

HANDBOOK
OF UNCITRAL
ARBITRATION

THOMAS H. WEBSTER

SWEET & MAXWELL

Handbook of UNCITRAL Arbitration

**Commentary, Precedents and Materials
for UNCITRAL Based Arbitration Rules**

Thomas H. Webster



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DEDICATION

To Birgit and our sons
Kevin, Andreas and Anthony

PREFACE

The adoption of the revised UNCITRAL Rules in 2010 (Rules) has been a major event not only with respect to UNCITRAL Arbitration, but with respect to arbitration in general. In and of itself that is the occasion for a new book on UNCITRAL arbitration. A second reason for this Handbook is to analyse actual experience with respect to the 1976 UNCITRAL Rules (1976 Rules). As the discussion in the commentary shows, the 1976 Rules have been very successful. When the Rules were revised, one of the benchmarks in the discussion was to maintain provisions of the 1976 Rules where it was felt that there had been no problems with the application of those provisions during the last 34 years. Therefore, the Commentary is forward looking but does so based on experience accumulated during the last three decades.

UNCITRAL's Working Group II conducted the discussions and made the proposals to amend the 1976 Rules. With certain exceptions, these proposals were adopted by UNCITRAL when it approved the Rules. The reports of UNCITRAL Working Group II and of the Commission in adopting the Rules are therefore important *travaux préparatoires* to be considered in interpreting the Rules. Since Working Group II was composed of government representatives (with observers, including the author, from international arbitration bodies), the perspective with respect to issues regarding international arbitration was in many ways unique.

Since the 1976 Rules were adopted, there has been a development of various supporting materials for international arbitration. The scope of these developments is discussed in particular in the Introduction. The discussion of this material has to be integrated in a discussion of the Rules. It is of particular interest that the IBA Rules on the Taking of Evidence were revised in 2010, as they have become an important point of reference in international arbitration.

Arbitration rules are generally subject to the arbitration law of the place of arbitration. UNCITRAL has also played a very active role in this respect with the development of the UNCITRAL Model Law on International Arbitration as amended in 2006 (the Model Law). The commentary reflects the principles in the Model Law, as well as the principles in the arbitration laws applicable in a number of major places of arbitration (France, Switzerland, England and the United States). For arbitrators and counsel there is a need for a certain basic familiarity with the legal principles applicable in various places of arbitration. There have been a number of important court decisions in the last few years that should be taken into consideration depending on the place of arbitration and that are discussed below.

The Handbook is written from the perspective of a counsel and arbitrator in international arbitration. In addition, it reflects the author's experience in administering arbitration. These different perspectives serve to identify issues that are viewed quite differently from participants in their various capacities. Counsel is in the most direct contact with the clients, who provide an unvarnished view of

arbitration proceedings. Arbitrators are used to the need for balancing the interests of the parties and the need to ensure that arbitration meets the requirements of a private form of justice. Administration of arbitral proceedings is of particular interest in considering issues such as the overall efficiency of proceedings, the quality of Awards in general and challenges to arbitrators.

In writing the Handbook, the role of the Permanent Court of Arbitration and Appointing Authorities has been discussed in detail. Both are key elements in ensuring that arbitration under the Rules, while *ad hoc* in nature, is administered effectively.

This Handbook would not have been possible without the extensive work done by colleagues in international arbitration. The Commentary is based on, and provides reference to, publications by UNCITRAL, the PCA, UNCTAD and the IBA in particular. The arbitrators who have rendered the Awards referred to in the commentary have provided valuable contributions to international arbitration. Moreover, international arbitration depends to a considerable extent on state courts, and the decisions of those courts have been instrumental for the commentary and for international arbitration in general.

The author would like to thank his associates, Andreia Iordachita, Magdalena Staniczek and David A. Wilhite, for their research and assistance with respect to the Handbook.

Paris, September 6, 2010

FOREWORD

The UNCITRAL Arbitration Rules are often cited as one of the most successful instruments of a contractual nature in the field of international trade law. The original Rules were adopted in 1976 by the United Nations Commission on International Trade Law, after extensive consultations with arbitral institutions and arbitration experts. The General Assembly of the United Nations, by its resolution 31/98, recommended the use of these Rules in the settlement of disputes arising in the context of international commercial relations. This recommendation was based on the conviction that the establishment of rules for *ad hoc* arbitration that were acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations. Since then, the UNCITRAL Arbitration Rules have become well known and are widely used around the world, not only in *ad hoc* arbitration. Contracting parties increasingly refer to these Rules in their arbitration clauses or agreements, and a substantial number of arbitral institutions have, in a variety of ways, accepted or adopted these Rules. Nowadays, the UNCITRAL Arbitration Rules are used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. They have been used as a model for various other rules. They have been widely commented by a number of authors over the past 34 years.

