

CURRENT TRENDS IN INTERNATIONAL ARBITRAL PRACTICE AS REFLECTED IN THE REVISION OF THE UNCITRAL ARBITRATION RULES

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I INTRODUCTION

A Working Group of the United Nations Commission for International Trade Law ('UNCITRAL') is in the process of revising the UNCITRAL Rules of Arbitration ('Rules'). The Rules were introduced more than 30 years ago and were designed to offer a flexible set of procedures for any type of commercial dispute anywhere in the world. To this end the Rules have been remarkably successful but they are due for an upgrade to keep up with modern arbitral practice, and to continue to be useful for the more complicated and sometimes more controversial nature of international disputes brought under the Rules today.

This article provides background information to the revision process and canvasses some of the proposed steps aimed at improving the efficiency of the Rules and bringing them into step with 21st century arbitral practice. The article then identifies three themes that have emerged from the revision process and how they reflect some of the more challenging trends in current international arbitral practice. Finally, the article sets out the expected steps for finalisation of the Rules and possible future projects for the Working Group.

II BASIC FACTS ABOUT THE REVISION PROCESS

A What is UNCITRAL?

UNCITRAL was established in 1966 as a subsidiary body of the General Assembly of the United Nations ('UN'). It is premised on the consideration that 'international trade cooperation amongst States is an important factor in the promotion of friendly relations and consequently in the maintenance of peace and

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security.¹ Disparities in national laws inhibit the flow of trade, and UNCITRAL's purpose is to reduce obstacles created by such disparities. The general mandate of UNCITRAL is 'to further the progressive harmonization and unification of the law of international trade.'²

While international arbitration is one facet of UNCITRAL's work, UNCITRAL itself is not an arbitral institution and has no role in the day to day running of any international arbitrations.

B What are the Rules and When are they Used?

The Rules were adopted in 1976 and provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedures for appointment of arbitrators and conduct of proceedings, and dealing with the form, effect and interpretation of the award.³

The Rules are widely used in diverse contexts. First, the large majority of cases under the Rules are ad hoc international commercial arbitrations where the parties have agreed in their contract to submit disputes relating to that contract to arbitration under the Rules. Second, the Rules are used in international commercial arbitrations administered by regional and international arbitral institutions whose rules are modelled on the Rules (such as the Australian Centre for International Commercial Arbitration ('ACICA'), Kuala Lumpur Regional Centre for Arbitration, Cairo Regional Centre for International Arbitration, the Swiss Chambers' Court of Arbitration and Mediation, and the Permanent Court of Arbitration ('PCA')). Third, the Rules are increasingly being applied to investment arbitrations where a foreign investor brings a claim against a state for breach of obligations under an investment treaty where that treaty's dispute resolution clause specifies arbitration under the Rules as one option for investors to seek recourse against the state. Australia is signatory to various bilateral investment treaties ('BIT') that feature this characteristic,⁴ as do several important multilateral treaties on trade and investment.⁵ Fourth, the Rules have been used where the parties

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- 1 See UNCITRAL, *Origin, Mandate and Composition of UNCITRAL* (2007) <<http://www.uncitral.org/uncitral/en/about/origin.html>> at 21 February 2008. UNCITRAL was established by Resolution 2205(XXI) of 17 December 1966.
 - 2 Ibid.
 - 3 The UNCITRAL Arbitration Rules ('Rules') are at UNCITRAL, *UNCITRAL Arbitration Rules* (1976) <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>> at 21 February 2008.
 - 4 See, eg. *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, opened for signature 15 September 1993, ATS 93/30 (entered into force 15 October 1993) United Nations Conference on Trade and Development ('UNCTAD') <www.unctad.org/sections/dite/ia/docs/bits/hongkong_australia.pdf> at 21 February 2008; *Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments*, opened for signature 26 February 1999, ATS 00/14, art 10 (entered into force 4 May 2000) UNCTAD <http://www.unctad.org/sections/dite/ia/docs/bits/australia_india.pdf> at 21 February 2008.
 - 5 See, eg. *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 605, art 1120(1)(c) (entered into force 1 January 1994) North American Free Trade Agreement Secretaria

to an existing dispute agree to submit to arbitration under the Rules. For example, the Iran-US Claims Tribunal uses the Rules, and other bodies resolving public international law disputes have similarly adopted and adapted the Rules.⁶

C What is the UNCITRAL Working Group on Arbitration and Conciliation?

Working Group II ('Working Group') – on Arbitration and Conciliation – is one of six working groups within UNCITRAL. Other projects by the Working Group have included the development of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') and a set of Notes on the organisation of arbitral proceedings.⁷ The Working Group meets twice a year, in New York and Vienna.

