

# CONTRACTUAL DISPUTE RESOLUTION IN INTERNATIONAL TRADE: THE UNCITRAL ARBITRATION RULES (1976) AND THE UNCITRAL CONCILIATION RULES (1980)

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## I INTRODUCTION

Over the past few decades, international commercial dispute resolution has witnessed substantial change and improvement. A notable feature has been a move away from the traditional court-based litigation model, allowing exploration of other methods and techniques. The United Nations Commission on International Trade Law ('UNCITRAL') has played an important role in this development of alternative dispute resolution. Since its establishment in 1966 UNCITRAL has made improving international commercial dispute resolution one of its priorities.<sup>1</sup> Two important achievements arising from its efforts are the

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<sup>1</sup> *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, 23 UN GAOR Supp No 16, UN Doc A/7216 (29 January–26 February 1968) 12–13. See also John Franchini, 'International Arbitration under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement' (1994) 62 *Fordham Law Review* 2223, fn 35:

UNCITRAL Arbitration Rules (1976) ('Arbitration Rules') and the UNCITRAL Conciliation Rules (1980) ('Conciliation Rules').<sup>2</sup> The products of active participation of international experts from various legal, economic and social backgrounds, both have made a significant contribution to the more efficient resolution of international commercial disputes.

Both sets of Rules are based on agreement between the parties, operating on a private contractual rather than public statutory level. This is an important point which distinguishes the Rules from UNCITRAL's other major achievement in dispute resolution: the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').<sup>3</sup> The Rules are a form of contractual trade law dispute resolution. Since the expectations of the private parties to an arbitration or conciliation under the Rules risk being frustrated by the domestic laws of different countries, the Model Law provides countries with a template that they can adopt for their national laws in order to 'provide a hospitable legal climate for international commercial arbitration.'<sup>4</sup>

This article intends to serve as an introduction to the Rules. We begin by distinguishing conciliation from arbitration and explaining the comparative strengths and weaknesses of these two forms of dispute resolution. We then give an outline of the Arbitration Rules in the context of ad hoc and institutional arbitration generally, followed by an assessment of the influence and acceptance of the Arbitration Rules. We provide a similar analysis of the Conciliation Rules, before concluding with a look at the likely development of the two sets of Rules in the future.

## II CONCILIATION OR ARBITRATION

The search for alternatives to traditional court-based litigation has resulted in a variety of forms of dispute resolution, which vary in their degrees of complexity, flexibility and formality. These include: arbitration, assisted negotiation, counselling, conciliation, evaluation, expert appraisal, mediation and mini-trials. Many of these are used to resolve national as well as international commercial disputes. While there are infinite possibilities for models of alternative dispute resolution, in one key respect there are really only two alternatives. In arbitration, the third person assisting in the resolution of the dispute is able to impose a binding decision on the parties; in conciliation, this person's role is limited to making a non-binding recommendation. The parties' choice of dispute resolution method will depend on their assessment of the

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The other eight topics included: international sale of goods, transportation, insurance, international payments, intellectual property, elimination of discrimination in laws affecting international trade, agency, and legalization [sic] of documents. International commercial arbitration, along with international sale of goods and international payments were given priority status.

<sup>2</sup> *UNCITRAL Arbitration Rules*, 31 UN GAOR Supp No 17, UN Doc A/31/17 (1976); *UNCITRAL Conciliation Rules*, 35 UN GAOR Supp No 17, UN Doc A/35/17 (1980) (collectively, 'Rules').

<sup>3</sup> *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, 40 UN GAOR Supp No 17, UN Doc A/40/17 (1985), annex I, 81, 24 ILM 1302 (1985).

<sup>4</sup> Gerold Herrmann, 'UNCITRAL Conciliation and Arbitration Rules' (1989) 55 *Arbitration* 85, 86.

advantages and disadvantages of different systems, an assessment which may be influenced by cultural considerations.

It has been suggested that the distinction between arbitration and litigation is increasingly a formal one, since both involve a binding decision by a third party to resolve the dispute. In this sense, neither arbitration nor litigation is truly consensual.<sup>5</sup> However, the jurisdiction of an arbitral tribunal is based on the original consent of the parties to submit to arbitration, evidenced by an arbitration agreement or by an arbitration clause in a substantive agreement.

