

## UNCITRAL Arbitration Rules: Survey and Comparison

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## THE UNCITRAL ARBITRATION RULES: SURVEY AND COMPARISON

The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session, April 1973, requested the Secretary-General:

In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade.<sup>1</sup>

A preliminary draft<sup>2</sup> was circulated and received comment from most of the major international arbitration organizations. On April 28, 1976, UNCITRAL unanimously adopted the revised draft and invited "the General Assembly to recommend the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly . . . in commercial contracts."<sup>3</sup> The General Assembly considered the Rules and on December 15, 1976, recommended their use to all members of the United Nations.<sup>4</sup>

The following is a brief highlight of the new Rules:

I. SCOPE OF APPLICATION — The parties to a contract must agree in writing that disputes concerning the contract shall be settled by the UNCITRAL Arbitration Rules. (Article 1)

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1. Report of the United Nations Commission on International Trade Law on the work of its sixth session, 28 U.N. GAOR, Supp. (No. 17) para. 85, U.N. Doc. A/9017 (1973). For a brief history of the formulation of the Rules, see UNCITRAL Yearbook, Vol. VII, part two, III, 1 (1976).

2. Draft A/CN. 9/97 reproduced in UNCITRAL Yearbook, Vol. VI, part two, III, 1 (1975).

3. Report of the United Nations Commission on International Trade Law on the work of its ninth session, 31 U.N. GAOR, Supp. (No. 17) 34, U.N. Doc. A/31/17 (1976).

4. G.A. Res. 98, 31 U.N. GAOR, Supp. (No. 17) 34, U.N. Doc. 31/98 (1976). For a complete text see UNCITRAL Yearbook, Vol. VII, part two, III, 20 (1976) or 15 INT'L LEGAL MATS. 701 (1976).

II. NUMBER OF ARBITRATORS — There shall be one or three arbitrators. If the parties do not stipulate in advance as to the number of arbitrators, there shall be three. (Article 5)

### III. APPOINTMENT OF ARBITRATORS

A. *Sole Arbitrator* — If a sole arbitrator is to be appointed either party may propose the name of one or more persons to serve as the sole arbitrator. Alternatively, the appointment of an arbitrator may be delegated by the parties to an appointing authority, in which case the parties will submit the names of one or more persons or institutions to serve as the appointing authority. If the parties fail to agree on the person to serve as the sole arbitrator or as the appointing authority, the Secretary-General of the Permanent Court of Arbitration at the Hague shall designate the appointing authority. The appointing authority may then appoint the sole arbitrator or may use a list-procedure. If a list-procedure is to be used, the appointing authority will send three names to each of the parties from which each party may exclude one or more of the names from the list and number those remaining in order of preference. The appointing authority may then in his sole discretion appoint the sole arbitrator from the list or, if he so desires, select a person never before on the list submitted by the parties. (Article 6)

B. *Three Arbitrators* — If three arbitrators are to be appointed each party will choose one and then the two appointed arbitrators shall choose the third. Should the first two arbitrators fail to agree on the third arbitrator, that appointment will be made in the same manner as the appointment of sole arbitrators. The presiding arbitrator shall be appointed by the first two arbitrators and if they cannot reach an agreement, the presiding arbitrator will also be appointed as is a sole arbitrator. (Article 7)

IV. CHALLENGE AND REPLACEMENT OF ARBITRATORS — Any arbitrator may be challenged. If the challenged arbitrator was appointed by an appointing authority then that authority rules on the challenge. If the challenged arbitrator was not selected by an appointing authority, then the agreed upon appointing authority shall rule on the challenge. If no appointing authority has been agreed upon then an authority shall be selected as outlined above and will then rule on the challenge. If the challenge is sustained the challenged arbitrator is replaced in the same manner in which he was originally appointed. If an arbitrator resigns or dies during

the course of the hearings, he shall also be replaced in the same manner as he was appointed. (Articles 10, 12, and 13)

#### V. ARBITRAL PROCEEDINGS

A. *Rules* — The arbitral tribunal shall establish appropriate rules to govern the proceedings and to insure equal treatment of all parties involved. Unless the parties have reached an advance agreement, the tribunal shall select the location of the hearings and the language in which they are to be conducted. (Articles 15, 16, and 17)

B. *Claims* — The party seeking arbitration shall submit a statement of claim to the tribunal stating the facts, the points at issue and the remedy sought. The other party shall submit a statement of defense in response to the claim and/or a counterclaim. Both parties are free to amend their claims or defenses during the course of the hearings. (Articles 18 and 19)

C. *Jurisdiction* — The tribunal itself will rule on questions regarding the validity or existence of its jurisdiction. The arbitration clause is separate from the contract in that even if the contract is null and void the arbitration clause remains valid. (Article 21)

D. *Evidence* — Each party shall have the burden of proving the facts upon which it relies. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. All documents made available by one party to the tribunal will be made available to the other party. (Articles 24 and 25)

E. *Awards* — The arbitral tribunal shall have the power to grant any interim measures it deems necessary including the making of interim awards. Should the parties settle before the conclusion of the hearings the tribunal shall be terminated. The parties may elect to have the settlement in the form of an award granted by the tribunal. The decision of the arbitral tribunal is final and binding upon the parties. At any time within 30 days of the award either party may request the arbitral tribunal to make an additional award. The tribunal may consider the request and must render a decision within 60 days of the request. (Articles 26, 32, and 34)

