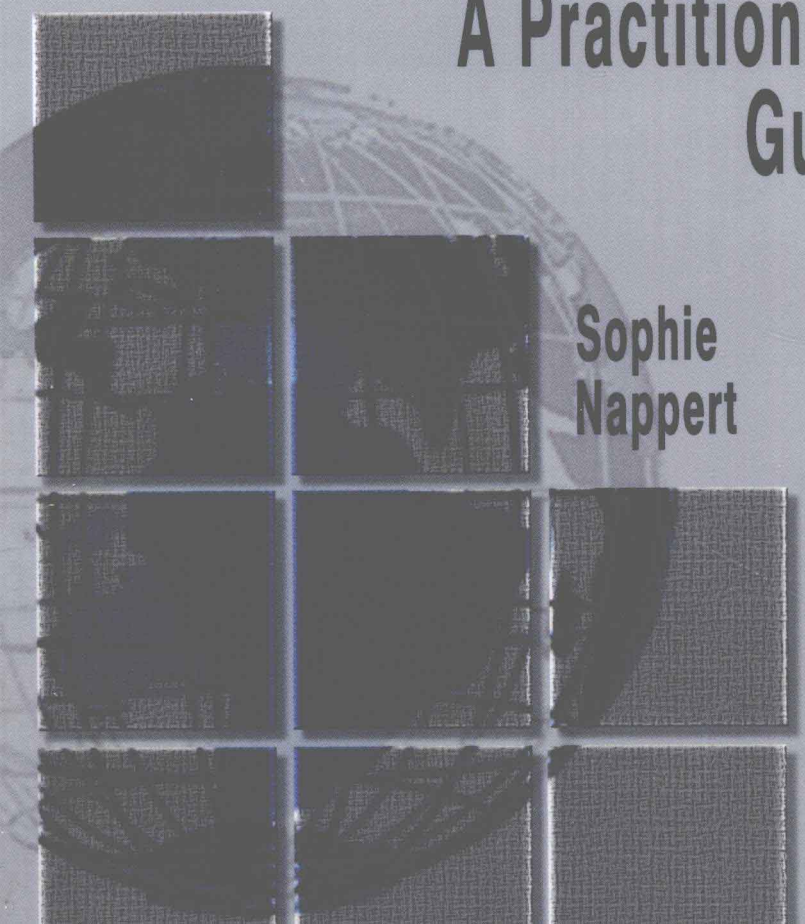
Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide

Sophie Nappert



Commentary on the UNCITRAL Arbitration Rules 2010:

A Practitioner's Guide

SOPHIE NAPPERT

JURIS

Questions About This Publication

For assistance with shipments, billing or other customer service matters, please call our Customer Services Department at:

1-631-350-2100

To obtain a copy of this book, call our Sales Department:

1-631-351-5430
Fax: 1-631-351-5712

Toll Free Order Line:

1-800-887-4064 (United States & Canada)

See our webpage about this book:
www.arbitrationlaw.com

Printed in the United States of America
ISBN: 978-1-933833-85-9

JurisNet, LLC
71 New Street
Huntington, New York 11743
USA
www.arbitrationlaw.com

ACKNOWLEDGEMENTS

The tone and contents of this book are purposely practical. It is meant to act as an easy guide for busy practitioners and arbitrators.

The aim of the book is twofold. I thought it would be informative to provide a glimpse into the "behind the scenes" process undertaken by the UNCITRAL Working Group in revising the 1976 UNCITRAL Arbitration Rules. Also I hope that both seasoned international arbitration practitioners, and colleagues who may not have an in-depth knowledge of the area, might find useful a commentary—laconic though it may be in these early days of the application of the new Rules—of the more significant changes to the Rules and their ramifications.

I was greatly assisted by the UNCITRAL Secretariat with access to information and documents. The comparative presentation of the Articles is theirs, and I was also provided with the Secretariat's reports and summaries of Working Group discussions. I am indebted to Mr. Renaud Sorieul, Ms. Corinne Montineri and Ms. Claudia Gross for their patience with my queries and their unfailing professionalism and helpfulness.

I thank Michael Kitzen and the Juris Publishing team for bearing with me.

This book is dedicated to the memory of my mother, who passed away whilst it was in progress.

Sophie Nappert
London, May 2012

ABOUT THE AUTHOR

Sophie Nappert is a dual-qualified Lawyer in Canada and in the UK. She is an arbitrator in independent practice, based in London. Before becoming a full-time arbitrator, she was Head of International Arbitration at a global law firm.

Ms. Nappert is trained and has practised in both civil law and common law jurisdictions. She is ranked in Global Arbitration Review's Top 30 List of Female Arbitrators Worldwide and is listed in the International Who's Who of Commercial Arbitration.

She is a member of the UNCITRAL Working Group on International Commercial Arbitration and participated in the Working Group's review and development of the 2010 UNCITRAL Arbitration Rules.

TABLE OF CONTENTS

—INTRODUCTION—

GENERAL PRINCIPLES GUIDING THE WORKING GROUP

The goal of the review was to update the Rules in order to meet the many changes to UNCITRAL arbitration practice over the past 30 years (1976) (although this does not make the latest version of the Rules the only version "in force"—*see* Article 1).

