International Arbitration Alert

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Revised UNCITRAL Arbitration Rules

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On 25 June 2010, UNCITRAL, the United Nations Commission on International Trade Law, adopted a long-awaited revision of its arbitration rules. The UNCITRAL Rules are intended to be used by parties for *ad hoc* international commercial arbitrations – i.e., arbitrations that are not administered by an arbitral institution and, usually, do not proceed under the rules of such an institution. The UNCITRAL Arbitration Rules may also be used in arbitrations between investors and States which proceed pursuant to a treaty, such as a bilateral investment treaty, where the treaty allows investors to pursue arbitration conducted under the UNCITRAL Rules.

This is the first revision of the UNCITRAL Rules since their adoption in 1976 and reflects four years of effort by a working group consisting of members from governments and international organizations.[1] The working group's mandate was to revise the 1976 Rules to address the current needs of users while keeping the structure of the original rules and retaining the procedural flexibility that has been one of the hallmarks of the 1976 Rules.[2]

Changes in the Rules are summarized below. Among the more noteworthy changes are revisions intended to provide for more procedural balance between the parties by requiring the Respondent to submit a "Response" to the Notice of Arbitration early in the proceedings, changes to the provisions on interim measures, the addition of express provisions addressing the possibility of proceedings involving more than two parties, express references to the use of modern technologies (e.g., the use of email and the use of videoconferences as part of evidentiary hearings), and language intended to address more directly issues of costs and efficiency.

A number of the changes to the Rules address one of the unique features of the UNCITRAL Rules – the use of an "appointing authority." UNCITRAL is not an arbitral institution, and does not administer or oversee arbitrations pursuant to the UNCITRAL Rules. In an *ad hoc* arbitration, the appointment of the arbitral tribunal is a fault line, because there is no arbitral institution to oversee the process and step in to make an appointment where one or more parties are in default. For that reason, the UNCITRAL Rules provide for the use of an "appointing authority" – a third party chosen by the parties and vested with the authority to act to address a failure in the process of appointing an arbitrator and/or tribunal (as well as related issues, such as the challenge and replacement of arbitrators or the determination of arbitrator fees,

[1] WilmerHale Partner Franz Schwarz participated in some of these discussions as an observer on behalf of the London Court of International Arbitration.
[2] For a longer discussion of the 1976 UNCITRAL Rules, see G. Born, *International Commercial Arbitration*, 2nd ed. (2009), at pp. 151-153. The UNCITRAL Rules are distinct from UNCITRAL's Model Law on International Commercial Arbitration, adopted in 1985 and revised in 2006, which has been adopted (often in modified form) by more than 50 jurisdictions.

if disputed).[3] As discussed in more detail below, the revised Rules include changes regarding the competence of an appointing authority and the role of the designating authority, and now provide that the parties may choose the Secretary General of the Permanent Court of Arbitration at The Hague (PCA) as the appointing authority.

The revised Rules will apply to arbitrations where the arbitration agreement was concluded on or after 15 August 2010. Unless the parties agree otherwise, the original version of the Rules (referred to below as the 1976 Rules) will remain in force for arbitrations in which the agreement to arbitrate was concluded before that date.

The revised Rules maintain the structure of the 1976 Rules and continue to be divided into four sections – (i) Introductory Rules, (ii) Composition of the Arbitral Tribunal, (iii) Arbitral Proceedings, and (iv) the Award. Revisions to each section are discussed in turn below.

Section I: Introductory Rules

As described in more detail below, Section I of the Rules has been subject to several noteworthy changes, including the removal of the provision that the arbitration agreement must be in writing, the revision of the notice requirements, new provisions requiring the Respondent to file a Response to the Notice of Arbitration and changes to the roles of the designating and appointing authorities.

