The Work of UNCITRAL on Arbitration and Conciliation

Pieter Sanders

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BY

PROFESSOR PIETER SANDERS

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FOREWORD

In this publication an attempt is made to present a survey of the important work of UNCITRAL (United Nations Commission on International Trade Law) in the field of Arbitration and Conciliation. It is meant as an introduction to the complicated field of international commercial arbitration for students and those who are involved for the first time in an international arbitration.

The work of UNCITRAL in the field of arbitration started in 1976 with its *Arbitration Rules* which Rules largely influenced its *Model Law* on International Commercial Arbitration of 1985. UNCITRAL issued its *Conciliation Rules* in 1980. All three will be discussed, with short comments. The comments on the Conciliation Rules are concluded by the suggestion that the time has come also to prepare a Model Law on Conciliation. UNCITRAL's 1996 'Notes on OrganisingArbitral Proceedings' are not dealt with although on some occasions reference will be made to the Notes when the Arbitration Rules are discussed.

In this survey I have abstained from notes. However, for the convenience of the readers the text of the Model Law is annexed as are the texts of the Arbitration and Conciliation Rules of UNCITRAL. Also the relevant portion of the New York Convention, Articles I-VII, is annexed and a List of countries which adopted, in various manners the Model Law.

In this comparative study, I have concentrated mainly on the 'Model Law countries'. However, where relevant and informative to the reader, I have included comparisons with countries where new legislation appears to have been influenced by the Model Law, c.q. BRAZIL, COSTA RICA, ENGLAND, SWEDEN AND VENEZUELA.

I hope this survey of the impressive work of UNCITRAL in the field of private settlement of disputes, will serve its purpose as an introduction for further study as well as for practice.

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PART I. THE ARBITRATION RULES OF UNCITRAL 1976

Introduction

These Rules, comprising 41 articles, are often referred to in international contracts. The Iran-US Claims Tribunal in The Hague, dealing since 1981 with claims of nationals of the US against Iran and claims of nationals of Iran against the US and contractual claims between the two Governments after the seizure of the American Embassy in 1979 and the detention of the Americans in the Embassy as hostages, arbitrates on the basis of these slightly adapted Rules. Many existing Arbitral Institutions are prepared, if parties so wish, to administer an arbitration under the UNCITRAL Arbitration Rules instead of their own Arbitration Rules. Also several Arbitral Institutions have adopted, with minor modifications, the UNCITRAL Rules as their institutional rules.

However, UNCITRAL is not an Arbitral Institute. UNCITRAL does not administer arbitrations and cannot come to the rescue, for example, in case the parties cannot reach agreement on the composition of the arbitral tribunal. For this case and also in case deposits are requested from the parties (see art. 41) or an arbitrator is challenged (see art. 12) the Rules introduce the Appointing Authority (A.A.). Parties have to agree upon an A.A.. If they cannot reach agreement on the Appointing Authority, the Secretary General of the Permanent Court of Arbitration in The Hague will designate the A.A.. The introduction of an Appointing Authority and a Designating Authority distinguishes the UNCITRAL Rules from all other well-known Arbitration Rules used for the solution of international commercial disputes.

When parties from different countries negotiate an international contract there usually remain at the end two obstacles to overcome: which law will apply to the contract and how will disputes be resolved? In case the parties to such international contract prefer arbitration instead of going to court, the question arises which Arbitration Rules will apply? The UNCITRAL Arbitration Rules have the advantage of having been prepared by a Commission with an international composition. Representatives from developed and less developed countries participated in the drafting of these Rules. This may explain why in many circumstances UNCITRAL's Arbitration Rules are chosen.

The Rules were approved by the General Assembly of the United Nations in its Resolution of 15 December 1976 and distributed by the Secretary-General worldwide. A draft of the Rules was discussed at the Fifth Arbitration Congress of ICCA (International Council for Commercial Arbitration) held in New Delhi, India in January 1975. This marked the first collaboration between UNCITRAL and ICCA.

