

***THE REVISED UNCITRAL  
ARBITRATION RULES OF 2010:  
A COMMENTARY***

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# THE REVISED UNCITRAL ARBITRATION RULES OF 2010: A COMMENTARY

Justice Clyde Croft<sup>1</sup>

*Supreme Court of Victoria*

## ***Introduction***

The UNCITRAL Arbitration Rules of 1976 (the “1976 Rules”) have, since their inception, been extensively employed in the management of a broad range of international commercial contract disputes. Although the Rules were designed to apply in absence of a facilitating or overseeing arbitral institution, parties to various forms of commercial disputes have nonetheless agreed to have their arbitrations governed by these rules; irrespective of whether the form of arbitration chosen is one administered by an arbitral institution, or, instead, an “ad hoc” arbitration. More unexpectedly, the Rules have also seen wide acceptance and employment in a diverse array of investor-State and State-State disputes. This can, to a large extent, be explained by the logical, consistent and coherent default framework that the Rules offer contracting parties. At the same time, however, the Rules manage to combine flexibility, allowing them to apply to a number of different forms of arbitration. Indeed, the true influence of the Rules extends beyond their practical application, having also shaped and informed the drafting of a number of institutional rule sets.<sup>2</sup>

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<sup>1</sup> BEc LLM (Monash), PhD (Cantab), JFAMINZ, LFACICA, LFIAMA. The author gratefully acknowledges the assistance of Mr Drossos Stamboulakis, Associate, Supreme Court of Victoria, in the preparation of this paper.

<sup>2</sup> For example, the Australian Centre for International Commercial Arbitration (“ACICA”) Rules.

The ongoing guidance and support of UNCITRAL, a State-neutral and internationally recognised and respected non-partisan body, allows parties to be confident that the Rules are based on enduring expertise, embody best practice, and are clearly tailored towards the best method for resolving disputes in arbitration.<sup>3</sup> As a result, the Rules are recognised as one of the most successful voluntary international contractual frameworks in the field of arbitration.<sup>4</sup> This recognition canvasses both the extensive adoption and use of the Rules, but also the carefully considered wording,<sup>5</sup> which has, for the most part, made it relatively easy to ascertain the intended effect of each provision, and thus apply the Rules consistently across a broad range of disputes.

### ***The review process***

In light of the success of the 1976 Rules, it was not until 2006, three decades later, that the UNCITRAL Commission decided that a review should be undertaken to determine what revisions may be required to meet the changes in arbitral practice since the 1976 Rules were first adopted. The revision process was largely focused on resolving problems in practice and codifying best practice, to enhance the efficiency of arbitration conducted under the Rules. Over eight sessions, spanning a period of five years, a specialist Working Group on International Arbitration drafted and developed what essentially forms the basis of the updated Rules. This draft was put to the UNCITRAL Commission, which

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<sup>3</sup> This was most recently demonstrated in the 2010 Revision process, outlined below, which was largely devoid of the usual 'political' decision making seen at the UN. The UNCITRAL Working Group – comprised of a number of experts, including academics and respected arbitration practitioners – worked in close cooperation with interested inter-governmental and non-governmental organizations over eight sessions, from September 2006 to February 2010. This allowed for technical and best-practice solutions to be more readily reached.

<sup>4</sup> See, for example, the remarks of Ms Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel, given at 43<sup>rd</sup> session of UNCITRAL (21 June 2010, 11:00am).

<sup>5</sup> The clear expression of UNCITRAL's intention is strengthened by the drafting style and unique notation and agendas provided by the UNCITRAL Secretariat in the Commission and Working Groups. It is also no doubt enhanced by the official translation of the Rules into a number of languages, which serves both to reinforce and highlight the original intent and meaning behind the provisions. Indeed, the availability of the Rules in different languages has also allowed the Rules to appeal to a broader audience, extending their influence significantly.

chose to adopt the final text on 25 June 2010 (the “revised Rules” or the “2010 Rules”). The revised Rules will apply to arbitration agreements governed by the UNCITRAL Rules entered into after 15 August 2010.<sup>6</sup>