Scope of Application

- Article 1 has been amended to remove the requirement that an arbitration agreement must be in writing. This revision is intended to reflect the concern that retaining the writing requirement would conflict with the more "liberal" understanding of the form requirement under certain national laws and the UNCITRAL Model Law on International Commercial Arbitration which do not impose form requirements for arbitration agreements. The revision leaves the question of such formal requirements to the applicable law.

- The Rules include as an annex a model arbitration clause for use by parties wishing to arbitrate disputes using the Rules. The new Rules make one revision to the model clause. The 1976 Rules state that parties using the model clause "may wish to" include in their arbitration agreement provisions setting out: (a) the appointing authority; (b) the number of arbitrators; (c) the place of arbitration; and (d) the language to be used. The revised Rules now indicate that the parties "should" include such provisions. The revised Rules also now include a "Possible Waiver Statement," which parties can add to their arbitration agreement and is intended to expressly exclude recourse against the arbitral award to the extent permitted by applicable law. The waiver statement, and some of its implications, are discussed in the section on the "Form and Effect of the Award" below.

Notice and Calculation of Periods of Time

- Article 2 addresses how notices are transmitted, including when they are received or deemed to be received, as well as how periods of time are calculated under the Rules (Article 2(6), which remains unchanged). Article 2 has been restructured and includes new provisions. Among other changes, Article 2 has been revised to reflect changes in technology and clarifies that notices may be

[3] The appointing authority can be a particular person or institution (indeed, parties often designate an arbitral institution, such as the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA) to be the appointing authority). As discussed below, the Rules provide that if the parties fail to designate an appointing authority, and one is required, the Secretary General of the Permanent Court of Arbitration (PCA) at The Hague will act as the "designating authority," and, in that capacity, designate an appointing authority.

transmitted by "any means of communication" that provides for a record of its transmission, and specifically refers to the use of facsimile and email.

Notice of Arbitration

- Article 3 addresses how (Article 3(1)) and when (Article 3(2)) an arbitration commences and describes required and optional contents of a Notice of Arbitration. Section 3(3) identifies the information that a Notice of Arbitration "shall" include and Section 3(4) identifies information that a Notice of Arbitration "may" include.

- Among other changes, Article 3(3)(d) has been revised so that it no longer requires "a reference to the contract" from which the dispute arises but rather the "***identification of any contract or other legal instrument out of or in relation to which the dispute arises***." Article 3(3)(e) has been revised to require a "***brief description***" of the claim rather than the indication of the "general nature" of the claim required by the 1976 Rules. Article 3(3)(g) also now specifies that the Claimant should provide in the Notice of Arbitration a proposal concerning the number of arbitrators, the language, and the place of arbitration if any of those elements have not been agreed upon by the parties.

- Article 3(4) provides that in its Notice of Arbitration the Claimant should, as appropriate based on the parties' arbitration agreement, propose (a) the designation of an appointing authority, (b) the appointment of a sole arbitrator or (c) the notice of the appointment of an arbitrator referred to under Articles 9 and 10 (see below).

- Under Article 3(4) of the 1976 Rules, the Notice of Arbitration could also be designated as the Claimant's Statement of Claim (assuming it included a statement of the facts supporting the claim, the points at issue and the relief requested). While under the revised Rules, the Notice of Arbitration must include "a brief description of the claim and an indication of the amount involved … the relief or remedy sought," Article 3 no longer expressly refers to including the Statement of Claim in the Notice of Arbitration and, as discussed below, the revised Rules now require that the Respondent provide a "Response" to the Notice of Arbitration within 30 days of receiving it. The deletion of the reference in Article 3 to including the Statement of Claim in the Notice of Arbitration does *not* mean that the Claimant cannot now elect to treat its Notice of Arbitration as its Statement of Claim (Article 20(1) of the revised Rules still allows a Claimant to do so), but the revision to Article 3 reinforces the new approach in the revised Rules, which is to provide the Respondent with the opportunity – and the obligation – to file a response to the Notice of Arbitration at the outset of the proceedings rather than having to wait until after the Statement of Claim to first state its position in its Statement of Defence.