The Rules preceded the Model Law of UNCITRAL of 1985. Several articles of the Law are borrowed from the Rules. Where this has taken place the Rules will be compared with the Model Law. I refrained from comparing the Rules with the Arbitration Rules of well known Arbitration Institutes dealing with international commercial arbitration. My comparison is limited to UNCITRAL: Rules and Law.

SECTION I
Introductory Rules
(arts. 1-4)

Article 1 deals with 'The scope of application' of the Rules. The parties should have referred to the application of the Rules by an agreement in writing. These Rules are 'subject to such modification as the parties may agree in writing' (*para.* 1*)*. Parties as far as I know do not make use of this possibility. The Iran-US Claims Tribunal slightly modified the text, adapting the Rules to the circumstances under which this Tribunal applies the Rules. Arbitral Institutes, adopting the Rules have adapted them to institutional arbitration. Thus, for example, IACAC (Inter-American Commercial Arbitration Commission), when adopting the UNCITRAL Arbitration Rules in 1977, replaced all references to the Appointing Authority by reference to IACAC.

Para. 2 of art.1 deals with the relationship between the Rules and the arbitration law, applicable to the arbitration (see Place of Arbitration in art. 16 hereafter). Mandatory provisions of this law prevail. However, as the expression 'mandatory provisions' may be subject to different interpretations, this is replaced by 'provisions of the law applicable to the arbitration from which the parties cannot derogate'. The law applicable to the arbitration should be distinguished from the law applicable to the merits (see art. 33 hereafter).

A modern Arbitration Clause is presented in a Note to art. 1. It is a broad arbitration clause to which four recommendations are added which, if complied with, regulate issues which otherwise will arise during the arbitration. Arbitral Institutes also provide model clauses. It is to be recommended that

parties use these model clauses, whether provided by UNCITRAL or by an Arbitral Institute. They are drafted with great care and tested in practice.

Article 2
See Part II, art. 3 of the Model Law which is modelled on art. 2 of the Rules.

Article 3 deals with the 'Notice of arbitration' with which arbitral proceedings are deemed to commence. *Para.* 3 deals with the contents of this notice. The notice should *inter alia* contain the general nature of the claim with an indication of the amount involved (under *e*) and the relief or remedy sought (under *f*). A list of issues to be decided by the arbitral tribunal is not required. Under the Arbitration Rules of the ICC (International Chamber of Commerce, Paris) arbitrators have to draw up 'Terms of Reference', which have to contain a List of issues to be decided. In the most recent version of these Rules of 1998, this requirement, which may give rise to lengthy discussions with the parties and delay, has been weakened by adding 'unless the Arbitral Tribunal considers it inappropriate'.

SECTION II
Composition of the arbitral tribunal
(arts. 5-14)

Article 5 provides for an uneven number of arbitrators; either a sole arbitrator or three. Three arbitrators will be appointed if, within a short period after receipt of the notice, parties have not agreed on a *unus* (compare art. 10 M.L.. in Part II).

Appointment of the arbitrators (arts. 6-8).

In every arbitration, whether domestic or international, the appointment of the arbitrators is essential. It is a well-known saying that each arbitration is as good as the arbitrators. The Rules had to find a solution for the composition of the arbitral tribunal as UNCITRAL is not an Arbitral Institution (see Introduction). The Rules introduced the Appointing Authority (A.A.) and Designating Authority in case the parties cannot agree on the choice of an A.A.. Designating an A.A. has become a regular part of the activities of the Secretary General of the Permanent Court of Arbitration.

Article 6 deals with the appointment of a *sole arbitrator*. First of all the parties have the opportunity to agree on the choice. If they cannot reach agreement

within the thirty days mentioned in *para.* 2, the A.A. will make the appointment. According to *para. 1* the A.A. may be either 'an institution or a person'.

In appointing the sole arbitrator the A.A. shall use the so-called *List-procedure (para. 3).* This procedure works as follows. The A.A. sends to both parties an identical list containing at least three names for the appointment of the sole arbitrator. The parties have the opportunity to send the list back to the A.A., deleting the names they object to and ordering the remaining names in the order of their preference. The A.A. will make the appointment from the names approved on the lists returned to him in accordance with the preferences indicated by the parties. If for any reason this is not feasible the A.A. may exercise its discretion in appointing the sole arbitrator (*para.* 3 under *d*).