Although the revised Rules are not intended to significantly depart from the ‘structure’, ‘spirit’, or ‘drafting style’ of the 1976 version,<sup>7</sup> there are considerable modifications, amendments and adjustments in a number of important respects. Viewed simply from a quantitative basis, however, it appears that little has changed: the revised Rules will have 43 articles as opposed to 41 in the 1976 Rules. Nonetheless, in practice, approximately half of the articles of the 1976 Rules have been modified in the 2010 Rules (albeit, some of the changes are minor textual revisions only). Qualitatively, a number of articles have been heavily refined, varied and clarified, and new provisions included. While the scope of the revision was somewhat limited,<sup>8</sup> it is no doubt true that the revised Rules offer significant modifications from the 1976 Rules.

### ***Structure of the paper***

An article-by-article review and comparison of the 1976 and 2010 Rules has been covered comprehensively elsewhere.<sup>9</sup> While this paper gives consideration to some important changes in the Rules, the primary focus is on a broad commentary of the Rules, particularly with reference to how well they meet their objective of ‘future-proofing’ and improving upon the 1976 Rules. Thus, in Part I of this paper, I focus on a select few changes seen in the revised Rules,

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<sup>6</sup> See Article 1(2) of the revised UNCITRAL Arbitration Rules (2010).

<sup>7</sup> See UNCITRAL, Working Group II (Arbitration and Conciliation) 50th Session, Annotated Provisional Agenda, 13 November 2008 (A/CN.9/WG.II/WP.153), at para 9. This was re-expressed in the press statement of UNCITRAL, dated 29 June 2010, announcing in its heading that the “Revised UNCITRAL Arbitration Rules Adopted” (UNIS/L/139).

<sup>8</sup> Largely to resolve problems in practice, and update the rules with current arbitral practice: see *APRAG Report*, Forty-eighth session of the Working Group, ¶33.

<sup>9</sup> See, for example, Professor Jeffrey Waincymer, *The New UNCITRAL Arbitration Rules: An Introduction and Evaluation* (2010), and James Castello, “UNCITRAL Rules” in Weigand (ed), *Practitioner’s Handbook on International Commercial Arbitration* 2nd ed (2009).

reflecting particularly on changes that may be of particular significance for Australia and New Zealand. In Part II, I consider, more broadly, the impact the revised Rules are likely to have on arbitration.

### ***Part I: Comparison with the 1976 Rules***

I first consider the increased guidance the revised Rules offer ad hoc arbitrations, which often face difficulties where procedural requirements are not clearly agreed upon by contracting parties. Second, I consider the amended provision on interim measures, testament to the frequent resort to interim relief in support of arbitration, as well as UNCITRAL's recent 2006 revision of the Model Law on International Commercial Arbitration (the "Model Law"). I then discuss the amendments relating to experts, reflecting an increased reliance on tribunal-appointed experts in modern arbitrations. Finally, I canvass a select number of miscellaneous amendments, directed at enhancing procedural efficiency.

#### ***The role of designating and appointing authorities***

The 'semi-institutionalisation' of the revised Rules is seen most clearly in the new provisions contemplating a wider role for appointing authorities (Articles 8-10, 13, 14 and 41), and the provision that more clearly spells out the role of a designated authority (Article 6). These measures are, amongst other things, aimed at assisting the resolution of deadlocks and procedural quagmires. In particular, the appointing authority has been given broad residual powers (usually in default of agreement) to appoint arbitrators (Articles 8-10), rule on challenge to arbitrators (Article 13), replace arbitrators (Article 14), and review the fees and expenses of arbitrators (Article 41). These amendments will leave parties less exposed to tactical delaying of proceedings, by parties refusing to nominate arbitrators, progress challenges or failing to attend to the replacement of arbitrators. In addition, all parties to a dispute will be less vulnerable to abuse by arbitrators setting unreasonably high fees or claiming unreasonable expenses (particularly where the party with deeper pockets may be complicit in this behaviour, as a bid to bring on an earlier settlement).