- Article 3(5) clarifies that the constitution of the arbitral tribunal shall not be hindered if the Claimant submits an incomplete Notice of Arbitration.

Response to the Notice of Arbitration

- Revised Article 4 now requires the Respondent to submit an answering submission (called a "Response") within 30 days of receiving the Claimant's Notice of Arbitration. As noted, Article 4 reflects a change in the basic procedure of the 1976 Rules and brings them in line with other arbitration rules. This is intended to rectify an imbalance under the 1976 Rules, which did not give the Respondent an opportunity to set out its position until it submitted its Statement of Defence – which was after the constitution of the arbitral tribunal and, in practice, often after the procedures and timetable for the case had been established.

- Article 4(1) identifies the information the Response "shall" contain, which corresponds to the information required for the Notice of Arbitration as set out in Article 3(3)(c) to (g).

- Article 4(2)(a) to (f) identifies the information the Response "may" contain. Apart from the option to raise jurisdictional objections, the appointment of the appointing authority and arbitrators (corresponding to Article 4(2)(a) to (c)), Article 4(2) allows the Respondent to assert counterclaims or claims for the purpose of set-off and to join third parties. This revision helps to create balance between the parties by ensuring that critical aspects of the dispute have been identified before the full constitution of the tribunal and before important procedural decisions are considered.

- Article 4(3) (as with Article 3(5)) states that the constitution of the tribunal shall not be hindered by any failure by the Respondent to communicate the Response or to submit an incomplete or late Response and provides that the tribunal will resolve any disputes about the completeness of the Response.

Representation and Assistance

- Article 5 (revising Article 4 of the 1976 Rules) provides that each party may be represented or assisted by parties chosen by it, but clarifies that, where a person is to act as a representative of a party, the tribunal may at any time on its own initiative or at the request of a party require proof of the representative's authority.

Designating and Appointing Authorities

- As described above, the existence of an appointing authority is a critical aspect of the 1976 Rules. New Article 6 seeks to underline the importance of the appointing authority and to clarify the respective roles of the appointing and designating authorities. Article 6 of the Rules consolidates the provisions relating to the appointing authority, which were divided in the 1976 Rules between former Article 6 (Sole Arbitrator Appointment) and Article 7 (Appointment of Three Arbitrator Tribunal).

- Where the parties have not already agreed on an appointing authority at an earlier stage, Article 6(1) provides that the parties may propose an appointing authority at any time during the proceeding. While the default rule in Article 6(2) provides that the Secretary General of the PCA will be the "designating authority" if the parties fail to agree upon an appointing authority,[4] revised Article 6(1) now clarifies that the parties also may designate the Secretary General of the PCA to act as the ***appointing authority***, and not only as the designating authority.

- Other provisions in Article 6 clarify the role of the designating and appointing authorities. For example, Article 6(4) now provides that where the designated appointing authority fails to appoint an arbitrator within 30 days (as compared to 60 days under the 1976 Rules) or refuses to act or fails to comply with any other time limits as set forth in the Rules, the Secretary General of the PCA will appoint a substitute appointing authority upon the request of any party.

- Article 6(5) now clarifies that an appointing authority and the Secretary General of the PCA may require that the parties and the arbitrators provide any information the authority deems necessary to the exercise of its function (e.g., the appointment of arbitrators pursuant to Articles 8, 9, 10 and 14) or for it to render a decision (e.g., on the challenge to an arbitrator pursuant to Article 13).

[4] While it is generally advisable for the parties to an arbitration agreement to designate an appointing authority in their agreement, the Rules specify that where the parties have failed to designate an appointing authority, the Secretary General of the PCA at the Hague will act as the "designating authority," and, in that capacity, designate an appointing authority, which, in turn, will act to appoint an arbitrator or tribunal, as required.

- As discussed below, revised Article 41 addresses the role of the appointing authority in relation to arbitrator fees and expenses.