Composed primarily of delegations from the 60 member states of UNCITRAL and other observing states, each state delegation typically comprises a government representative and an expert adviser who practices international arbitration, or in some cases, professors dedicated to the field. In addition to state delegations, there is a large and active corps of observer groups. Most are arbitral institutions or think tanks, such as the International Chamber of Commerce ('ICC'), the London Court of International Arbitration ('LCIA'), the American Arbitration Association, the Asia-Pacific Regional Arbitration Group, and the Institute for International Arbitration. These groups offer input from a practical perspective based on their experience with similar procedural issues. The PCA in The Hague, which is the only institution specifically referenced in the Rules, is also represented.⁸

Recently, the group of observers has grown to include those outside the traditional 'club' of international arbitrators. In February 2007, two non-governmental organisations dedicated to environmental law and sustainable

<www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1120> at 21 February 2008; *Energy Charter Treaty*, opened for signature 17 December 1991, 34 ILM 381, art 26(4) (entered into force 24 April 1998) Energy Charter Secretariat, <www.encharter.org> at 21 February 2008; *Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, Manila, 15 December 1987, art X(2) Association of Southeast Asian Nations (ASEAN) Secretariat <<http://www.aseansec.org/6464.htm>> at 21 February 2008.

6 The United Nations Compensation Commission was established in 1991 pursuant to United Nations ('UN') Security Council Resolution 692 to process claims for compensation stemming from the Gulf War. See UN Security Council, *Security Council Resolutions – 1991*, UN Doc S/RES/692 (1991) UN Security Council, *Resolutions* (2008) <<http://www.un.org/documents/scres.htm>> at 21 February 2008, which uses the Rules as a procedural fall back mechanism. The Rules were also used in the Brcko Corridor boundary arbitration of 1997: see *Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area: The Republika Srpska v The Federation of Bosnia and Herzegovina (Arbitration for the Brcko Area)*, UN Doc S/1997/126 (1997). For discussion of both, see Jan Paulsson and Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (undated) UNCITRAL <http://www.uncitral.org/pdf/english/news/arbrules_report.pdf> at 21 February 2008, [6]–[7].

7 UNCITRAL, *1996 – UNCITRAL Notes on Organizing Arbitral Proceedings* (2007) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html> at 1 April 2008.

8 See, eg, the Rules, art 6(2).

development were given access to the group.⁹ Their interest in, and contributions to, the Working Group discussions are dealt with further below. At the February 2008 session in New York, a new group of ‘users’ of arbitration called the ‘Corporate Counsel International Arbitration Group’ was given access to the Working Group. The same session also saw the participation of the UN Secretary-General’s Special Representative on Business and Human Rights.

This expansion of the Working Group should be seen as a positive development allowing constructive contributions, a diversity of views, and openness in discussions amongst the various stakeholders affected by the Rules. The overall effect is a uniquely large gathering and collaboration of leading arbitrators, practitioners, government lawyers, experts and stakeholders presented with the opportunity to collaborate on best practices.

D Why and How are the Rules being Revised?

The rules have not been amended since their introduction in 1976. While the extent to which the Rules have been used demonstrates considerable success, a wholesale review has long been considered overdue in order for the Rules to continue to be of use. Professor Pieter Sanders, who was involved in drafting the original Rules, has remarked that UNCITRAL’s Arbitration Rules were born in 1976 and grew up to everybody’s satisfaction; however after 30 years they are ready for their first facelift.¹⁰ Most other major arbitral rules have been revised regularly to accommodate developments in arbitral practice, including the rules upon which the Rules were originally based.¹¹

The Working Group has thus been tasked by UNCITRAL to ‘modernize the Rules and to promote greater efficiency in arbitral proceedings.’ The ‘focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years in arbitral practice.’¹² The update, however, is not expected to change the Rules radically. As expressed in a July 2006 report from the UNCITRAL Commission:

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- 9 See UNCITRAL Working Group II (Arbitration), *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-sixth Session (New York, 5–9 February 2007)*, [10], UN Doc A/CN.9/619 (2007) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008 (‘UN Doc A/CN.9/619’). All Working Group documents, including reports of meetings and texts of proposed amendments, may be found at UNCITRAL <www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008.
- 10 Pieter Sanders, ‘Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?’ (2004) 20 *Arbitration International* 243. See also discussion in Paulsson and Petrochilos, above n 6, [3]–[7].
- 11 The International Chamber of Commerce (‘ICC’) Rules have been revised twice since 1976 and are in the process of being revised once again. The London Court of International Arbitration (‘LCIA’) Rules were revised in 1985 and 1998. The International Centre for Settlement of Investment Disputes (‘ICSID’) Rules were revised in 2006. The UNCITRAL Rules were initially based on the 1966 UN Economic Council for Europe Rules: see Paulsson and Petrochilos, above n 6, [7].
- 12 See UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules – Note by the Secretariat*, [5], UN Doc A/CN.9/WG.II/WP.145 (2007) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008 (‘UN Doc A/CN.9/WG.II/WP.145’).

In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, the spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex.¹³

The Working Group began the revision process in Vienna in 2006. After commissioning a study thoroughly reviewing each article of the Rules,¹⁴ the UNCITRAL Secretariat has prepared reports and discussion papers setting out suggested draft amendments for consideration. The sessions are presided over by a Chairperson elected from the floor and assisted by officers of the UNCITRAL Secretariat.

E Unique Challenges Involved in Revising the Rules

Before considering the actual proposals for change, it is helpful to understand some unique features about the process of revising the Rules.