### *Designating and appointing authorities*

The significantly expanded Article 6 spells out in detail what the original Article 6.2 of the 1976 Rules mentions in passing: essentially, the process for designating an appointing authority in absence of party agreement. However, as has been suggested elsewhere, such a provision is not completely new – Article 6 of the revised Rules is, to a significant extent, a consolidation of existing provisions in the 1976 Rules. It is important to note, however, that the revised Rules also grant much wider powers to appointing authorities. Thus, the decision of how this appointing authority is designated becomes more practically important. This is of particular significance for the UNCITRAL Rules, which were originally tailored for parties choosing to undergo ad hoc arbitration, who would necessarily forego the facilitative oversight of an institutional arbitral organisation (and its rules).

### *Rationale for a designated authority*

The rationale for appointing a designated authority to choose an appointing authority, in default of agreement, is clear. Without an agreed procedure to resolve the disputed appointment of arbitrators, challenge or replacement of arbitrators or review of fees and expenses, arbitral proceedings may be subject to delaying tactics, which are both time and cost consuming. Similarly, contracting parties will face uncertainty, and perhaps duplicitous litigation, as to which body should or could make the relevant decision. Failing express agreement, it would likely fall to the *lex arbitri* – that is, the law of the place where the arbitration is to take place. Although the law of the *lex arbitri* differs significantly across jurisdictions, under some, it may be that parties have to apply to a court in the “seat” for a determination. As discussed directly below, this may, in certain circumstances, be problematic.

### *Who should make the appointment decision?*

This may raise problems whereby courts, which may have little experience in international commercial arbitration, are compelled to make a determination.

Courts may simply face the practical difficulty of lacking knowledge as to who the best arbitrators to appoint would be, what the relevant fee schedule is or should be, and what expenses are acceptable. Courts may also lack the administrative resources to maintain a comprehensive and up-to-date contact list (and a list reflecting the requisite expertise of potential arbitrator candidates), and an appropriate fee schedule for the varied types and complexities of particular disputes. In my experience, judicial resources are limited, and are better placed to resolving complex disputes, rather than being directed to matters of this kind when other bodies have more appropriate expertise and experience (matters which, of course, have very important consequences for the parties). As a result, it is beneficial if arbitral rules provide for a specialised body to assist in this process.

A similar debate centred on recent amendments to s 18 of the Australian *International Arbitration Act 1974* (Cth) (the “IAA”), which now provides that an authority can be prescribed for the purpose of appointing arbitrators.<sup>10</sup> Although the legislative authority now exists, no arbitral body has yet been prescribed pursuant to this legislation. Nonetheless, it is clear that courts are not generally in the best position to make determinations as to which arbitrator or arbitrators will be best suited to a particular dispute. It is a decision best left to the parties themselves – and in situations absent agreement – a professional body, like AMINZ or ACICA which has a great knowledge of arbitrators and their expertise, as well as experience in arbitral practice and procedure. Reflecting this rationale, for the most part, the rules of leading arbitral institutions reserve some degree of authority for the facilitating institute to act where necessary; this is often seen in rules which, in default of agreement, allow the arbitral institution itself to decide on the process of appointment (or appoint the arbitrator in its own right).

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<sup>10</sup> For more information, see Clyde Croft, *Arbitration Law Reform and the Arbitration List G of the Supreme Court of Victoria* (a paper presented at a discussion night hosted by the Building Dispute Practitioners’ Society Inc and the Business Law Section of the Law Council of Australia (Construction and Infrastructure Law Committee) on 5 May 2010), at page 10.



However, UNCITRAL is not an arbitral institution. It does not have the capacity, resources or inclination to be involved in such determinations. Ultimately, deciding which body *should* be designated under the Rules is a difficult task: UNCITRAL is indeed an international organisation, and the Rules are used across the world in a variety of disputes. This makes it difficult to select a single appointing authority to effectively oversee all disputes conducted pursuant to the Rules. Thus, dating back to the 1976 Rules, provision was made for the Permanent Court of Arbitration in The Hague (“PCA”), considered to be a suitably international arbitral organisation, to step in and appoint an appropriate appointing authority where parties could not themselves agree.

#### *Rationale for the revised Article 6*

The inclusion of Article 6.2 of the 1976 Rules generated significant ambiguity. What did it mean to say that parties *may* request the Secretary-General of the PCA designate an appointing authority? The details were not clear. Neither was the process of objection. There was also no indication given as to how to proceed if the appointing authority refused or failed to act. These procedural lacunae sometimes operated to hinder the timeliness of arbitrations – particularly where capitalised upon by a party for tactical advantage. Thus, Article 6 of the revised Rules clearly sets out exactly what is expected of all who may be involved in such a situation: the parties, the arbitral panel, the PCA and the appointing authority designated.