Section II: Composition of the Arbitral Tribunal

- Section II of the Rules has been subject to substantial revision including changes to the role of the appointing authority in appointing, resolving challenges to and replacing arbitrators, and changes to the rules on disclosure of any circumstances likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators.

Number of Arbitrators

- Article 7 (revising Article 5 of the 1976 Rules) maintains the default rule that if the parties have not agreed to the number of arbitrators in their arbitration agreement or otherwise, three arbitrators shall be appointed. Notwithstanding this default rule, the appointing authority may appoint a sole arbitrator when: (i) the responding party fails to respond to a proposal for the appointment of a sole arbitrator; ***and*** (ii) fails to appoint a second arbitrator and (iii) the appointing authority determines that the appointment of a sole arbitrator would be more appropriate under the specific circumstances of the case.

- Article 10(2) provides that parties may agree to appoint a number of arbitrators other than one or three, in which case the arbitrators will be appointed by the method agreed by the parties.

Appointment of Arbitrators

- The mechanisms for the appointment of a sole arbitrator under Article 8 (replacing Article 6 of the 1976 Rules) and for the appointment of three arbitrators under Article 9 (replacing Article 7 of the 1976 Rules) remain unchanged, subject to the revised role of the appointing authority under new Article 6 (as discussed above).

- New Article 10 addresses the appointment of the tribunal where there are multiple parties, and the parties have not otherwise agreed on a method for appointment. Specifically, Article 10(1) provides that, where there are three arbitrators, and there are multiple parties as Claimant or Respondent, those parties shall jointly appoint an arbitrator. However, the parties can agree to a different method of appointment.

- Article 10(3) sets out a general default rule where the parties fail to constitute the tribunal in accordance with Articles 8 to 10. That article provides that, upon the request of any party, the appointing authority will constitute the tribunal and, in doing so, may also revoke appointments already made, appoint or reappoint each of the arbitrators, and designate one as the presiding arbitrator.

Disclosure By and Challenge of Arbitrators

- Article 11 (revising Article 9 of the 1976 Rules) clarifies that the duty of arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality is ongoing and continues throughout the entire proceedings, until the final award is issued. Model "statements of independence" are provided as an annex to the Rules.

- Articles 12 to 14 (revising Articles 10 to 13 of the 1976 Rules) set out the procedure for the challenge and the replacement of arbitrators and introduce two new provisions. First, Article 12(3) expressly provides that an arbitrator can be challenged where a party asserts that it is impossible for the

arbitrator to perform his or her function. Second, Article 13(4) states that if within 15 days of the date of the notice of challenge the challenged arbitrator does not withdraw or the other parties do not agree to the challenge, the party making the challenge has 30 days from the date it noticed its challenge to seek a decision on the challenge from the appointing authority.

Replacement of an Arbitrator

- Article 14(2) (revising Article 13 of the 1976 Rules) grants the appointing authority the power in exceptional circumstances to deprive a party of its right to appoint a substitute arbitrator (after giving the remaining arbitrators and the parties the opportunity to express their views).

Exclusion of Liability

- New Article 16 expressly provides a specific immunity for the tribunal and the appointing authority. It states that the parties formally 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."

Section III: Arbitral Proceedings

Section III of the Rules, which address the arbitral proceedings, remain largely unchanged but some significant new provisions have been introduced, including the express requirement that the tribunal establish a provisional timetable, the authority for the tribunal to allow one or more third persons to be joined into proceedings, and the obligation that parties must submit with their respective Statement of Claim and Statement of Defence all documents or evidence relied upon. The revisions also include a significant widening of the grounds upon which a tribunal may order interim measures.

General Provisions

- Article 17(1) (revising Article 15 of the 1976 Rules) retains the key principle of the 1976 Rules, which is that the tribunal "may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." The Rules add a new sentence to Article 17(1), underlining the tribunal's duty to enhance procedural efficiency by determining that "***[t]he arbitral tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense***."