First, as noted above, the Rules apply to many different types of disputes, and need to retain their flexible one-size-fits-all structure. This means that any proposed change that is too specific to a particular type of dispute (such as investor-state disputes) has the potential to diminish the generic nature of the Rules and is unlikely to be adopted. Some members expressed the view that ‘inclusion of specific provisions could undermine the existing flexibility and simplicity of the Rules and therefore make them less attractive.’ On the other hand, some could argue that such an approach keeps the Rules unnecessarily generic, and could mean missing a once-in-30-years opportunity to target specific problems that arise in specific types of cases.¹⁵

Second, part of the appeal of the Rules is the fact they have the imprimatur of a UN General Assembly body, and thus approval from different legal systems around the world. The benefits of UN imprimatur come with some burdens. Decisions within the Working Group must be arrived at by consensus. From a practical perspective, decision making is inevitably rendered quite slow. Furthermore, only those changes which are universally considered necessary, or proposals which are watered down to the lowest common denominator of views in the room, will be adopted. This may ultimately lead to a more conservative set of Rules than might otherwise be possible in alternative fora or through different means of decision making.¹⁶ The more controversial (consensus unlikely to be

13 United Nations, *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session 19 June–7 July 2006*, [184], UN Doc A/61/17 (2006) UNCITRAL <<http://www.uncitral.org/uncitral/en/commission/sessions/39th.html>> at 21 February 2008.

14 Paulsson and Petrochilos, above n 6.

15 See UNCITRAL Working Group II (Arbitration), *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session (Vienna, 11–15 September 2006)*, [18], UN Doc A/CN.9/614 (2006) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008; UN Doc A/CN.9/614, [18].

16 UNCITRAL is currently reviewing practices with regard to working methods, including decision-making by consensus. See *40th Session Second Part: 10–14 December 2007, Vienna (2007)* UNCITRAL <<http://www.uncitral.org/uncitral/en/commission/sessions/40th.html#second>> at 21 February 2008.

reached) or complex (too time consuming) a proposed change, the less likely it is to be adopted.

Third, the Rules are typically used in ad hoc disputes and therefore most UNCITRAL arbitrations do not have the benefit of an institution in place from the beginning of the case. While some institutional rules will fall back on an institution on rudimentary procedural issues,¹⁷ such issues are not so easily resolved in ad hoc cases. The Rules should therefore provide as much guidance as possible through every step of their proceedings. The role of an ‘appointing authority’ to intervene and appoint or replace arbitrators is also ripe for clarification in the Rules.¹⁸ Some complex procedural mechanisms, such as consolidation of multiple related claims, are more feasible with institutional arbitrations than ad hoc arbitrations and the inclusion of provisions dealing with such mechanisms in the Rules may be overly ambitious.¹⁹

Finally, the Rules need to be ‘acceptable in countries with different legal, social and economic systems’.²⁰ This means they need to account for all legal traditions. Some of the proposed changes (such as requiring proof of the scope of authority to represent a party²¹ and requiring reconstitution of an entire tribunal if multiple parties on one side are unable to agree on an arbitrator) may seem unusual to common law lawyers but are required in certain civil law countries. A provision on arbitrator immunity from liability except in the case of fraud may seem to Australians entirely acceptable as it is consistent with the country’s own *International Arbitration Act 1974* (Cth) and ACICA’s Rules, but for some delegates from civil law countries, it may not go far enough to exclude acts of gross negligence.²² A provision specifying that party representatives can appear as witnesses may easily be inserted in the Rules of the LCIA, given that England has a tradition of allowing party witnesses. However, to insert a similar provision in the Rules is not so simple when consensus is needed from all countries, including those who do not generally permit party witnesses to testify in their

17 See, eg, Australian Centre for International Commercial Arbitration (‘ACICA’), *ACICA Arbitration Rules* (2005) art 8 <http://www.acica.org.au/arbitration_rules.html#_Toc132016257> at 21 February 2008 which provides for ACICA to decide whether a sole arbitrator or three arbitrators are more appropriate.

18 See, eg, UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules – Note by the Secretariat*, UN Doc A/CN.9/WG.II/WP.147 (2007) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008 (‘UN Doc A/CN.9/WG.II/WP.147’).

19 See discussion in UN Doc A/CN.9/619, [119]–[120]. See also Swiss Chambers’ Court of Arbitration and Mediation, *Swiss Rules of International Arbitration (Swiss Rules)* (2006) art 4 <https://www.sccam.org/sa/download/SRIA_english.pdf> at 21 February 2008 which provide for joinder and consolidation.

20 *Arbitration Rules of the United Nations Commission on International Trade Law*, UN Doc A/RES/31/98 (1976) UNCITRAL <<http://www.uncitral.org/uncitral/en/GA/resolutions.html>> at 21 February 2008. This General Assembly Resolution precedes the Rules in their published and online versions.

21 For discussion on proposed changes to art 4 of the Rules, see UN Doc A/CN.9/619, [63]–[68]; UN Doc A/CN.9/WG.II/WP.145, [40].

22 See ACICA, above n 17; *International Arbitration Act 1974* (Cth) s 28. See also UNCITRAL Working Group II (Arbitration), *Draft Report of the Working Group on Arbitration and Conciliation of the Work of its 48th Session (New York, 4–8 February 2008)*, [6], UN Doc A/CN.9/WG.II/XLVIII/CRP.1/Add.2 (not publicly available at the time of publication). Examples of such civil law countries include Greece, Italy and Croatia.

own cause.²³ Accordingly, amending the Rules in the UNCITRAL context can be more challenging than when a regional or national institution embarks on a similar process but operates in the sphere of only one set of legal traditions.