This list-procedure is not a *novum.* It has been borrowed from the American Arbitration Association (AAA). The list-procedure is also applied by other Arbitral Institutes. The Netherlands Arbitration Institute (NAI) has already done so since 1948. In practice it appears that often the parties express an identical preference. In effect the list-system may lead to what may be regarded as the ideal system of appointing arbitrators: appointment of the arbitrators by agreement of the parties.

When the A.A. has to appoint the sole arbitrator regard shall be made to the requirements of independence and impartiality of the arbitrator (see art. 10 hereafter on challenge of the arbitrator). The A.A. shall also take into account the advisability of appointing an arbitrator of another nationality than the nationality of the parties (*para.* 4 of art. 6). This also applies when the A.A. has to appoint the chairman of the Arbitral Tribunal of three (see art. 7, *para.* 3).

Article 7 deals with the appointment of *three arbitrators.* Each party shall appoint one arbitrator, the two arbitrators thus appointed shall choose the third arbitrator who shall act as the presiding arbitrator of the tribunal *(para. 1).*

On two occasions the A.A. has to come to rescue. Within the time-limit of 30 days mentioned in *para. 2* the claimant normally will have appointed his arbitrator. He may have done so already in his notice of arbitration (see *para.* 4 of art. 3 under *b*). However, the defendant may not have used this opportunity to make his appointment. In that case the A.A. will appoint the second arbitrator.

Second, if within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the third arbitrator, the A.A. will appoint the chairman 'in the same way as a sole arbitrator would be appointed' *(para. 3).* The A.A. will then apply the list-procedure and will take into account the advisability of appointing an arbitrator who does not have the nationality of one of the parties.

Article 8 regulates the procedure in case the A.A. has to make the appointment. The party which requests the appointment by the A.A. shall provide the A.A. with the necessary information for which I may refer to art. 8 in Annex I. The A.A. may require from any party such information as it deems necessary to fulfil its function.

Challenge of arbitrators (arts. 9-12)

Article 9 requires a prospective arbitrator to disclose to the person who approaches him for a possible appointment any circumstances that may give raise to 'justifiable doubts as to his *impartiality or independence*'. Also during arbitral proceedings an arbitrator, once appointed, is obliged to disclose those circumstances. For example, if a lawyer has been appointed as arbitrator and his law firm merges with another law firm of which one of the partners acts as lawyer of one of the parties, this circumstance should immediately be disclosed.

Impartiality and independence **(art. 10)** applies to all the arbitrators as it does to judges. It also applies to the party-appointed arbitrator. However, this does not seem to be generally accepted. The Code of Ethics of the American Bar Association and the AAA qualify the party-appointed arbitrator as a 'non-neutral' arbitrator who may be 'predisposed to deciding in favour of the party who appointed him'. On the other hand the International Bar Association's Code states that 'all the arbitrators shall be and remain free from bias'.

Article 11 deals with the notice of challenge, to be sent by a party to the challenged arbitrator *(para. 1)* and the notification of the challenge to the other party and to the other members of the arbitral tribunal *(para. 2)*, both within short time limits.

According to *para.* 3, the other party may agree to the challenge or the challenged arbitrator may withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for challenge. The challenged arbitrator may be inclined to withdraw as apparently the challenging party has no confidence in his impartiality or independence although personally he deems the grounds for challenged unjustified. The provision that withdrawal does not imply a recognition of the validity of the challenge may facilitate his decision to withdraw. Only in case the challenge is without any reasonable ground and has only been introduced to delay the proceedings will he refuse to withdraw.

Article 12 regulates the procedure in case the other party does not agree to the challenge or the challenged arbitrator does not withdraw. Here again the

A.A. plays a role and will be called upon to decide on the challenge *(para. 1)*. If the A.A. sustains the challenge a *substitute arbitrator* will be appointed in which case the A.A. may make the appointment.

