MCNAIR CHAMBERS

INTERNATIONAL COMMERCIAL LAWYERS

# REVISION OF THE UNCITRAL RULES 1976

## An overview by Khawar Qureshi QC[i]

**Why are changes proposed to the Rules?**

**What changes are suggested?**

### A. The Context.

The UN Commission for International Trade Law Rules (referred to as the UNCITRAL Rules ("the Rules)) were adopted by the UN General Assembly on 15th December 1976[1]. In the period since then, recourse to arbitration for settlement of commercial disputes has surged globally – largely as a result of perceived dissatisfaction with the domestic Court process.

Many observers remark that the "pro-arbitration focus" of the 1958 New York Convention ("NYC") has been a major catalyst for arbitration to flourish. The NYC requires signatory States (of which there are more than 140) to ensure that their domestic legal processes recognize and gives effect to International Arbitration Awards. Indeed, it is actually easier to enforce an International Arbitration Award as opposed to a foreign Court Judgment in some States.

However, problems still remain. Not all States which have signed up to the NYC provide effective support for the arbitral process. Moreover, arbitration is increasingly seen as mimicking Court process – expensive, slow and often unpredictable.

Indeed, there are some commentators who predict that mediation will benefit from the problems of arbitration, and that domestic Courts in certain jurisdictions (such as the English Commercial Court) are now realizing the potential for their services to be used as an effective rival to arbitration.

What is certain is that the guiding principles for international arbitration should be cost effective, fair, informal and expeditious dispute resolution.

It is against this background that revision of the Rules is being considered.

[1] For the text of the Rules see www.uncitral.org

## B. The Rules.

The Rules (of which there are 41 in total) were adopted to provide commercial users with an easily accessible and understandable procedural "road map" for the arbitral process. The Rules are intended to be used by parties familiar with different legal systems – whether common law or civil law based.

The main feature of the Rules is that they are not "tied into" an institution – unlike for example, the ICC Rules or the LCIA Rules. This means that Rules based arbitration can be commenced without paying institutional fees. The main disadvantage of lack of institutional support is that parties are left to chase each other at the critical stage of appointment of the Tribunal (if one party fails to agree to the appointment of a sole arbitrator, or fails to nominate its arbitrator), until the Permanent Court of Arbitration is asked to intervene.

It is within this environment that the Rules have been used as the template (with modifications) for arbitral rules of various Arbitral Institutional Rules, as well as providing the model for arbitral procedures in some States.

Moreover, many commercial contracts seek to incorporate the Rules, so as to provide the framework for dispute resolution. In addition, many Bi-Lateral Investment Treaties between States (of which there are more than 3000 - intended to provide protection to foreign investors (BIT's)) refer to the Rules for dispute resolution.

The widespread use of the Rules over more than 30 years has (unsurprisingly) revealed shortcomings. Whereas arbitral institutions can make changes to their rules fairly swiftly, because the UNCITRAL Rules are the product of a UN institution, any changes must emerge by consensus. Given that the Rules are intended to be used internationally, consensus is vital to ensure that they appeal to the widest possible community of users. However, there is always a risk that the pursuit of consensus may produce text which is either ineffective, complex or otherwise unworkable.

In the summary below, we will consider some of the key provisions of the Rules which have been considered for revision by commentators and the UN Working group ("the Working Group").

For more detailed consideration of the specific Rules and the suggested textual amendments, readers should refer to the Reports of the 49th to 52nd sessions of the Working Group[2].

[2] See www.uncitral.org/uncitral/en/commission/workinggroups/2 Arbitration.html

## C. Some possible changes to the Rules.

The impetus for change to the Rules was first developed at the 31st session of the UNCITRAL meeting in 1998. The following year, it was accepted that there ought to be consideration given to improving the Rules. It was not until the 39th session in July 2006 that priority was given to revision of the Rules.

The stated aim of the revision was to *"seek to modernize the Rules and to promote greater efficiency in arbitral proceedings"*. However, the UN Working Group sought to place limits on the revision process, namely that it should not *"alter the structure of the text, its spirit, its drafting style and should respect the flexibility of the text rather than making it more complex".*

As everyone who has tried to re-draft any document will know, it is even more difficult to "modernize" a text when the process of revision takes place in Committee format with many State participants, as well as arbitral institutions and interested observers looking on.

It is therefore no surprise that the UN Working Group has been meeting twice a year in recent years, but has yet to complete the task of producing a complete text for the proposed revised Rules.

## D. Key Issues.

### (i) BIT Claims.

Commentators observe that one of the major issues which needs to be addressed in terms of revision of the Rules concerns their adoption for BIT based arbitrations.

BIT claims are brought against States, and will very often involve allegations of State interference in foreign investment (whether by legislative means or otherwise). As a result, BIT claims will engage issues of public interest, and claims (if successful) may entail liability of tens of millions of dollars. A consensus has emerged to the effect that such claims should not be covered by the blanket of confidentiality (which is normal for most arbitrations). On the contrary, it is said that such proceedings must be transparent to ensure that the rule of law is upheld.

The main areas of concern relating to BIT arbitration claims and revision of the Rules include (i) appointment of arbitrators (greater emphasis upon impartiality/independence - it is argued that lawyers who act as Counsel in BIT claims or whose firms act in such matters should not be arbitrators) (ii) the need for public access to arbitral documents and hearings (iii) permitting

amicus briefs and Third Party participation (iv) providing for consolidation of arbitral claims where the substance of different claims is sufficiently related (v) availability of appeal.

Whilst the Working Group initially considered amending the Rules so as to enable these BIT specific concerns to be addressed, there was no consensus as to whether this was appropriate. There were some who argued that it was for the States to make provision in their BIT's if they wanted BIT claims to be dealt with in this way.