The Working Group was guided by the principle that no unnecessary amendments would be made that might call into question the legitimacy of prior application of the Rules. Consequently the review did not amount to a search for perfection.

The Working Group also followed what might be termed a "generic" approach to the review reflecting the broad range of circumstances in which the Rules are applied,[1] and the developing nature of the practice in various areas, including investor-State arbitration. The preference was therefore for common denominators applying to all types of arbitration, as opposed to annexes containing subject-specific guidance. For example, the expressions "both parties", "either party", were replaced throughout with "parties", such as to encompass multi-party arbitration.

The Working Group considered it important to maintain consistency between the Rules and the Model Law and to maintain the structure and spirit of the Rules. The review was not meant to fix something broken, but to provide an update whilst maintaining flexibility and simplicity.

Nevertheless, the new Rules contain several novel provisions, including truncated tribunals (Article 14(2)), the liability of arbitrators (Article 16), a review mechanism for arbitrators' fees (Article 41), joinder (Article 17(5)), Model Statements of Independence and Impartiality, and a Possible Waiver Statement. These are highlighted and commented on below.

A side by side comparison of the 2010 and 1976 versions of the UNCITRAL Rules is provided at the beginning of each Article. The text printed in "***bold italics***" denotes the differences between these rules.

---

[1] There are at least four types of arbitration where the Rules are used: ad hoc arbitration between private commercial parties; investor-State disputes; State-to-State disputes; commercial disputes administered by an arbitral institution.

Whither Ad Hoc Arbitration?

The review process highlighted the fact that, whilst institutional rules often look to the UNCITRAL Rules as a model, the UNCITRAL Rules also feed off institutional practice (e.g. Model Statements of Independence pursuant to new Article 11; the more defined and expanded role of the Appointing Authority in new Article 6). Although this mutual influence is to some extent inevitable and healthy, the question does arise whether the ad hoc commercial arbitration process now presents any specificity of its own, and whether the absence of an overseeing body fetters it in any way.

Consistency between Commercial and Investment Arbitration

Although the Working Group's mandate was squarely defined as a review of the Rules for international commercial arbitration, the frequent use of the Rules in the investment arbitration context did inform the Working Group's discussions in certain aspects, although these considerations did not override the commercial arbitration considerations (see, e.g., the discussions concerning Article 1 on the reference to "disputes in relation to that contract"). The issues underlying the use of the Rules in the investment arbitration context, however, differ from the commercial context, and it can legitimately be asked how consistency in the Rules and their use might be achieved in those areas where commercial and investment arbitration differ.

By way of illustration, the Working Group was mindful of the need to differentiate the UNCITRAL Rules from the institutional ICSID Rules, whereas, as pointed out above, that gap is less pronounced in the commercial arbitration field. Likewise, the "fundamental right" of a party to name an arbitrator in international commercial arbitration is a sustained theme in the Working Group discussions (and particularly in the introduction of provisions for a truncated tribunal (Article 14)), whereas voices are increasingly being heard criticising the exercise of such a "right" in investment arbitration.[2]

For the time being, therefore, the use of the new UNCITRAL Rules in the investment arbitration context means using Rules elaborated primarily for commercial disputes.

---

[2] Jan Paulsson, "Moral Hazards in International Arbitration", Michael E Klein Inaugural Lecture, June 2010, at: http://www.arbitration-icca.org/articles. htmlhttp://www. arbitration-icca.org/articles.html. *See also* Hans Smit, "The Pernicious Institution of the Party-Appointed Arbitrator", *Columbia FDI Perspectives*, No.33, 14 December 2010.

SECTION I

INTRODUCTORY RULES

—ARTICLE 1—

SCOPE OF APPLICATION

Revised **UNCITRAL Arbitration Rules February 2010** **Section I. Introductory Rules** **Article 1—Scope of Application**	**UNCITRAL Arbitration Rules 1976** **Section I. Introductory Rules** **Article 1—Scope of Application**
1. Where parties have agreed that disputes between them ***in respect of a defined legal relationship, whether contractual or not,*** shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.	1. Where ***the*** parties ***to a contract*** have agreed ***in writing*** that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree ***in writing***.
2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.	

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.	2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Title

→ The new proposed title of "Applicability" was not retained, following the generally agreed principle that the Working Group would avoid making unnecessary changes.

Applicable Version of the Rules

→ A deeming provision (Article 1(2)) of application of the revised version of the Rules in force on the date of commencement of the arbitration is added to provide certainty as to which version of the Rules applies, and from which point in time. The former Rules did not make it clear that the latest version of the Rules was to be considered "in force", despite the wording of the model clause referring to the Rules "as at present in force".

→ The deeming provision promotes the application of the latest version of the rules in a greater number of situations. It also seeks to avoid preliminary disputes concerning which version of the Rules should apply in a given proceedings, particularly in ad hoc proceedings, in the absence of a supervisory arbitration centre.

→ The new provision also makes clear that there shall be no retroactive application of the revised version of the Rules to arbitration agreements and treaties concluded before the adoption of the revised version.