Article 6 also sets explicit time limits and much more expansive, prescriptive and definitive procedural guidelines. Consequently, it is likely that the revised Article 6 will resolve ambiguity that exists in the 1976 Rules, and provide a clear method for designating an appointing authority, if this cannot be done by agreement. Consequently, any delay where agreement on appointment cannot be reached will be significantly minimised.

### *Appointing authorities: ACICA and PCA cooperation*

Importantly for both Australia and New Zealand, and perhaps foreshadowing the passage of the revised Rules, on 24 May 2010, the PCA and the Australian Centre for International Commercial Arbitration (“ACICA”) announced an agreement establishing a formal cooperation between the two bodies. ACICA is now the fourth arbitral body, following in the footsteps of ICSID, SAIC and the AAA, to conclude such an agreement. The bodies agreed to “cooperate in the discharge of their respective functions” and “exchange information on subjects of mutual interest”. Combined with the International Dispute Centre in Sydney, which is nearing completion, this will provide the required infrastructure to expand and attract international arbitrations to Australia.

This may mean that where the PCA designates an appointing authority for arbitrations in the region, ACICA is considered first and foremost. Going one step further, it may even be that the combination of the changes to the UNCITRAL Rules, the PCA-ACICA agreement, and the availability of suitable facilities, assist in facilitating a wider agreement between the PCA, ACICA and the Australian Government, for Australia to eventually be a host country for PCA arbitrations.

### ***Interim relief***

Article 26 of the revised Rules defines an interim measure as ‘any temporary measure ... prior to the issuance of the award by which the dispute is finally decided’ that, amongst other things, preserves assets or documents, maintains the status quo pending determination of the dispute, or prevents parties from taking action that would cause harm or prejudice the arbitral process. An interim measure is thus broadly similar to restraining orders or injunctions, which are well known to the common law world. Since the adoption of the 1976 Rules, arbitrators have had the authority, at the request of a party, to grant interim measures.

### *Revised Article 26*

Revised Article 26 is significantly more detailed than the original. The revised version adopts much of its phrasing directly from UNCITRAL's 2006 revision of the Model Law. Article 26(3) requires that the party requesting a measure satisfy the tribunal that:

- (a) Harm, not adequately reparable by damages will result if the measure is not granted, and this harm 'substantially outweighs' the harm likely to result to the party against whom the measure is directed; and
- (b) There is a 'reasonable possibility' the requesting party will succeed on the merits of the claim.<sup>11</sup>

This seemingly places a substantial onus on the party requesting the measure – particularly where the party seeks an interim measure at an early stage of proceedings (where it may be difficult to foresee even the structure of the proceedings, let alone assess the merit or possibility of a party's eventual success). Nonetheless, this formulation is similar to what exists in a number of international documents, and largely mirrors the substance of a number of national laws relating to injunctions – all of which operate without major difficulties. As an increased protection, the Rules also provide that the party requesting an interim measure may face cost consequences, being 'any costs and damages caused by the measure to any party if the arbitral tribunal later determines that ... the measure should not have been granted' (Article 26(8)).

Despite the increased length of revised Article 26, it purposely avoids resolving questions of enforcement, or the availability of *ex parte* measures. Both of these questions have been important under Australian law and recent efforts to reform its *International Arbitration Act*. UNCITRAL took the view instead that such

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<sup>11</sup> Note, however, that in cases where the interim measure relates to the preservation of evidence, the arbitral tribunal need only apply Article 26(3) to 'the extent [it] considers appropriate': Article 26(4).

matters are not appropriate to be included in the Rules, and are better resolved by the applicable law to the arbitration.