Replacement of the arbitrator will, according to **article 13** also take place in case an arbitrator dies or resigns *(para. 1)* or when he 'fails to act or in the event of the *de jure* or *de facto* impossibility to perform his function' *(para. 2)*. Failing to act may seem unlikely but, exceptionally, it happens when an arbitrator attempts to obstruct the arbitral proceedings. *De jure* impossibility may occur when an arbitrator is put under legal restraint; *de facto*, for example, in case of a serious illness.

Article 14 finally contains a procedural provision. In case the sole or presiding arbitrator is replaced, previously held hearings shall be repeated. If one of the other arbitrators is replaced, it is up to the arbitral tribunal whether hearings should be repeated. The Rules go much further into detail in respect of challenge than the Model Law.

SECTION III
Arbitral Proceedings
(arts. 15-30)

The Rules are also detailed in respect of the arbitral proceedings. Parties, not familiar with international arbitration proceedings are guided by these Rules, drafted in plain language, easily understood by the business world.

Article 15 *General Provisions*

Para. 1 contains the principle that 'the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case'. This provision is repeated in art. 18 of the M.L.. It is a mandatory provision. Non observance of equal treatment or not giving parties a full opportunity to present their case will make the award subject to an action for setting aside.

This principle is preceded by 'subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate'. This provision can be compared with art. 19 of the M.L.. Both the Rules and the M.L. contain a waiver clause (see art. 30 of the Rules and art. 4 of the M.L.). In case a provision of the Rules or a provision of the Law from which the parties may derogate is not complied with, this must immediately be objected to.

According to *para. 2* any party may request at any stage of the proceedings 'to hold a hearing for the presentation of evidence or for oral arguments'. The M.L. changed this, to holding such hearings, if requested by the parties 'at an appropriate stage of the proceedings' (art. 24(1) M.L., second sentence). For art. 24 M.L. see further Part II.

The provision may be regarded as an application of the principle of para. 1 that each party should have a full opportunity to present its case. Nevertheless the question may arise whether, under circumstances, the arbitral tribunal may refuse to comply with such a request. Why should an arbitral tribunal, for example, comply wit a request for an oral hearing when it is fully informed by the exchange of written pleadings and the production of documents? If an arbitral tribunal would under these circumstances not comply with the request for an oral hearing, the risk exists that its award may be set aside. However, in that case the Court might, in my opinion, dismiss the action if it were to agree with the tribunal that the parties had a full opportunity to present their case and that obviously the request for an oral hearing was only made to delay the arbitral proceedings.

Also in respect of a request for the hearing of witnesses, arbitrators should have some freedom. When witnesses have been heard and a party were to request a re-hearing of the same witness or the hearing of new witnesses, arbitrators should be entitled to reject this request when obviously the request has only been made to delay the proceedings. A *preparatory meeting* with the parties held for the organisation of the hearing of witnesses may be helpful to prevent these subsequent requests.

This may be the place to discuss the holding of preparatory meetings, used as a tool of case management by arbitrators. The Rules are silent on such meetings but, in my opinion, they may be recommended, at several stages of the arbitral proceedings, in the interest of an efficient conduct of an international arbitration.

Preparatory Meetings

Primo a preparatory meeting may be held *at the beginning* of an international arbitration. At such a meeting the timetable for the exchange of written pleadings (arts. 18 and 19) could be agreed upon. Also the language to be used in the arbitral proceedings (art. 17) could be discussed and regulated.

In case a party intends to raise the plea of lack of jurisdiction (see art. 21) it may also be discussed whether arbitrators should first render an award on this issue. The same question may arise in respect of the law applicable to the merits (art. 33 of the Rules). Preliminary decisions of the arbitral tri-

bunal on both issues – the jurisdiction and the applicable law – may be helpful for an efficient conduct of the arbitral proceedings.

Finally, reference may also be made to the situation that, in an international arbitration, arbitrators may be buried under an abundance of documents. How to avoid this, may be another topic for discussion at a preparatory meeting at the beginning of an arbitration. The Notes of UNCITRAL *inter alia* deal with this topic. The Rules (art. 24(2)) only provide that an arbitral tribunal may request 'a summary of the documents' a party intends to present in support of the facts set out in his statement of claim or statement of defence.