→ The corresponding reference to the version of the Rules "as at present in force" in the Model Clause was deleted.

The Writing Requirement

→ An important change in the revised Rules is the deletion of the requirement in Article 1(1) that the agreement to arbitrate, as well as any modification thereto, should be in writing.

→ The *travaux* of the 1976 version of the Rules indicate that the writing requirement was intended, (i) in light of the New York Convention's own writing requirement (Article I (1) and (2)), also found in various domestic laws, to enhance the enforceability of an award issued under the Rules; and (ii) to stress the fact that the parties' agreement should clearly express their intention to arbitrate under the Rules.

→ The Working Group adopted a different position for the revised Rules, which do not take a stand on the form of the arbitration agreement, left to the applicable law.

→ The writing requirement was a requirement of form that, unlike the form requirement under the Model Law, was distinguished from the question of validity of the arbitration agreement (left to the applicable law) and that of enforcement under the New York Convention. Form was a matter that should be left to the applicable law, and there was no uniformity in domestic laws on the requirement that the agreement to arbitrate or modifications thereto should be in writing.

→ The Model Law reflected a broad and liberal understanding of the form requirement. The revised Rules, in the interest of harmonisation of international arbitration, mirror that understanding.

→ Article 19(1) of the Model Law[3] did not require a writing requirement. As a matter of consistency, the Rules ought not to go beyond the requirements of the Model Law.

→ If the writing requirement were maintained, it would have to be defined, as there was no uniform approach to the question in domestic laws, nor in other arbitration rules.

→ The same approach prevailed for the requirement that modifications should be in writing.

---

[3] "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

PRACTICE NOTE: Parties may agree to refer disputes to arbitration under the UNCITRAL Rules, and amend that agreement, without having to consign it in writing if that is in conformity with the applicable law. Consider, however, the evidence requirements consonant with this option if (i) the Claimant starts court proceedings in breach of the (unwritten) arbitration agreement; (ii) the Respondent disputes the existence of the arbitration agreement.

The References to "Contract", "Parties to a Contract" and "Disputes in Relation to That Contract"

→ The Working Group agreed that the ambit of the Rules should be widened to ensure that they were not limited to disputes of a contractual nature. The Working Group had in mind, notably, disputes arising under investment treaties that did not relate to a contract, or disputes relating to a contract involving a person that was not a party to the arbitration.

→ The reference to "parties" was retained, but the words "to a contract" dropped. In that way both investment disputes, and non-contractual disputes between parties to the arbitration proceedings, were covered in addition to parties to a contract containing an arbitration clause.

→ The words "in respect of a defined legal relationship, whether contractual or not," were added to paragraph (1). These words are well-recognised as derived from the New York Convention and included in Article 7(1) of the UNCITRAL Arbitration Model Law.

Model Arbitration Clause

Model arbitration clause for contracts	**Model arbitration clause for contracts**
Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL	Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with

Arbitration Rules.	the UNCITRAL Arbitration Rules ***as at present in force***.
Note — Parties ***should*** consider adding:	Note — Parties may wish to consider adding:
(a) The appointing authority shall be ... [name of institution or person];	(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... [one or three];	(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town and country);	(c) The place of arbitration shall be ... (town and country);
(d) The language to be used in the arbitral proceedings shall be	(d) The language***(s)*** to be used in the arbitral proceedings shall be ... .

→ In contrast with the discussion regarding the scope of application of the Rules in Article 1(1), the reference to a contract was retained in the Model Clause, given that the purpose of the Clause was to be used in a contractual context. Also, if the reference to a contract was deleted, then the deletion of "or the breach, termination or invalidity thereof" would have to ensue. This was considered undesirable.

→ Placement of the Model Clause in the Rules: it used to be placed as a footnote to the writing requirement. That requirement having now been deleted, the Model Clause would be placed at the end of the Rules.

PRACTICE NOTE: If the Model Clause is not used, consider including wording limiting the application of the arbitration clause to contractual disputes only if that is the intent of the parties, lest a wider ambit of non-contractual disputes might also be covered, e.g. tort or insolvency.

Note to the Model Clause: Optional additions on appointing authority, number of arbitrators, place and language of arbitration

Chapeau: "should consider adding" instead of "may wish to"

→ The change to "should" was intended to stress the importance for the parties to consider the inclusion of the listed elements.

Subparagraph (a): Appointing Authority

→ The wording remained unchanged, and the proposal that the word "person" as an appointing authority be removed was not retained, as it would run contrary to accepted practice (e.g. the Secretary-General of the Permanent Court of Arbitration).

Subparagraph (c): "Seat" or "Place" of Arbitration

→ The term "place" is retained following the discussion related to (new) Article 16.

Proposed Provision on Applicable Law

→ The Working Group considered whether the Note ought to include a reference to the law governing the arbitration agreement, so as to raise awareness of the importance of defining it.

→ The Working Group came to the view that such a reference addressed only one of the applicable laws of arbitration; there were also the law applicable to the substance of the dispute, and the impact of the place of arbitration on the law applicable to the arbitral proceedings.

→ The Working Group concluded that the Model Arbitration Clause would not contain any provision on applicable law.