#### *Ex parte preliminary orders*

The issue of *ex parte* interim measures (or “preliminary orders”) came to the fore after the power to issue these orders was given to arbitrators pursuant to a new Article 17B in the 2006 revision of the Model Law. It is too early for the 2006 revision to have seen much practical impact on national laws, but it is likely that a number of jurisdictions will in future allow arbitrators to grant *ex parte* preliminary orders pursuant to such a provision. In jurisdictions where the 2006 revisions have been considered, however, it is not necessarily the case that the *ex parte* provisions of the Model Law have been implemented.

For example, although Australia has recently amended its *International Arbitration Act*, choosing to adopt the 2006 revision of the Model Law, the Act expressly removes the power of arbitrators to grant *ex parte* interim measures.<sup>12</sup> Similarly, in arbitrations where the Model Law or its respective domestic counterparts do not apply, the Rules do nothing to change the default position. Although the Working Group considered an essentially neutral proposal to the effect that nothing in the Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, it was decided that it was best for the Rules to remain silent, leaving the ability of arbitrators to grant *ex parte* preliminary orders entirely to the *lex arbitri* or some other jurisdictional source.

#### ***Tribunal-appointed experts***

The revised Article 29 (“Experts appointed by the arbitral tribunal”) replaces Article 27 (“Experts”) of the 1976 Rules. The ability of the tribunal to appoint an independent expert, in Article 29(1), is largely unchanged; however, the revised

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<sup>12</sup> *International Arbitration Act 1974* (Cth) s 18B.

Rules now mandate that the tribunal consult with the parties prior to appointing the expert.

### *Challenge*

The new Article 29(2) largely relates to challenge of an expert. The provision states that the expert ‘shall, in principle’ – creating a seeming contradiction: ‘shall’ is a mandatory term, and ‘in principle’ implies a voluntary suggestion. The intention, according to the Working Group, seems to be that this phrase means that ‘before accepting appointment’ an expert should submit a description of his or her qualifications, and a statement of impartiality. This is intended to avoid parties challenging an expert *after* they determine that the expert evidence may not be in their favour. Thus, ‘in principle’, challenge to an expert should occur before appointment. After appointment, Article 29(2) further provides that a challenge can only occur if fresh information has come to light, and reserves discretion for the arbitral tribunal to act as it deems necessary in response.

### *Production to the expert*

The remainder of the article mandates that the parties provide to the expert any relevant information, or produce documents or goods, subject to any dispute as to relevance being heard by the arbitrator. This may create an unduly burdensome obligation – depending on how narrowly or broadly ‘relevance’ is interpreted by the arbitrator, as it is the only ground of objection (as opposed to traditional discovery tests, which may balance the weight of the burden of production).

### *Questioning the expert’s report*

Article 29(4) also establishes that the expert’s report, once received by the arbitral tribunal, must be communicated to the parties. Parties must then be ‘given an opportunity to express, in writing, their opinion on the report’, and can also examine ‘any document on which the expert has relied in his or her report’. Depending upon how the word ‘relied’ is interpreted, this provision may be overly broad – or, instead, perhaps overly narrow. If construed as “referenced in writing

in the report”, it may be that experts are counselled not to refer specifically to problematic documents where at all possible, to avoid their production. If constructed as “used in compiling the report” this may relate to potentially any document that an expert has seen before the composition of his or her report. It seems the most sensible outcome relies on the arbitrator’s discretion, but the revised Rules nonetheless contain a significant ambiguity – particularly where an overly broad interpretation may extend production to documents that a tribunal would not have required the parties to produce pursuant to Article 27 (“Evidence”) of the revised Rules.

Additionally, if either party requests, at the tribunal’s discretion, the expert may be heard. If this is so, parties must have the opportunity to ‘present’ and ‘interrogate’ the expert at a hearing (Article 29(5) of the revised Rules).

#### *Australian and New Zealand position on tribunal-appointed experts*

Both the IAA in Australia and New Zealand’s *Arbitration Act 1996* (NZ) contain a s 26, titled “Expert appointed by arbitral tribunal” which is identical to Article 26 of the Model Law. It reads:

1. Unless otherwise agreed by the parties, the arbitral tribunal
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

## ***Enhanced procedural efficiency***

In addition to the reforms outlined above, a number of amendments were included in the revised Rules to further enhance procedural efficiency. Some of these amendments simply bring the Rules into line with international norms and modern arbitral practice, but a number are relatively innovative. I briefly consider a select few revisions below.