III MEASURES TO CLARIFY, UPDATE AND IMPROVE THE EFFICIENCY OF THE RULES

This section presents some of the proposed changes to the Rules which are aimed at removing confusion from, modernising, and increasing the efficiency of arbitrations conducted under the auspices of the Rules. It is not intended as a comprehensive article by article analysis of the Working Group's proposals, but rather a snapshot of some of the proposed revisions.²⁴

A Catching up with Technological Developments

Perhaps one of the less controversial proposals for change is simply to account for technology in arbitral practice, much of which is today conducted via fax, email and conference calls. Under the original Rules, the initial agreement to use the Rules and any subsequent modification to the Rules, must be 'in writing.'²⁵ The original Rules also contain a requirement of 'physical delivery' for 'a notice, including any notification, communication or proposal'²⁶ related to the arbitration. The Working Group has agreed to contemporisise these provisions. In doing so, it may find universally acceptable language in UNCITRAL's prior work on electronic commerce as well as recent updates to the Model Law.²⁷

B An Opening Submission for Respondents

A major procedural improvement to the Rules will be the introduction of a preliminary pleading by Respondent parties called a 'Response', similar to an 'Answer' in ICC arbitrations.²⁸ An amended Article 3 of the Rules would provide for a Response to be filed within a set period (such as 30 days) of receiving a Notice of Arbitration. The Response would include any objections to jurisdiction, Respondents' initial comments on the Notice of Arbitration, proposals as to the number of arbitrators, language, and place of arbitration.

The lack of such a preliminary pleading in the current rules is seen as a critical gap.²⁹ The change will bring the Rules in line with other modern arbitration rules, and will make it possible to identify the real issues in dispute before choosing

23 For proposed changes to art 25(2bis) see UN Doc A/CN.9/WG.II/WP.145/Add.1, [24]: 'The Working Group might wish to note 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.'

24 For detailed reports, see those prepared by Dr Clyde Croft SC for the Asia Pacific Regional Arbitration Group ('APRAG') <www.aprag.org> at 21 February 2008; Paulsson and Petrochilos, above n 6.

25 UN Doc A/CN.9/619, [25]-[31].

26 Ibid [46]-[50].

27 UN Doc A/CN.9/WG.II/WP.147, [15]-[18]. See also the equivalent of this in the ICC Rules: art 3(2).

28 UN Doc A/CN.9/WG.II/WP.147, [19]-[23].

29 Paulsson and Petrochilos, above n 6.

and constituting the Tribunal. A Response, for example, might reveal that the real issue in dispute is a technical one concerning a piece of equipment, or it could show that it is a specific question of a national law that is involved. Such factors may influence the type of arbitrator suitable for resolution of the dispute based on variants such as the arbitrator's technical expertise or knowledge of a particular national law. Identifying the true issues in dispute early on in the proceeding may also encourage early settlement.

C Default Number of Arbitrators: One or Three?

One proposed revision aimed at reducing the cost of international arbitration is to reduce the default number of arbitrators from three to one. Article 5 of the original Rules provides that unless the parties have agreed otherwise, three arbitrators shall be appointed. When first raised in the Working Group, this question provoked divergent and heated views. On the one hand, many embraced the proposal as cost-effective. Constituting a tribunal of three arbitrators can be an expensive exercise, especially if the claimant files a simple claim and the respondent does not even cooperate in the proceedings. Further, many modern arbitral rules have as the default a sole arbitrator (such as the ICC Rules). On the other hand, others insisted that allowing a party to appoint its own arbitrator was an important right and gave parties confidence in the arbitral process, especially in investor-state arbitrations.³⁰ An effective compromise was drafted, pursuant to which the default number of arbitrators shall be one unless the claimant in its notice of arbitration, or the respondent within 30 days after receipt of notice of arbitration, requests that there be three arbitrators, in which case that request shall be satisfied. Thus, if a respondent fails to participate, the claimant need not incur the expense and inconvenience of constituting a three-member tribunal, whilst demands by either party for a tribunal consisting of three arbitrators shall be met.³¹

D PCA to Act Not Only as Designating Authority but Also as Appointing Authority

If parties are unable to select the arbitrators on their own, then the Rules currently provide for an 'appointing authority' to become involved in that process. In practice, such an appointing authority could be an individual, an arbitral institution or a court. If the parties have not already designated an 'appointing authority' or are unable to agree upon one, then the current Rules provide for the Secretary-General of the PCA to 'designate an appointing authority.'³² Once called on by a party to do so, the PCA then designates an appointing authority who in turn is requested to appoint the arbitrators.