F. *Costs* — The cost of arbitration shall generally be borne by the unsuccessful party. However, the tribunal shall be

permitted to apportion the costs if they determine that it is reasonable to do so. Generally each party shall bear the cost of its legal representation, but, again, the tribunal may apportion the costs if it deems such action reasonable. (Articles 38, 39, and 40)

The UNCITRAL Arbitration Rules do not represent a drastic change from international arbitration rules presently in effect. In the preamble, the Commission stated that the Rules were drafted in "full consultation with arbitral institutions and centres of international commercial arbitration." In fact, the Commission drew quite extensively from the rules of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the USSR Chamber of Commerce, other existing major international arbitration organizations and several international conventions in formulating the present rules.<sup>5</sup>

The most widely used arbitration rules currently in effect are the Rules for the ICC Court of Arbitration, which were adopted in 1955 and revised in 1975. The innovative features of the UNCITRAL Rules are best highlighted by comparing them with the ICC Rules.

For the most part there is little to distinguish the two sets of rules. Both the ICC Rules and the UNCITRAL Rules permit the arbitral tribunal to set up rules for their proceedings and provide that in the absence of an agreement on choice of law, the tribunal shall select the law it deems most appropriate. Furthermore, under both sets of rules the tribunal has final authority on questions challenging the applicability of the rules to the question in dispute. Nevertheless, there are several noteworthy differences.

The ICC Rules provide for arbitration in an institutional setting, while the UNCITRAL Rules provide for arbitration on an *ad hoc* basis.<sup>6</sup> In fact, an effort to provide for a greater institutional element in the UNCITRAL Rules was strongly opposed by various elements. The process for the appointment of arbitrators is indicative of this distinction.

Under the ICC Rules the Court of Arbitration must give its approval to all of the arbitrators. Additionally, in cases where the first two arbitrators cannot agree on the third, or the parties do not name their arbitrators within the required time period, the Court may appoint the arbitrator. This is in sharp contrast to the UNCITRAL Rules, which has no provision for the approval of

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5. UNCITRAL Yearbook, Vol. VII, part two, III, 7 (1976).

6. UNCITRAL Yearbook, Vol. VII, part two, III, 9 (1976).

arbitrators and allows the parties involved to select their own appointing authority to name arbitrators in situations where the parties fail to agree. Furthermore, under the UNCITRAL Rules, if the parties cannot mutually agree upon an appointing authority, the selection is left to the Secretary-General of the Permanent Court of Arbitration at the Hague. Moreover, under the ICC system the Court of Arbitration has the power to rule on challenges to the arbitrators, while under the UNCITRAL Rules the appointing authority has that responsibility. Finally, while the ICC Rules *require* that all of the arbitrators be independent from the parties in dispute, the UNCITRAL Rules contain no such provision. However, the UNCITRAL Rule that allows the challenge of arbitrators where doubts may exist as to their independence has the practical effect of requiring that they in fact be independent.

The ICC Rules provide the parties with a better estimate as to the eventual cost of arbitration. The ICC Rules have published tables which specify the arbitrators' fees and administrative charges. Furthermore, the ICC considers the cost of expert witnesses and legal fees in its calculation. The UNCITRAL Rules provide little guidance as to costs and generally leave the final cost to the discretion of the tribunal. As to which party shall bear the costs, the ICC Rules leave the question completely to the discretion of the tribunal, while the UNCITRAL Rules provide that the unsuccessful party shall generally bear the costs of arbitration.

Perhaps the most important distinction between the two bodies of Rules is the manner of granting awards. Under the UNCITRAL Rules the arbitral tribunal has the final determination of the award. There is no appeal to a higher authority, although either party may petition the tribunal for reconsideration of the award. Under the ICC Rules the tribunal makes the award, but it is subject to review by the Court of Arbitration and the Court has the power to alter the tribunal's award.

The UNCITRAL Rules' prime departure from its forerunners is not in substance, but rather in acceptability. The ICC Rules are viewed by the developing and Communist states as the instruments of the "capitalist" West. This may be in part understandable as the ICC is composed mainly of Western businessmen, who drew heavily from Western legal theory in formulating the Rules. The developing and Communist states desire a set of rules in which they participated in the formulation and which they feel they can recommend to their own businessmen and government

agencies. The attitude of the developing countries is best reflected in the process of selecting arbitrators, as previously noted. Under the ICC Rules the ICC Court of Arbitration, perhaps considered a "capitalist" body by some countries, is automatically selected as the appointing authority, while the UNCITRAL Rules allow the parties to choose their own appointing authority, or in the most extreme instance the International Court of Arbitration at the Hague, an organization viewed as more international in flavor than the ICC, will be selected.

Fortunately, the UNCITRAL Rules stand a good chance of acceptance with Western business interests as well. Input by United States representatives in the formulation of the Rules was substantial and a large number of proposals presented by the United States were accepted. The Corporate Council Committee of the American Arbitration Association has expressed satisfaction with the Rules and will recommend to business interests in the United States the new Rules be implemented, especially in contracts with third world countries.

*Arthur D. Webster*