### *Statement of claim and the notice of arbitration*

Replacing Article 18 of the 1976 Rules, Article 20 of the revised Rules now additionally mandates that '[t]he legal grounds of arguments supporting the claim' shall be included in the statement of claim (Article 20(2)(e)). Article 20 of the revised Rules also provides that the statement of claim 'should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them' (Article 20(4)). Although the latter change is not strictly expressed in mandatory terms, it is articulated with more force than the 1976 Rules, which provide that '[t]he claimant *may* annex ... all documents *he deems* relevant' (emphasis added) (Article 18(2)).

These two changes alone strongly encourage the claimant to provide more than a bare skeleton of its case in the statement of claim. This assists all parties. It assists the claimant by making it focus its case and define exactly what legal redress it seeks, and which supporting documents go to proving its case. In a similar vein, it assists respondents who will not be ambushed or surprised, and given adequate time to prepare a defence, setoff or counterclaim. This process may also facilitate earlier settlement, with fewer costs thrown away or wasted if the entire case against a party is put as fully as possible at the earliest possible opportunity.

In addition, the revised Rules provide that if the notice of arbitration includes the required information for statement of claim, the claimant can elect to treat it as such. This can speed up the timeline of an arbitration. More broadly, the notice of arbitration provisions (Article 3 of the revised Rules) update the rules to reflect

modern arbitral practice (now canvassing, for example, multiple claimants or respondents). The required contents of the notice of arbitration are extended compared with the 1976 Rules, to include the ‘language and place of arbitration’ (Article 3(3)). Additionally, a new Article 4 appears in the revised Rules entitled “Response to the notice of arbitration”. This provision provides for certain compulsory and discretionary responses in reply to a notice of arbitration.

### *Exclusion of liability*

A new provision, Article 16 of the revised Rules clarifies that the appointing authority, the PCA, the arbitrators, and any person appointed by the arbitral tribunal has immunity from liability, to the fullest extent permitted under the applicable law, except for in cases of ‘intentional wrongdoing’. This brings the Rules in line with majority of rule sets of arbitral institutions,<sup>13</sup> and is likely to be an important method of protecting the operation of the PCA, as well as a key protection for arbitrators. However, the efficacy of such a clause has been questioned. In a recent Paris Court of Appeal decision,<sup>14</sup> the Court held that under French law, the exclusion of liability provided for in Article 34 of the ICC Rules was unenforceable, as it was void ab initio because it allowed the ICC to discharge its ‘essential obligations’ as a non-judicial service provider. Worryingly, this kind of reasoning may also be extended to an arbitrator, who provides adjudicatory services under contract. This may mean that the Rules may soon require some revision to be as broadly applicable as possible, particularly given the importance of this provision to both arbitral institutes and arbitrators.

Furthermore, the phrase ‘intentional wrongdoing’ was chosen to describe situations where bodies or persons would not be protected by immunity, despite and perhaps because of, the lack of application and meaning of this phrase in

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<sup>13</sup> See, for example, the ACICA Rules, Articles 44 and 43(4).

<sup>14</sup> See *Cytec v SNF*, Paris Court of Appeal, First Division, Section C, January 22 2009, 07/19492, cited in Jean-Louis Delvolvé, Gerald Pointon, Jean Rouche, *French Arbitration Law and Practice / A Dynamic Civil Law Approach to International Arbitration* (2<sup>nd</sup> ed, Kluwer Law International, 2009), at p 81.



any legal system. It is intended to apply on its face, unlike the terms 'fraud', 'good faith' or 'bad faith', which all carry strong and varied connotations stemming from different legal concepts associated with the words. There is inherent ambiguity in the word 'intentional', however, particularly as different legal systems attach different standards to intent. Does, for example, wilful blindness or reckless conduct equate to intent? It is unlikely, but it is possible this provision could be construed in this manner.

By contrast, s 28 of the Australian IAA, modelled on s 74 of the *Arbitration Act 1996* (UK), uses the language of 'good faith'. Section 13 of New Zealand's *Arbitration Act 1996* (NZ) provides that '[a]n arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator'. It is unclear if this distinction will have any practical impact. Although the term 'intentional wrongdoing' is not a legal term, it is arguable that its meaning is clearer and more jurisdiction-neutral than any of the current terms in use, and this seems to be the rationale for its adoption by the UNCITRAL Working Group.