- As noted above, Article 17(2) now requires that "***[a]s soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration***." By making this practice an express requirement, the intent is to enhance the efficiency of proceedings.

- Following significant debate within the working group, Article 17(5) (revising Article 15 of the 1976 Rules) now allows "***one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds*** … ***that joinder should not be permitted because of prejudice to any of those parties***." This is an effort to address one of the potential inefficiencies in arbitration – difficulties in joining multiple parties in single proceedings, and is consistent with similar efforts by arbitral institutions to address the practicalities of multi-party disputes.

Statement of Claim, Statement of Defence

- Articles 20, 21 and 22 (revising Articles 18, 19 and 20 of the 1976 Rules) allow for the Notice of Arbitration to be treated as a Statement of Claim and for the Response to the Notice of Arbitration to be treated as a Statement of Defence (so long as those submissions comply with the relevant requirements for such Statements). The Rules also clarify that the Statement of Claim and the Statement of Defence "***should***" (and not "may") be accompanied by all documents or evidence relied upon by the submitting party.

Interim Measures

- Revised Article 26 now defines more fully what is meant by "interim measures" and provides guidance as to the purposes of, and conditions for, interim measures to be granted. For example, under Article 26(2) a tribunal's power to award interim measures is not merely limited to measures to preserve the status quo but now expressly includes the authority to grant injunctions and order the preservation of evidence. Revised Article 26 significantly widens the express grounds upon which a party may apply for interim relief.

- Article 26(8) also expressly provides that the party which obtains 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."

Evidence and Hearings

- Articles 27 and 28 (revising Articles 24 and 25 of the 1976 Rules) address the conduct of hearings and the giving of evidence, and now expressly refer to the use of videoconferencing and similar technologies.

- Article 27 also clarifies that any person (including a party) can be a witness, although this provision will be subject to the applicable mandatory law.[5]

Experts Appointed by the Arbitral Tribunal

- Under Article 27 of the 1976 Rules, a tribunal was permitted to appoint an expert without consultation with the parties.[6] Article 29(1) (revising Article 27 of the 1976 Rules) provides that a tribunal may appoint an expert only "[**a**]***fter consultation with the parties***" and that, under Article 29(5), any expert appointed by a tribunal "may be heard at a hearing where ***parties shall have the opportunity to be present and to interrogate the expert***" during which the parties "***may present expert witnesses in order to testify on the points at issue***."

- Article 29(2) adds the requirement that a tribunal-appointed expert must submit to the tribunal and to the parties "***a description of his or her qualifications and a statement of his or her impartiality and independence***" and the parties are to be given a period of time by the tribunal to "inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence." The 1976 Rules did not refer to such disclosure obligations for tribunal-appointed experts.

[5] This corresponds to Article 4(2) of the IBA Rules on the Taking of Evidence in International Arbitration.
[6] Tribunal-appointed experts should be distinguished from experts appointed by a party, a process which is only indirectly referred to in the Rules.

Default

- Article 30(1) (revising Article 28(1) of the 1976 Rules) provides that the tribunal can order the proceedings terminated where the Claimant "has failed to communicate its statement of claim" but where the Respondent "has failed to communicate its response to the notice of arbitration or its statement of defence," the tribunal "shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations." This is intended to provide an express sanction to prevent a Respondent from being burdened by an arbitration that is noticed, but not pursued.

Waiver of Right to Object

- Article 32 (revising Article 30 of the 1976 Rules) broadens the possibility of the waiver of objections for non-compliance with the Rules. The revised Rules require that a party objects "promptly" to any non-compliance with the Rules, otherwise the party is deemed to have waived its right to object. Under the 1976 Rules, a tribunal can find waiver of an objection where a party "knows" that a provision or requirement of the Rules had not been complied with and fails to promptly object. In contrast, under the revised Rules, to avoid waiver, the burden is on the party that failed to object to "***show that, under the circumstances, its failure to object was justified***."