Secundo, a preparatory meeting may also be useful when witnesses are to be heard. The most difficult task of all is to find the date on which all persons involved, the arbitrators, the parties' lawyers and the witnesses are available. For the Chairman of the Arbitral Tribunal it may be a cumbersome exercise to fix the dates of the hearing by telephone or other means of communication. A preparatory meeting with the parties or their lawyers may lead to a quicker result. Before the hearing parties should have informed each other and the arbitral tribunal of the names, addresses and functions of the witnesses to be presented as well as the subjects on which they will testify (see art. 25, *para.* 2).

A discussion in a preparatory meeting of the witnesses to be heard may also facilitate the arbitral tribunal's task of organising the hearing and may, sometimes, lead to a reduction of the number of witnesses to be heard. In any case it is only upon receipt of this information, that the tribunal will be in a position to estimate the time needed for the hearing which not only may take several days but in some cases weeks or even more than a month.

It also should be known whether the hearing of a witness calls for translation as not every witness may be familiar with the language of the arbitral proceedings (mostly English), and whether the parties want to have the hearing recorded and want to have the opportunity of post-hearing briefs. All this may be discussed and settled in a preparatory meeting.

Tertio, the holding of a preparatory meeting may also be useful when an arbitral tribunal considers the appointment of an *expert*. I will discuss this ad art. 27 of the Rules. I only wanted to draw attention to the use of preparatory meetings as a tool for case management by arbitrators, which is not uncommon in the practice of international commercial arbitration.

Article 16 *Place of arbitration*

Apart from the choice of arbitrators, the most important choice made by parties in an international arbitration is the choice of the place of arbitration. The arbitration law of the place of arbitration governs the arbitration. For the

consequences thereof see my comment on art. 20 M.L. which is modelled on art. 16 of the Rules. Choosing a country with a modern arbitration law and with courts which have a favourable attitude towards arbitration, therefore is indicated. In case the choice has not been made, arbitrators will determine the place of arbitration *(para. 1)*.

The locale where the arbitration will be held within the country agreed upon by the parties may be determined by the arbitrators. However meetings between the arbitrators and hearings of witnesses may take place at any place *(para. 2)*. The award shall be made at the place of arbitration *(para. 4)*. The award should state: made at (place of arbitration) and the date (art. 32(4), first sentence). For the signing of the award arbitrators, coming from different countries, need not to travel to the place of arbitration. An award may be circulated to the arbitrators for signing at their convenience.

Article 17 *Language*
Promptly after their appointment the arbitrators shall determine the language to be used in the arbitral proceedings *(para. 1)*. This applies to the briefs, submitted by parties to the arbitral tribunal, and to the oral hearings. As observed already under art. 15 above the determination of the language may be a typical topic for discussion with the parties in a preparatory meeting at the beginning of an arbitration. It may also be a topic for a preparatory meeting when witnesses are to be heard. In both cases – oral hearing and hearing of witnesses – also the question whether translation is needed may be discussed. *Para. 2* deals with translation of documents delivered in the original language into the language or languages of the proceedings.

Article 18 *(Statement of claim) and* **Article 19** *(Statement of defence)*
The Rules only needed to give some guidance for the contents of these two statements. Replication *(Réplique)* and Rejoinder *(Duplique)* may follow (see **art. 22**). The statement of defence may contain a counter-claim or set-off, if they arise out of the same contract containing the arbitral clause. At a later stage of the arbitral proceedings a counter-claim or set-off can only be introduced when the arbitral tribunal decides that the delay was justified (art. 19(3)). When a counter-claim is made arbitrators may also require a supplementary deposit from the parties (art. 41(2)).

Article 20 *Amendments to the claim or defence*
The arbitral tribunal may reject the amendment if it considers it inappropriate having regard to 'the delay in making it or prejudice to the other party or

any other circumstances'. The arbitral tribunal has a broad discretionary power. However, a claim may anyhow not be amended when the amended claim falls outside the scope of the arbitration agreement (last sentence of art. 20).