It has been highlighted that this two step process of designation followed by appointment can lead to delays. Accordingly, the Working Group agreed that the PCA could be chosen not just as a 'designating authority' but an appointing

30 UN Doc A/CN.9/619, [79]–[81].

31 UN Doc A/CN.9/WG.II/WP.147, [34].

32 See, eg, arts 6.2 and 7.2(b) of the current Rules.

authority in its own right.³³ One state proposed speeding up the process even further by simply establishing the PCA as the default appointing authority and trimming the process from one requiring two steps to one.³⁴

That proposal is still on the table, and while initially it was greeted with some hesitation by regional bodies,³⁵ others have welcomed the idea as a significant ‘progressive step’ and timesaving change – one that would ‘preserve the freedom of the parties to select another appointing authority but would give them a predictable rule in the event they do not agree’³⁶ and assuaged concerns of regional groups by pointing out that the PCA is an intergovernmental organisation with over 100 member states. Indeed, recent years have seen the PCA increase its regional presence by entering into host country and facility agreements with countries in the Middle East, Africa, South-east Asia and Central America.³⁷

E Removing Confusion Over the Meaning of ‘Place’

The revision process is not only directed at improving efficiency, but it also has as an objective the removal of confusion that may pervade the existing rules. One example is the use of the word ‘place’ in four sub-paragraphs of Article 16. In Article 16 sections (1) and (4) the use of the word ‘place’ appears to connote the concept of ‘legal *situs*’ or ‘juridical seat’ of the arbitration (which imports the supervisory and support jurisdiction of the courts of that country and the application of the national arbitration law). However, sections (2) and (3) of the same Article use the word ‘place’ with a more physical meaning, akin to the geographic location or venue where actual meetings and hearings and witness examinations physically occur (which can be different from the legal *situs*). A wide range of views on appropriate vocabulary were expressed but all agreed that the confusion should be resolved. The UNCITRAL Secretariat is presently tasked with redrafting the Article.³⁸

F Explicit Reference to ‘Efficiency’ as a Goal of Arbitral Proceedings

Currently, Article 15 provides the general rule for the conduct of proceedings and confers a wide discretion on an arbitral tribunal to conduct an arbitration in such manner as it considers appropriate, provided that the parties are treated with

33 UN Doc A/CN.9/619, [79]–[81]. See also Paulsson and Petrochilos, above n 6, [71].

34 See proposals by observer state Bahrain in UNCITRAL Working Group II (Arbitration), *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-sixth Session (New York, 5–9 February 2007)*, [71], UN Doc A/CN.9/WG.II/XLVI/CRP.2 (2007).

35 Dr Clyde Croft SC, ‘Forty-sixth Session of the UNCITRAL Working Group II (Arbitration) – New York, 5–9 February 2007’ (2007) APRAG <<http://www.aprag.org/news.html>> at 21 February 2008, 17, 35. See also UN Doc A/CN.9/619, [74].

36 Professor James Crawford, ‘The Permanent Court of Arbitration and Mixed Arbitration’ (Remarks on the occasion of a Celebration of the Centenary of the PCA, The Hague, 18 October 2007) <<http://www.pca-cpa.org/upload/files/Crawford%20EN.pdf>> at 21 February 2008, 5–6. See also the discussion on an enhanced role for the PCA in Paulsson and Petrochilos, above n 6, [59], [69], [74].

37 See, eg, *PCA Facility Agreements with Singapore and South Africa* (2007) <http://www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&searchkind=archive&nws_id=102> at 29 April 2008.

38 See UN Doc A/CN.9/619, [137]–[142].

equality and are given the opportunity to be present their case. Added to this, the new Rules will provide that: ‘The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.’ This new language is similar to conventional principles expressed in other arbitral rules and is consistent with the overall goal of improved efficiency.³⁹

IV TRENDS AND CHALLENGES AS REFLECTED IN THE REVISION PROCESS

In this section, three themes that have emerged from the revision process are drawn upon to illustrate how current trends in international arbitration law and practice present challenges to the process of keeping the Rules relevant to and workable for arbitration today.

A Prevalence of Multi-party and Multi-contract Arbitrations

International commercial agreements increasingly involve a multitude of contracting parties and often a complex web of underlying agreements. Statistical figures testify to this trend towards multi-party arbitration. For example, the ICC has reported that approximately one third of the cases registered with it between 2002 and 2005 involved more than one claimant or respondent.⁴⁰

This trend impacts the revision of the Rules in several ways. On a cosmetic level, references throughout the rules to ‘both parties’ and ‘either party’ are being altered to read ‘all parties’ or ‘any party.’⁴¹

Serious problems can arise when the parties on the same side are unable to agree on one arbitrator to be appointed jointly by all of them. In the case of *Sociétés Siemens & BKMI v Société Dutco* (*‘Dutco’*),⁴² the French *Cour de Cassation* declined to uphold the validity of an appointment made in an ICC case where the ICC had appointed an arbitrator on behalf of two co-respondents who had been unable to select an arbitrator. The Court held that ‘the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy.’⁴³ The solution to *Dutco*, adopted in most European arbitral rules, is for an external appointing authority to appoint the entire tribunal when parties on the same side are unable to agree on one arbitrator to be appointed jointly by them. It has been agreed that the Rules should adopt the same solution to avoid the

39 UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, [5], UN Doc A/CN.9/WG.II/WP.147/Add.1 (2007) <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008 (‘UN Doc A/CN.9/WG.II/WP.147/Add.1’).

40 Paulsson and Petrochilos, above n 6, 7 where the authors cite Whitesell and Silva-Romero, ‘Multiparty and Multicontract Arbitration: Recent ICC Experience’ (2003) *ICC International Court of Arbitration Bulletin* (Special Supplement – Complex Arbitration).