Section IV: The Award

- Section IV of the Rules address the form and effect of the award as well as other issues related to the issuance of the tribunal's decision and fees. Many of the provisions in this section remain unchanged from the 1976 Rules. There are, however, several significant changes, including the introduction of a "Possible Waiver Statement" allowing parties to expressly waive any recourse against an arbitral award and an amendment allowing parties to agree on the application of "rules of law" rather than "law."

Form and Effect of the Award

- As with most arbitration rules, revised Article 34 provides that a tribunal may issue interim, interlocutory, partial and final awards, and that "all awards" shall be "final and binding on the parties" and "the parties shall carry out all awards without delay." However, the "finality" of the award is subject to a "Possible Waiver Statement" (attached to the Annex) which provides the parties with the option to expressly agree to waive any recourse against an arbitral award that may be available and admissible under the applicable law. The approach under the UNCITRAL Rules raises an issue as to whether parties are prevented from challenging the substance of the award in the courts of the place of arbitration, and contrasts with the approach under certain other leading arbitration rules, such as Article 28(6) of the ICC Rules, which provide that "by submitting the dispute to arbitration under these Rules, the parties undertake to carry out the Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can be validly made." (Article 26.9 of the LCIA Rules has similar language.) The working group's decision not to include similar language in the revised UNCITRAL Rules may allow parties to argue about the meaning of "finality" under the Rules.

- Article 34(5) (revising Article 32(5) of the 1976 Rules) makes clear that, even without consent of all the parties, an award may be made public to the extent required by legal duty or for the protection of legal rights in relation to legal proceedings. Indeed, as with many other arbitration rules (but not all), there is no general duty of confidentiality in the Rules; parties can only ensure confidentiality through agreement or as provided by the applicable law.

Applicable Law, Amiable Compositeur

- Article 35 (revising Article 33 of the 1976 Rules) addresses the law that the tribunal shall apply and the circumstances when the tribunal may act as *amiable compositeur*. Revised Article 35 retains the principle from Article 33 of the 1976 Rules that where the parties have failed to agree on the applicable law or "rules of law," the tribunal shall directly choose the law "it determines to be appropriate." However, Article 35 has been revised to clarify that the parties may agree on the application of "***rules of law***" – rather than simply "law" – to govern different aspects of their legal relationship. This is intended to make clear that a tribunal is not restricted to applying a law but, where requested by the parties, it may apply legal sources and rules such as *lex mercatoria*, UNIDROIT Principles of International Commercial Contracts, the Convention of International Sale of Goods, etc.

Definition of Costs

- Article 40 provides that the tribunal may fix the costs of the arbitration and sets out specific different categories of costs. Article 40 has been amended to clarify that the tribunal has the authority to determine and set the costs in any decision it might render at any stage of the proceedings, and not just in a final award. Article 40 further defines the term "costs" which arise in relation to the conduct of the arbitration proceeding (e.g., the reasonable fees and travel expenses of the arbitrators, parties, witnesses and experts and the fees and expenses of the opposing authority and the PCA).

Fees and Expenses of Arbitrators

- Revised Article 41 addresses circumstances where an appointing authority has appointed the tribunal and allows the appointing authority to set the methods for determining the arbitrators' fees.

- Article 41(3) provides that, promptly after its constitution, the tribunal must inform the parties of its proposal as to how to determine its fees. Within 15 days after receipt of such proposal the parties can refer any complaints about the fee proposal to the appointing authority, which shall "within 45 days of receipt of such referral … make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal." If the appointing authority refuses or fails to make a decision on the fees and expenses of the arbitrators, any party may request that the Secretary General of the PCA make that decision.

As noted above, unless the parties agree otherwise, the revised UNCITRAL Rules will apply to arbitration agreements concluded on or after 15 August 2010, i.e. the date the revised Rules enter into force. The 1976 Rules will continue to apply to all arbitration agreements concluded before that date.

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