

Working progress?

Ana Stanic discusses the revised UNCITRAL arbitration rules

IN BRIEF

- Adoption of Revised UNCITRAL Rule expected in July.
- Extensive amendments of existing rules and new provisions concerning inter alia multiparty arbitrations and immunity from liability.

The UNCITRAL arbitration rules (the rules) were adopted by the United Nations Commission for International Trade Law (UNCITRAL) and the UN General Assembly in 1976. The rules seek to create a unified, predictable and stable procedural framework for ad hoc (non-administered) international arbitration acceptable in countries with different legal, social and economic systems.

Although designed for international trade disputes, the rules have been successfully used in state-to-state and investor-state arbitrations. In addition, the rules have been used as the template (sometimes with modifications) for arbitral rules of numerous arbitral institutions, including International Centre for Dispute Resolution, Hong Kong International Arbitration Centre, Cairo International Commercial Arbitration Centre and the Iran-US Claims Tribunal.

“Seeking to modernise the rules and to promote greater efficiency in arbitral proceedings”, an UNCITRAL Working Group was set up to discuss possible revisions of the rules in 2006. The group, which has met on 52 occasions since inception, comprises representatives of the 60 members of UNCITRAL. Many non-member countries and non-governmental organisations, such as International Bar Association, the International Chamber of Commerce, and the London Court of International Arbitration, as well as organisations representing “users” of arbitration took part in the deliberations of the working group as observers.

The draft revised rules (the revised rules) are tabled for review and adoption at the 43rd session of UNCITRAL, scheduled to place in New York from 21 June to 9 July 2010. Bar for the wording

of Arts 2, 6, 34 and 41(3) and (4), the working group achieved a consensus on the wording of the articles of the revised rules. Because both the working group and UNCITRAL are UN bodies, they require the consensus of all of their members to reach a decision. The revised rules propose to extensively revise the rules, as well as to insert new provisions concerning multiparty arbitrations, the role of the designating and appointing authority and immunity from liability.

New provisions Multiparty arbitrations

Recognising that commercial agreements in the international sphere increasingly involve a multitude of contracting parties, Art 10(1) of the revised rules provides that, unless the parties have agreed otherwise, where a three member

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tribunal needs to be appointed and there are multiple parties as claimant or as respondent, the multiple parties as claimant or as respondent will jointly appoint an arbitrator. To remove the potential paralysis that can ensue in a multiparty arbitration when parties on the same side are not able to jointly appoint an arbitrator, Art 10(3) accords the appointing authority a default power to constitute the entire arbitral tribunal in such circumstances.

Designating & appointing authority
Emphasising the importance of the role of the appointing authority in the

context of non-administered arbitrations and wishing to improve the efficacy thereof, Art 6 of the revised rules provides that

- (i) the appointing authority can be appointed by the parties at any time during the arbitral proceedings;
- (ii) shortens the period a party must wait before it can request that the secretary general of the Permanent Court of Arbitration (PCA) designate the appointing authority from 60 to 30 days; and
- (iii) grants the secretary general of the PCA the power to designate a substitute appointing authority where the appointing authority refuses to appoint an arbitrator or otherwise fails to act in accordance with the rules. In addition, para 4 of the Art gives the designating and appointing authorities powers to determine and review the fees and expenses of the arbitral tribunal.

Immunity from liability

Article 16 of the revised rules addresses the issue of immunity of arbitrators from liability. It provides that “[s]ave for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority, the Secretary-General of the PCA ...”.

Other important amendments to the rules are discussed below.

Other important changes

Scope of application

Art 1(1) of the revised rules clarifies that the rules can be applied to all disputes “in respect of a defined legal relationship, whether contractual or not,” thereby removing all ambiguity as to the broad scope of the operation of the rules.

Applicable Law

Article 35 of the revised rules refers to

“rules of law” rather than “law” enabling parties to:

- (i) select legal sources other than national law (for example the UNIDROIT Principles of International Commercial Contracts) as the substantive law; and
- (ii) elect different laws to govern different aspects of their legal relationship.

Waiver of recourse to courts

An agreement has been reached in principle in the working group to insert an express provision in the revised rules limiting the parties’ recourse to courts. However, without a consensus on the actual wording of Art 34, the following text has been submitted to UNCITRAL for consideration at the meeting in July: “Insofar as they may validly do so by adopting these rules, the parties waive their right to [initiate] any form of appeal [or] review [or recourse] against an award to any court or other competent authority [, except for an application requesting a setting aside, and proceedings regarding execution and enforcement of an award].”

Counterclaims

Article 21(3) of the revised rules seems

to broaden the basis for counterclaims. Whereas Art 19(3) of the rules only permitted counterclaims and set offs “arising out of the same contract”, the revised rules somewhat vaguely permit counterclaims in respect of any claims over which the arbitral tribunal has jurisdiction.

Interim measures

Article 26 of the revised rules clarifies that an arbitral tribunal’s power to award interim measures is not limited to conservation measures (arguably, as it is under the rules) and includes the right to grant injunctions and order the preservation of evidence. The revised rules provide a two pronged test for granting an interim measure in Art 26(3). As a general rule, the requesting party must show that “(a) [h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted” and “(b) [t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.”

Importantly, and in a departure from the rules of major arbitral institutions, Art 26(8) provides that a party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted.

Comment

It has taken over three years of extensive negotiations and discussions within the working group to achieve a consensus on the proposed wording of the revised rules. The revised rules submitted to UNCITRAL for review and adoption in July contain extensive amendments to the existing rules. Hopefully, the revised rules will meet the needs of its users, reflect the best practice in the field of international arbitration and will ensure the ongoing widespread acceptability of the UNCITRAL rules throughout the world.

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