41 See UN Doc A/CN.9/WG.II/WP.145, [7].

42 Cass Civ Ire, 7 January 1992, *Sociétés Siemens & BKMI v Société Dutco* (1992) 119 JDI 707.

43 See discussion in Paulsson and Petrochilos, above n 6, [83] (citing *Dutco*).

problem faced in *Dutco*. The appointing authority would retain power to confirm any appointment already made.⁴⁴

Another multi-party issue is that of joinder of third parties who were not parties to the original agreement, even if not all of the parties consent to such a joinder. An amendment has been proposed that would permit a tribunal, on the application of any party, to allow one or more third parties to be joined in the arbitration as a party provided that that third party consents, and to render an award in respect of *all* parties involved in the arbitration.⁴⁵ This issue remains open.

Perhaps more difficult than issues relating to multi-party cases are issues relating to multiple contracts. Where there are multiple disputes relating to the same set of facts and common legal questions arising out of transactions amongst the same sets of parties, it would sometimes be desirable to deal with the disputes together before the same tribunal. However, in the absence of party consent, and without any administrative institution to supervise such a process, consolidation of proceedings could prove extremely difficult in the ad hoc context of UNCITRAL. Doubts were frequently expressed as to the workability of a consolidation provision in the Rules.⁴⁶

Even if not addressed this time in the Rules, parties can attempt to agree on a consolidation framework at the time of their disputes. Ideally, parties would deal with the issue at the time of drafting the arbitration clauses in the underlying agreements.⁴⁷

A change allowing counterclaims based on related contracts is also being considered.⁴⁸

B Greater Expectations and Accountability of Arbitrators

Another theme to emerge from various aspects of the revision process is the accountability of arbitrators.

The past decade has witnessed an increased focus on arbitrator ethics and disclosures of conflict of interest. For example, the International Bar Association has devised a set of guidelines, as has the American Bar Association in conjunction with the International Centre for Dispute Resolution.⁴⁹ The ICC has developed a standard statement of independence and the International Centre for

44 UN Doc A/CN.9/WG.II/WP.147, [42]; UN Doc A/CN.9/619, [87].

45 UN Doc A/CN.9/WG.II/WP.147.Add.1, [5], [8]–[9] which were inspired by art 22.1(h) of the LCIA Rules.

46 See UN Doc A/CN.9/619, [119]–[120].

47 For two examples of *ad hoc* consolidation clauses, see Paul D Friedland, *Arbitration Clauses for International Contracts* (2nd ed, 2007) appendix 15. See also optional provisions dealing with consolidation in *International Arbitration Act 1974* (Cth) s 24.

48 See discussion concerning the proposed art 19.3 in UN Doc A/CN.9/WG.II/WP.147/Add.1, [21]–[22] (allowing for counterclaims ‘provided that it falls within the scope of an agreement between the parties to arbitrate under these Rules.’).

49 International Bar Association (‘IBA’), *IBA Guidelines on Conflict of Interest in International Arbitration* (2004) <http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf> at 21 February 2008; International Center for Dispute Resolution (‘ICDR’), *The Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004* (2004) AAA <<http://www.adr.org/si.asp?id=4582>> at 21 February 2008.

the Settlement of Investment Disputes ('ICSID') has recently introduced a standard declaration and disclosure form for arbitrators.⁵⁰ In line with this trend, the Working Group has agreed to include a 'model statement of independence'.⁵¹

Two proposed revisions to the Rules concern possible obstructive behavior by arbitrators. First, it is suggested that the Rules should provide for situations where an arbitrator has resigned, or is unable to serve, for 'invalid reasons'.⁵² The Working Group is considering amendments to Article 13 of the Rules that would allow a party to apply to the appointing authority to request either the replacement of the arbitrator or authorisation for the other arbitrators to proceed with the arbitration and make any decision or award. The Working Group will also consider whether there are circumstances in which the arbitrators themselves, rather than only a party, should be given the power either to decide to proceed as a truncated tribunal or to seek approval for so proceeding.⁵³

The second proposal addressing possibly obstructive arbitrators is to amend the majority rule appearing in Article 31(1). Presently, Article 31(1) requires that 'any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators'.⁵⁴ Approximately half of the representatives who expressed a view on this issue at the Working Group session considered that the 'better rule' is to provide that the presiding arbitrator may decide *alone* if no majority is formed.⁵⁵ Although rarely an issue in practice, it was argued that a tie breaker rule gives co-arbitrators a clear incentive to adopt a reasonable posture and avoids the situation where the presiding arbitrator must choose between two unreasonable positions in order to issue an award. Just as many members of the Working Group argued against the alteration, citing no strong case for change, the fact that parties can always agree to a tie breaker provision if the case is obviously a controversial one, and a concern that a tie breaking power for awards (not just for procedural issues) confers too much power on the presiding arbitrator and may deflect from the obligation to seek a bona fide majority award.⁵⁶

Arbitrators' fees will also be subjected to greater scrutiny in the revised Rules. For a start, they will be qualified by a 'reasonableness' requirement in Article 38.⁵⁷ It was agreed to introduce streamlined and objective mechanisms for determining arbitrators' fees, including giving decision making to appointing

50 For ICSID's statement of independence see Rule 6(2) of the ICSID Rules at ICSID, *Arbitration Rules* (2007) <<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap01.htm#r05>> at 21 February 2008.

