/CN.9/684.

[24] Compare *id*, ¶ 91 with Report of WGII on the work of its 47th session, *supra* n. 20, at ¶ 110.

[25] Report of WGII on the work of its 48th session (Feb. 4-8, 2008) ¶ 20, UN Doc A/CN.9/646).

[26] Report of WGII on the work of its 45th session, *supra* n. 10, at ¶ 57.

[27] Report of WGII on the work of its 46th session (5-9 Feb. 5-9, 2007) ¶ 63, UN Doc A/CN.9/619.

[28] UNCITRAL Secretariat, Note, *supra* n. 19, at ¶ 41.

[29] Report of WGII on the work of its 45th session, *supra* n. 10, at ¶ 67 ("in practice, arbitral proceedings had been adversely affected by *mala fide* or tactical resignations by arbitrators"); *id*. at ¶ 71 (noting that loss of the right to reappoint an arbitrator "could only be based on the faulty behavior of a party to the arbitration").

[30] *Id.* at ¶ 76.

[31] See, e.g., Baker & Davis, *supra* n. 12, at 107.

[32] See, e.g., *Glamis Gold v United States* (Procedural Order No 2, 31 May 2005; NAFTA Chapter 11 proceeding) ¶ 12(c) (tribunal 'may decline to [bifurcate jurisdictional issues] when doing so is unlikely to bring about increased efficiency'), available at http://ita.law.uvic.ca/documents/16Order2_000.pdf.

Med-Arb and its Variants: Ethical Issues for Parties and Neutrals

(Continued from page 61)

[1] David Lipsky & Ronald Seeber, "The Appropriate Resolution of Corporate Dispute: A Report on the Growing Use of ADR by U.S. Corporations," available at www.marquette.edu/disputeres/downloads/patterns.pdf.

[2] Claude Thompson, "Med-Arb: A Fresh Look" (Nov. 12, 2008), available at www.claudethomson.com/docs/Med-Arb_A_Fresh_Look.pdf.

[3] The ADR Committee of the Colorado Bar Association (CBA), Manual on Alternative Dispute Resolution, available at www.cobar.org/index.cfm/ID/211/subID/1244/Manual-on-Alternative-Dispute-Resolution.

[4] Steven Menack, "Mediation/Arbitration: The Hybrid ADR Theory," *N.J.L.J.* (Aug. 14, 1995), available at www.divorcelawandmediation.com/images/mediationarticle2.pdf.

[5] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative," available at irc.queensu.ca/gallery/1/cis-med-arb-a-viable-dispute-resolution-alternative.pdf.

Med-arb achieved broad acceptance in the 1980s, particularly in public sector labor conflicts where the mediation phase offered the possibility of resolving the dispute through a cooperative exchange, which, if unsuccessful, is followed by arbitration as the ultimate hammer to bring about resolution while preventing labor disruptions.

[6] See Gerald Phillips, "Same-Neutral Med-Arb: What Does the Future Hold?" 60(2) *Disp. Resol. J.* 26 (May/July 2005) (stating: "Some arbitrators and mediators believe that mixing mediation and arbitration is heretical and even unethical....").

[7] Colorado Bar Association, "Alternative Dispute Resolution Process Definitions," available at www.cobar.org/adrdirectory/description.cfm.

[8] Frank J. Navran, "Defining Values, Morals, and Ethics," available at www.navran.com/article-values-morals-ethics.shtml.

[9] Model Standards of Conduct for Mediators (Aug. 2005), available at www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.

[10] Michael Hoellering, "Mediation & Arbitration: A Growing Interaction," 52(2) *Disp. Resol. J. 23-25* (Spring 1997). Michael Hoellering was the corporate counsel of the American Arbitration Association for many years.

[11] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 1999).

[12] Code of Ethics for Arbitrators in Commercial Disputes (Feb. 9, 2004), available at www.abanet.org/dispute/commercial_disputes.pdf.

[13] Thomas J. Brewer & Lawrence R. Mills, "Med-Arb: Combining Mediation & Arbitration," 54(4) *Disp. Resol. J.* 32-39 (Nov. 1999).

[14] Thomson, *supra* n. 2.

[15] *Id.*

[16] Examples can be found in professional journals. "[The] med/arb process provides the disputants with the best that mediation and arbitration have to offer. It furnishes them with a clean incentive to resolve the disputed issues promptly, affordably, amicably and to their mutual satisfaction through mediation, by holding open the prospect of an adverse, nonappealable determination by the arbitrator if a mediated settlement is not reached." Menack, *supra* n. 4

[17] Hoellering, *supra* n. 10.

[18] Brewer & Mills, *supra* n. 13

[19] Thompson, *supra* n. 2.

[20] *Id.*

[21] Arnold Zack, "The Quest for Finality in Airline Disputes: A Case for Arb-Med," 58(4) *Disp. Resol. J.* 34-38 (Nov. 2003/Jan. 2004).

[22] William H. Ross & Donald E. Conlon, "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration," 25 *Acad. of Mgmt. Rev.* 416-27 (2000) (it "may cause disputants to actively consider the possibility of losing … because a ruling already has been rendered...."). As another author noted, "the deal sealer is the power of the envelope." Rita Drummond, "A Case for Arb-Med: Why Consider It and How to Draft an Arb-Med Clause," available at papers.ssrn.com/sol3/papers.cfm?abstract_id= 951194, 12/2/2008.

[23] Brewer & Mills, *supra* n. 13.

[24] 28 U.S.C. § 651.

[25] John W. Cooley, "Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR," 55(3) *Disp. Resol. J.* 72-79 (Aug./Oct. 2000).

[30] Model Standards, *supra* n. 9.

[31] Code of Ethics, *supra* n. 12.

[32] Phillips, *supra* n. 6.

[33] Brewer & Mills, *supra* n. 13.

[34] See www.jamsadr.com.

[35] Phillips, *supra* n. 6.

[36] International Institute for Conflict Prevention & Resolution, "An ADR Primer" (Dec. 2, 2008), available at www.cpradr.org/ClausesRules/ADRPrimer/tabid/340/Default.aspx.

[37] ABA Section of Dispute Resolution, "Expanded Conflict Management Processes," available at www.abanet.org/dch/committee.cfm?com=DR088888.