#### *Regulation of joinder and multi-party disputes*

Throughout the revised Rules, reference is now made to the potential existence of multiple parties as claimant or respondent. Importantly, Article 10 regulates the appointment of arbitrators in multi-party disputes. Article 10(1) provides that where there are multiple parties as claimant or as respondent, the multiple parties jointly appoint an arbitrator. Failing agreement, the appointing authority is granted a residual power to constitute the entire arbitral tribunal, to avoid a deadlock where parties ostensibly 'on the same side' cannot jointly agree on an arbitrator. In situations where no agreement is forthcoming, pursuant to Article 10(3), the appointing authority can 'constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator'. This largely

sidesteps the *Dutco*<sup>15</sup> situation – but does so at the expense of a significant step towards the institutionalisation of the revised Rules.

The revised Rules also make provision for joinder of a party to the arbitration agreement, provided that joinder should not be permitted where it would cause prejudice to any of the parties (Article 17(5)). There have also been minor wording changes across the Rules – for example in Articles 23 and 3(1), which now contemplate multiple parties or multiple claimants or respondents to an arbitration.

## ***Part II: A broad overview of the revised Rules***

At first glance, the changes made to the revised Rules are constructive, shrewd, and seem in line with UNCITRAL's stated purpose of resolving practical issues to enhance the operational efficiency of the Rules. This, no doubt, reflects the significant efforts of all involved in the UNCITRAL Commission and Working Group to make changes only where deemed necessary to update the Rules. The revisions create a more streamlined structure, and simultaneously update the Rules in line with the realities of modern methods of arbitration. This is seen in the recognition and regulation of joinder and multi-party disputes, the 'future-proofing' of the provisions relating to service and communication, and the myriad of procedural amendments to enhance arbitral efficiency.

However, and perhaps as an inevitable by-product of UNCITRAL's consultative process, some of the articles seem to be longer than necessary. The Working Group involved representatives from up to 60 of UNCITRAL's member states, as well as representatives from observer states and international non-governmental organisations. Many representatives were educated and practice in different jurisdictions, with vastly different legal systems and varying practical arbitral procedure. The well-intentioned jurisdiction-specific concern of these

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<sup>15</sup> French Cour de Cassation, Cass. Civ. 1er, 7 January 1992, *Sociétés Siemens & BKHI v Sociétés Dutco* (1992) Rev. Arb. 1992:470.

representatives led to divergent drafting approaches, and perhaps overly-prescriptive provisions in the revised Rules. This is not necessarily negative per se – as long as clarity is improved. However, the increased size makes the rules more difficult to grasp quickly, and any extra textual provision may create further scope for ambiguity in interpretation.

Additionally, it is clear that a broad push towards institutionalisation has been reflected in the Rules. This is seen, for example, in the greater role for appointing authorities, increased (or at least, ongoing) disclosure requirements for arbitrators (pursuant to Article 11) and the immunity of arbitrators and appointing authorities from liability (Article 16). These changes represent an increasing codification of the Rules. While this will no doubt assist in overcoming the most egregious breaches by parties or arbitrators, it may be that the Rules are becoming overly prescriptive. Commonly suggested in response is that the Rules are voluntary, and parties can avoid the operation of the Rules or sections thereof by agreement. However, it is difficult to foresee situations in concluding a contract where specific provisions of the Rules are agreed to be omitted or altered. The only real scope to negotiate then becomes after a dispute has arisen: a hard task for even the most able negotiator, particularly where one negotiating party will necessarily face a detriment compared to the default position offered under the revised Rules. Prior to the revised Rules, the 1976 Rules would simply have been silent on a number of points, encouraging negotiation (and of course, the tactical delays which come with it).