51 See UN Doc A/CN.9/619, [96]; UN Doc A/CN.9/WGII/WP.145, [50].

52 See UN Doc A/CN.9/WG.II/WP.147, [56]–[57].

53 See UN Doc A/CN.9/WG.II/WP.145, [55].

54 Paulsson and Petrochilos, above n 6, [232]–[239].

55 This is also reflects the rule in art 25(1) of the ICC Rules, art 26.3 of the LCIA Rules and art 32 of the ACICA Rules. But see art 26 of the American Arbitration Association's ICDR; art 16 of the ICSID Rules which retain the majority rule.

56 UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, [46]–[47], UN Doc A/CN.9/WG.II/WP.149 (2008) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> at 21 February 2008.

57 See UN Doc A.CN.9/WWG.II/WP145.Add.1, [43].

authorities and/or the PCA. This should minimise the need to approach a court over fee disputes and save parties from making the awkward choice between surrendering to a tribunal's request for higher fees or starting off on the wrong foot with the tribunal by disputing its requested fees.⁵⁸

Finally, one proposed revision which arbitrators will welcome relates to arbitrator liability. Unlike many other arbitral rules, the Rules are currently silent on this question. A proposal to include a provision exempting arbitrators from liability except in the case of fraud received broad support.⁵⁹ If approved, the Rules would be consistent with Article 44 of the ACICA Rules, and section 28 of the *International Arbitration Act 1974* (Cth).⁶⁰ The precise extent of the clause is still the subject of ongoing debate since different legal systems have varying immunity standards for acts of gross negligence. If included, the provision would also serve as a deterrent to parties dissatisfied with an award from attempting to attack the award by attacking the arbitrators.

C The Boom in Investor-state Arbitrations and the Prevalence of the Rules in Such Cases

One major development that was not envisaged by the drafters of the original Rules was the boom in investor-state arbitrations and the increasing use of the Rules for disputes brought under investment treaties.⁶¹ A recent empirical study showed that in 2006, more investor-state arbitrations are being conducted under the Rules than under the auspices of ICSID.⁶² Many of these cases are ad hoc, but the PCA reports that it has a record number of cases on its docket, including 14 investor-state arbitrations under bilateral or multilateral investment treaties. This development has several implications for the Rules. First, references purely to contractual relationships are too narrow given the growing number of treaty-based arbitrations. Accordingly, it has been agreed that the reference in Article 1 of the Rules to 'parties to a contract' and 'disputes in relation to that contract' be amended by, for example, using 'disputes in respect of a defined legal relationship whether contractual or not' which adopts language from the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

58 Draft report of the Working Group on Arbitration and Conciliation on the Work of its Forty-eighth Session (New York, 4 February 2008), [4], UN Doc A/CN.9/WGII/XLVII/CRP.1/Add.1 to become publicly available mid-2008.

59 Draft report of the Working Group on Arbitration and Conciliation on the Work of its Forty-eighth Session (New York, 4 February 2008), [1]–[8], UN Doc A/CN.9/WGII/XLVII/CRP.1/Add.2, to become publicly available mid-2008.

60 And many other arbitral rules: see, eg ICC Rules.

61 UNCTAD, 'Latest Developments in Investor-State Dispute Settlement' (2005) 4 *IIA Monitor* at UNCTAD <<http://www.unctad.org/Templates/Page.asp?intItemID=3745&lang=1>> at 21 February 2008; Paulsson and Petrochilos, above n 6, 2. See also Stanimir A Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" under Investment Treaties' (2005) 6(3) *The Journal of World Investment & Trade* 387.

62 Luke Peterson, *Investment Treaty News (ITN)*, May 16, 2006 (2006) International Institute for Sustainable Development <http://www.iisd.org/pdf/2006/itn_may16_2006.pdf> at 21 February 2008.

A further challenge is the reference to ‘applicable law’ in Article 33, which some believe to be too narrow for investor-state disputes under a treaty. Such disputes can be governed by more than one set of national laws and/or by public international law. A proposal to refer to ‘applicable rules of law’ is being considered by the Working Group.⁶³

Finally, the rise of investor-state arbitrations under the Rules raises issues of public disclosure and accessibility. A topic that received great attention at the last Working Group session was that of transparency in arbitrations brought by foreign investors against governments under the auspices of bilateral and multilateral investment treaties. Such arbitrations can give rise to special issues of public interest. Recent such cases affect water supplies in Tanzania, Bolivia and Argentina; regulation of hazardous waste by Canada and Mexico; Chile’s allocation of fishing permits; and South Africa’s positive racial discrimination laws.⁶⁴ In increasing numbers, these cases are being brought under the Rules either on an ad hoc basis or administered through such bodies as the PCA. There has been a developing trend towards greater public information about and participation in such cases,⁶⁵ but the Rules do not provide expressly for transparency. The current Rules provide for hearings to be held *in camera* unless the parties agree otherwise⁶⁶ and for an award to be made public only with consent of both parties.⁶⁷ Article 15 contains a ‘general provision’ that allows tribunals to conduct proceedings ‘in such manner as it considers appropriate provided that the parties are treated with equality and that at any stage of the

63 UN Doc A/CN.9/WGII/WP.149. Such a change could also encompass the possible application of transnational legal principles: [60].