Others argued that the Rules were mainly intended for private commercial disputes (the requirement of confidentiality is considered to be very important in this context) and thus, they forcefully maintained, it would be inconsistent with the main purpose of the Rules to "tinker" with them for BIT claims – far better to make specific provision for such matters. At the 41st session of the Working Group in July 2008 it was decided to deal with BIT based arbitration issues separately, after the Rules had been revised.

### (ii) The Main Procedural Issues.

With regard to private commercial disputes, some of the potential areas for revision of the Rules include the following;

**Article 3**

Should the Claimant be required to serve fuller Particulars of Claim (and supporting documents) at the time it serves its Request for Arbitration?

Should the Respondent be required to serve its response to the Request for Arbitration BEFORE the Arbitral Tribunal is constituted?

The advantages of such changes to Article 3 may include enabling the parties to understand each others' positions better before they become "locked" into the process (once the Tribunal is appointed). The parties might also be able to negotiate a settlement more effectively at this stage. Furthermore, as and when the Tribunal is appointed, it will have a clearer idea of the parties' position.

**Article 5 – Default position 1 or 3 arbitrators?**

The Rules at present stipulate 3 arbitrators, if there is no agreement on a sole arbitrator. In practice, almost half of the arbitrations conducted pursuant to the ICC Rules and the Swiss Rules take place before a sole arbitrator. There is no doubt that arbitration before a sole arbitrator is likely to be cheaper and quicker (not least because the diaries of 3 arbitrators are much more difficult to co-ordinate). Would parties be prepared to accept a sole arbitrator as the default position?

**Article 6 – The Default Appointing Authority**

Where there has been a failure to appoint an arbitrator or reach agreement on the composition of the Tribunal, the Secretary General of the Permanent Court of Arbitration may be called upon to designate an appointing authority. This is often a time consuming process, and failure to appoint an arbitrator is a frequent delaying tactic (the party in default hoping that it will be able to resist any subsequent attempted enforcement of an Award on the grounds that it was "forced" to accept an arbitrator).

It has been suggested that the Rules should be amended so that the PCA should itself be the appointing authority.

**Articles 6-12 – Appointment/Challenge of Arbitrators.**

There is increasing criticism of the situation where a lawyer acts as Counsel and also as arbitrator (in different matters of course). One suggestion to provide for a centralized list of arbitrators is that the UNCITRAL Secretariat should maintain a roster of available arbitrators. This suggestion has more support in the area of BIT arbitration, where a small number of law firms are most active, and in turn, their lawyers act as Counsel (and sometimes as arbitrators).

Another area of concern is the scope for disclosure on the part of arbitrators – is it enough that they declare that they have no conflict of interest or are independent/impartial?

What about the arbitrator who is regularly appointed by a particular law firm/party? Absent some form of voluntary disclosure (or a recognition that this situation creates a perception of possible conflict of interest), is it satisfactory that the other party must rely upon its own due diligence to discover such matters?

**Article 15 – Case Management Powers.**

It is suggested that there should be specific provision made in the Rules to enable the Tribunal to set a Procedural Time-Table as early as possible. Others argue that the 1996 UNCITRAL Notes On Organizing Arbitration Proceedings provide sufficient guidance to enable the Tribunal to exercise its wide discretion under Article 15 in an effective manner.

Additional issues include the scope for consolidation of different arbitral proceedings – must the different proceedings involve the same parties and arise from the same contract to enable consolidation to take place?

Should an arbitral Tribunal be able to join a third party (for example a sub-contractor) where the sub-contractor and the contractor consent, whereas the employer does not?

**Article 19 – Counterclaim.**

Should a party be able to plead a counter-claim which arises from the "same legal relationship whether contractual or not"?

Should the fact that, in civil law jurisdictions a set-off gives rise to a substantive defence, mean that a wider range of counter-claims should be permitted, and not just those arising from the same contract or legal relationship?

**Article 25 – Witness Evidence.**

In some civil law jurisdictions, procedural rules do not permit the parties themselves or officers of legal entities to testify as witnesses. It is suggested that the Rules should be changed to make it clear that "any person" can be a witness.

**Article 26 – Interim measures.**

Should the Tribunal be permitted to order interim measures on an ex parte basis (without notice to the affected party)? Should Article 26 be amended to make it clear that such ex parte orders are not available?

**Article 31 – Presiding Arbitrator authority.**

In the event that a majority decision cannot be achieved (because the party appointed arbitrators hold irreconcilable views and/or do not agree with the Presiding arbitrator), should the Rules be changed to enable the Presiding Arbitrator to issue an Award?

**Article 33 – Applicable Law.**

Should the Rules be amended so as to refer to "Rules of Law" as opposed to "the Law" (the aim being to enable the Tribunal to consider, for example, the UNIDROIT Principles of Commercial Law)?

Should the Rules be amended so as to enable the applicable law (absent choice) to be the rules "closely connected to the dispute", as opposed to "the law determined by the conflict of laws rules which [the Tribunal] considers applicable"? Does the suggested change provide greater clarity or certainty?

## E. Concluding Observations.

The revision process for the Rules is cumbersome, made more complicated by the need to ensure that many and diverse interests are represented, and ultimately reflected in the proposed amended text.

There are some who argue that the revision process is too narrowly framed. For example, it is said that the Rules should include more express provision concerning confidentiality, arbitrator immunity from legal claims, costs (and cost limits), as well as providing for "Med-Arb" – a hybrid process whereby arbitrators might also be able to act as mediators (on which subject the CEDR Commission recently produced an excellent report and survey of international practice).

The Working Group is nearing the final stage of its efforts and, once a composite proposed revised text is available, the user community will be able to assess for itself whether the revised text (if adopted by the General Assembly) is fit for purpose for the next 30 years.

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