Article 21 *Pleas as to the jurisdiction of the arbitral tribunal*
Para. 1 states that the tribunal has the power to rule on its jurisdiction when any objection is made in respect of the 'existence or validity of the arbitral clause' (Kompetenz-Kompetenz). Parties may want to receive at an early stage of the proceedings a decision of the arbitral tribunal whether it deems to have jurisdiction or not. This I mentioned already ad art. 15 as one of the topics to be discussed with the parties at a preliminary meeting at the beginning of the arbitration.

Para. 2 contains the so-called separability rule: the arbitral clause shall be treated as independent from the other terms of the contract. A decision of the arbitral tribunal that the contract is null and void does not entail *ipso jure* the invalidity of the arbitration clause. In 1976 this rule was rather progressive; today it may be regarded as generally accepted.

Para. 3 requires that this plea shall be raised at an early stage of the proceedings: not later than in the Statement of Defence or in respect of a counter-claim, in the reply to the counter-claim.

Para. 4 states that the arbitral tribunal should, in general, rule on this plea as a preliminary question. In PART II (Model Law) this procedural aspect will be discussed ad art. 16 M.L..

Article 22 *Further written statements*
No comment.

Article 23 *Periods of time*
The time period of 45 days for the communication of written statements will often not have been respected in an international arbitration. Longer periods may be agreed upon between the parties and the (chairman of) arbitral tribunal. In case not agreed but exceeded the waiver clause (art. 30) will prevent an attack on the award for non-compliance with the Rules.

Articles 24 and 25 *Evidence and Hearings*
Article 24 deals in *paras* 2 and 3 with the *production of documents*. According to *para.* 2 the arbitral tribunal may 'if it considers it appropriate' require from each party 'a summary of documents' which the party intends to present. In the practice of international arbitration such request will sel-

dom be made but each party may present *proprio motu*, a list of documents to which it refers in the written pleadings.

The provision apparently is aimed at an issue I mentioned earlier. In an international arbitration arbitrators may be buried under a load of documents produced by either side. UNCITRAL's Notes also attempt to remedy this phenomenon. They suggest that parties produce together a single set of documents to which they will refer. This establishes the authenticity of these documents and avoids duplication. The Notes add to this that, in case such a set of all documents would be too voluminous, a selection of documents could be made by the parties of frequently used documents in a jointly established set of 'working documents'. Such a set of working documents may be produced at an early stage o the proceedings but it can hardly be foreseen which documents will further have to be produced.

The topic of overwhelming production of documents does not occur in every international arbitration. In my opinion it should be discussed with the parties at a preparatory meeting at the beginning of an arbitration as suggested *supra* at the beginning of this Section on Proceedings (see ad art. 15).

Para. 3 entitles the arbitrators, at any time during the arbitral proceedings, to require the parties to produce a document. It may be that one party refers to a document in the possession of the other party but so far not produced. In case the request to produce the document is not complied with, the arbitral tribunal may draw its own conclusions from the non-production.

Article 25 deals in *para.* 1 with the advance notice of an *oral hearing*. There is more to it than only the fixing of the date, time and place of the pleadings *(playdoyers)*. Are the lawyers to produce, after their pleadings, a memorandum of oral pleadings with references to court decisions and literature they cited? If so, the tribunal could order the submission of post-hearing briefs directly to the arbitral tribunal. Upon receipt of the briefs the tribunal will then send a copy to the other party. This avoids that the production of post-hearing briefs leads to a new discussion between the parties.

Paras. 2-5 deal with the *hearing of witnesses*. For the preparation of the hearing I recommended a preparatory meeting (*supra* ad art. 15 under Secundo). The issues mentioned in *paras* 2 and 3 (see Annex I) could be settled in such a meeting of the arbitral tribunal with the parties.

Para. 4 states that the arbitral tribunal is free to determine the manner in which witnesses are examined (last sentence). In court proceedings, under the common law system, it is primarily the lawyers who conduct the hearing of witnesses: (a) examination-in-chief by the lawyer who presents the witness, (b) cross-examination by the lawyer of the other side and (c) re-examination