64 See discussion in Center for International Environmental Law and International Institute for Sustainable Development, ‘Revising the UNCITRAL Rules to Address Investor-State Arbitrations’ (revised version, 2007) at Center for International Environmental Law
<http://www.ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf> at 4 April 2008, 4–5.

65 This has occurred, for example, in ICSID’s new Rules, the WTO Rules and the ICJ Practice Directions: Brigitte Stern, ‘L’Entrée de la Société Civile dans l’Arbitrage entre l’Etat et l’Investisseur’ (2002) 2 *Revue de l’Arbitrage* 329–45; Amokura Kawaharu, ‘Transparency and Public Participation in Investment Arbitration: Recent Developments and Future Challenges’ (Speech delivered at the Annual Conference of the Australian New Zealand Society for International Law, Canberra, 28 June 2007) at Australian National University
<http://law.anu.edu.au/cipl/Conferences&SawerLecture/2007/ANZSIL%202007/Publications/Amicus%20Notes%2006.07_Amokura.pdf> at 1 April 2008; Paul Friedland, ‘The Amicus Role in International Arbitration’ in Julian D M Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration* (2006).

66 The Rules, art 25(4).

67 *Ibid* art 15.

proceedings each party is given a full opportunity of presenting his case.’ This general provision has been used to allow amicus briefs.⁶⁸

A paper circulated by two non-governmental organisations (‘NGO’), those being the Centre for International Environmental Law and the International Institute for Sustainable Development, proposed that the Rules should be amended insofar as they apply to investor-state treaty arbitrations by: (1) making the notice of arbitration publicly available; (2) making all copies of pleadings publicly available (subject to redaction of confidential information); (3) allowing for ‘amicus’ type written submissions to be made on behalf of non-disputing parties; (4) requiring hearings to be made open to the public; and (5) requiring publication of any decision.⁶⁹

While the February 2008 New York Working Group meeting saw broad support for the principle of greater transparency in investor-state arbitrations that affect the public interest, it was not agreed that such changes be introduced to the current version of the Rules, which are scheduled for completion by 2009, and which apply to many types of commercial arbitration, only a small percentage of which arise under investment treaties. The issue of transparency, widely agreed to be complex and worthy of further attention, will be considered further by UNCITRAL and may be the subject of a future project of the Working Group. Some delegations suggested it could lead to an optional or mandatory annex to the Rules, a set of model provisions for inclusion in future treaties (as in the 2004 Model BIT of the US)⁷⁰, or some other form of instrument or guidelines.⁷¹ The NGOs have expressed hope that the matter will be drawn to the attention of UNCITRAL as early as July this year.⁷²

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- 68 See *Methanex v United States of America*, Decision of the Tribunal on Petitions from Third Parties to Intervene as ‘Amici Curiae’ (15 January 2001) NAFTA <<http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>> at 1 April 2008, [29]–[31]: ‘The Tribunal considers that allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules.’ For similar reasoning with respect to the near identical art 44 of the ICSID Rules, see *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* of 19 May 2005 (English original) (2006) 21 *ICSID Review – Foreign Investment Law Journal* 342; (Spanish original) (2006) 21 *ICSID Review – Foreign Investment Law Journal* 351 at ICSID <<http://www.worldbank.org/icsid>> at 4 April 2008, [14]–[16].
- 69 Center for International Environmental Law and International Institute for Sustainable Development, above n 64.
- 70 *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment* (not entered into force) Office of the United States Trade Representative <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf> at 21 February 2008.
- 71 See UNCITRAL, above n 7.
- 72 Center for International Environmental Law and International Institute for Sustainable Development, ‘Block of Countries Refuses to Discuss Transparency in Investor-State Arbitrations’ (Press Release, 15 February 2008) International Institute for Sustainable Development <http://www.iisd.org/pdf/2008/pr_ciel_iisd_feb_15_2008.pdf> at 4 April 2008.

V NEXT STEPS AND FUTURE WORK

At its most recent session in New York, the Working Group completed the ‘first reading’ of the revised rules and commenced the ‘second reading.’ The Working Group will meet again to continue the second reading in September 2008 at the UN International Centre in Vienna. The revised Rules are slated to be presented to UNCITRAL in July 2009 and adopted by the General Assembly later that year. The Rules should be ready for use from 2010.

It is expected that a more efficient and modern set of rules will emerge from the process. In turn, those arbitral institutions whose rules are modelled on the Rules will update their own rules to reflect the outcomes of the revision process. The process is being closely monitored by the international arbitration community⁷³ and should be of interest to anyone practicing in the field, whether they advise on the drafting of arbitration agreements, participate in the negotiation of investment and free trade agreements, serve as arbitrators, advise commercial entities engaged in business abroad, or simply want to stay abreast of current challenges and best practices in international dispute resolution.

73 See, eg, the biannual conference program of the International Council for Commercial Arbitration (‘ICCA’) tailored around the Working Group project at ICCA, *Dublin ICCA 2008* (2008) <<http://www.iccadublin2008.org/easyedit/files/ICCA2008%20Programme.pdf>> at 21 February 2008.