It may be that this increasing codification and regulation of the revised Rules comes into conflict with parties' reasons for choosing to employ ad hoc arbitration: simplicity, flexibility and unrivalled party autonomy. No doubt this freedom gives rise to the very problems the revised Rules seek to solve. However, this is essentially what parties signed up for by choosing ad hoc arbitration – had they wanted to be overseen by an arbitral institution, or to some extent by an 'appointing authority' they could have chosen to do so. Nonetheless, by choosing the UNCITRAL Rules, it may be that parties accept some degree of

oversight, for the sake of procedural efficiency, in exchange for sacrificing some flexibility.

On balance, the revised Rules are clearly a positive force in the field of arbitration. Whilst those who see ad hoc arbitration as the ultimate expression of flexibility and party autonomy have complained of a creeping codification and institutionalisation, the Rules remain an agreement of choice, and the changes in the revised Rules are largely procedural. As the revised Rules remain on the forefront of arbitrators and arbitration lawyers' minds, this will, no doubt, encourage arbitral institutions across the globe to consider afresh their own rules and practices. Yet it is too early to say what the practical impact of the tension between regulation and party autonomy will be.

## ***Conclusion***

As the scope of the revision of the Rules was, for the most part, limited to resolving practical problems with the 1976 Rules, the revised Rules can hardly be described as ground breaking. Where progress has been made it is reflected in its incremental nature. As the UNCITRAL Rules serve as a benchmark for other arbitration rules, are intended to apply to ad hoc arbitrations, and offer worldwide applicability and scope, this is exactly what the revision process of the Rules should be tailored towards. That is, the achievement of a largely constant, mature base of arbitral best practice. The Rules should be built on durable foundations and not on experimental provisions (with all the uncertainty that comes with being on the 'cutting edge'). Instead, stability and predictability allow the Rules to be more broadly applicable – from all forms of commercial arbitration disputes, through to the more specialised State-State or investor-State disputes. Contracting parties also face greater certainty, as they can more readily define and predict their exact obligations and rights under the Rules, and how particular provisions are likely to be interpreted and applied by an arbitral tribunal.

While there may be an intermittent period of ambiguity as to the meaning of certain provisions,<sup>16</sup> as Professor Waincymer suggests,<sup>17</sup> any remaining ambiguity will see resolution by leading arbitrators and commentators. Over time, this will assist in creating common procedural norms and a de facto practical standard. Nonetheless, it may be that more conservative parties specify that the 1976 Rules are to apply,<sup>18</sup> waiting for such norms, procedure and practice to resolve substantially before choosing to adopt the revised Rules. It will no doubt also be the case that the changes to the Rules will go unnoticed by a number of contracting parties who specify, simply, that the ‘UNCITRAL Rules’ are to apply. For all agreements that do not specify a particular version, after August 15 2010, the revised Rules will apply. However, for the most part, it will not make a significant practical difference. The major changes will be noticed, if at all, in ad hoc arbitrations which now face increased regulation, and in the greater efficiency and modernity that the procedural amendments accord.

On balance, and perhaps due to the conservative nature of the changes, the revised Rules do justify departure from the 1976 Rules. The incremental nature of the change minimises any ambiguity in interpretation. No doubt, as discussed above, more conservative parties will attempt to use the 1976 Rules, at least until they see how the revised Rules perform in practice. The Rules strike a careful balance between innovation and stability. However, it may be said that perhaps they err too strongly in favour of the latter. Nonetheless, the Rules have been brought forward into the future, in a careful manner, mindful of the fact that they must be stable, predictable, and potentially applicable for another three decades or more.

At this point it may also be wise to consider whether there is need for a more regular review of the Rules. In this instance, UNCITRAL should be commended

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<sup>16</sup> Cf see above, footnote 5, for some of the uniquely (positive) drafting benefits the UNCITRAL Rules offer.

<sup>17</sup> See Waincymer, above n 9, under the heading “Conclusion”.

<sup>18</sup> As expressly provided for in Article 1(2) of the revised Rules.

for the work it has done, especially with its limited resources. However, given the speed at which modern arbitral practice is developing, a review process begun every three decades, and lasting for five years, may not be enough to keep the Rules sufficiently up to date. Indeed, there is no requirement that a review even take place within a defined period of time. I anticipate that the next review of the Rules will be seen in less than three decades – but now may be an opportune time for UNCITRAL to discuss some sort of automatic review process, whereby a determination can be made if a formal review of the Rules is deemed necessary.