The UNCITRAL Arbitration Rules have been revised for the first time in 2010 to meet changes in arbitral practice over the last thirty years, with the aim of enhancing the efficiency of arbitration under the Rules. One of the salient features of the Rules was, and remains, their flexibility. It may be anticipated that the present commentary, which was prepared with the needs of practitioners in mind, will contribute to a better understanding of the procedural framework for solving disputes under the Rules. Mr. Thomas Webster has a long experience as counsel and arbitrator in international arbitration proceedings. He is the author of several publications in the field of dispute resolution. The materials he gathered regarding the application of the original UNCITRAL Arbitration Rules by arbitral tribunals, their recent revision, and the basic principles of national laws on arbitration as inspired, in particular, from the UNCITRAL Model Law on International Commercial Arbitration, provide remarkable insight into current international arbitration law and practice, and illustrate the operation of the Rules in their wider context. As a member of an observer delegation, Mr. Webster gathered first-hand information on the revision of the Rules as he attended sessions of the UNCITRAL Working Group on Arbitration, which prepared the revised text. In this *Handbook of UNCITRAL Arbitration*, he offers a welcome and valuable contribution to the world of arbitration.

Renaud Sorieul, Director,
International Trade Law Division,
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ABBREVIATIONS

AAA-ICDR	The American Arbitration Association International Centre for Dispute Resolution
ABA	American Bar Association
Am Rev Int'l Arb	The American Review of International Arbitration
Arb Int	Arbitration International
ASA Bull	Swiss Arbitration Association Bulletin
Bus L Int'l	Business Law International
Ch.	Chapter
CA	Cour d'appel (French Court of Appeal)
Cass Civ 1re	Cour de cassation 1ère Chambre Civile (French Supreme Court)
Cass Civ 2eme	Cour de cassation 2ème Chambre Civile (French Supreme Court)
Code of Ethics for Arbitrators	Code of Ethics for Arbitrators in Commercial Disputes (2004) (adopted by the AAA and ABA in 2004)
Colum J Transnat'l L	Columbia Journal of Transnational Law
CPC	French Code of Civil Procedure
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
D.	Dalloz
Disp Res J	Dispute Resolution Journal
England	England and Wales
JDI	Journal de droit international (Clunet)
EU	European Union
IntlALR	International Arbitration Law Review
Int'l Am L R	International American Law Review
Int'l Comp Law Quart	International and Comparative Law Quarterly
IBA	International Bar Association
IBA Guidelines on Conflict of Interest	IBA Guidelines on Conflict of Interest in International Arbitration (2004)

IBA Rules of Evidence	IBA Rules on Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICC Court	ICC International Court of Arbitration
ICC ICarb Bull	ICC International Court of Arbitration Bulletin
ICC Rules	ICC Rules of Arbitration (1998)
ILA	International Law Association
ILM	International Legal Materials
J Chart Inst Arb	Journal of the Chartered Institute of Arbitrators
J Int'l Arb	Journal of International Arbitration
Mealey's IAR	Mealey's International Arbitration Report
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OLG	Oberlandesgericht (German Higher Regional Court)
PILA	Swiss Private International Law Act
PLI	Practicing Law Institute
Rev Arb	Revue de l'arbitrage
RDAI/IBLJ	Revue de droit des affaires internationales International Business Law Journal
Rev Crit DIP	Revue critique de Droit International Privé
s.	Section
SIAC	Singapore International Arbitration Centre
TDM	Transnational Dispute Management
TGI	Tribunal de Grande Instance (French Court of First Instance)
Tribunal	Arbitral Tribunal
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006

UNCITRAL Notes	UNCITRAL Notes on Organising Arbitral Proceedings (1996)
UNCITRAL Rules	UNCITRAL Arbitration Rules (2010)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2004)
USC	United States Code
YBCA	Yearbook of Commercial Arbitration
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

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