Because arbitration is conducted by a private tribunal established by the parties, through their arbitration agreement or clause they can determine such things as: the procedure of the arbitration (so that it fits the dispute); its location (such as a neutral territory); the applicable law; the language in which the arbitration will be conducted; arrangements to protect confidentiality (arbitral proceedings are not public); and the method of appointment of the arbitrator (for example, the arbitrator can be chosen based on his or her expert knowledge of the relevant area, reducing financial and time costs to the parties and hopefully increasing the likelihood of a sensible and satisfactory outcome).<sup>6</sup>

Arbitration therefore affords considerably 'more flexibility than there is in a system of compulsory jurisdiction with a standing court.'<sup>7</sup> Arbitration has two other key advantages compared to litigation.<sup>8</sup> First, arbitrations are more final than court judgments, which are subject to appeal. Second, arbitral awards are far easier to enforce internationally than foreign judgments, due to the greater prevalence of international treaties enforcing arbitral awards than treaties enforcing foreign judgments.

Conciliation involves a third party facilitating an agreed compromise between disputing parties. The conciliator has no power to make a binding determination. Therefore conciliation does not guarantee a final settlement of the dispute. Other criticisms of conciliation as a method of dispute resolution include that: a negotiated settlement may disadvantage the weaker party; a settlement lacks the enforceability of either an arbitral award or a judgment under the laws of many countries; and the conciliation process does not suspend the running of time for limitation of action purposes.<sup>9</sup> On the other hand, a mutually agreed settlement achieved through conciliation will often have a high degree of legitimacy for the parties in that it gives both parties ownership of the resolution and avoids loss of face by either party.

As foreshadowed above, cultural factors may play a role in the choice of alternative dispute resolution methods.<sup>10</sup> Historically, individuals from a Western common law background considered an adversarial system normal and

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<sup>5</sup> Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law* (1996) 501.

<sup>6</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> ed, 1999) § 1–36.

<sup>7</sup> Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 705.

<sup>8</sup> For a more detailed discussion of the comparative advantages and disadvantages of arbitration with litigation, see, eg, Justice Michael Kerr, 'International Arbitration v Litigation' [1980] *Journal of Business Law* 164.

<sup>9</sup> Herrmann, above n 4, 86–7.

<sup>10</sup> Steven Burton, 'Combining Conciliation with Arbitration of International Commercial Disputes' (1995) 18 *Hastings International and Comparative Law Review* 636, 637.

acceptable, and often preferred an arbitration model, while those from Asian legal systems placed more emphasis on consensus and preventing loss of face, and preferred a conciliation model.<sup>11</sup>

### III UNCITRAL ARBITRATION RULES (1976)

#### A *Ad Hoc and Institutional Arbitration*

Institutional arbitration is administered by an arbitral institution, under the rules of that institution.<sup>12</sup> In contrast, ad hoc arbitration (often called private hotel-room justice) 'is conducted under rules of procedure which are adopted for the purposes of the arbitration',<sup>13</sup> and no arbitral institution is automatically responsible for administering the arbitration. Ad hoc arbitration may be conducted under international rules (such as the Arbitration Rules), rules drafted by the parties, rules drafted by the arbitrator or any combination of these.

The Arbitration Rules have become the most widely accepted set of procedures for ad hoc arbitrations.<sup>14</sup> However, it is important to note that arbitral institutions can still play a role under the Arbitration Rules. The Arbitration Rules leave it open to the parties to designate an arbitral institution as an 'appointing authority' that can be called upon, for example, to assist the parties where they cannot agree upon an arbitrator. In addition, in some arbitral institutions, such as the International Chamber of Commerce and the American Arbitration Association, the parties may substitute the Arbitration Rules for the institution's own rules.<sup>15</sup>

Ad hoc and institutional arbitration have different strengths and weaknesses. Institutional arbitration reduces uncertainty by providing clearly defined rules to deal with a range of circumstances that can arise in arbitration. Institutional arbitration also often means administrative staff are available to assist in the proceedings. A disadvantage of institutional arbitration is that arbitral institutions generally base their fees on the amount in dispute. In disputes involving large amounts, where the parties may be more likely to be experienced in arbitration, this may mean the fees are higher than warranted.

An advantage of ad hoc arbitration is that it permits greater flexibility in terms of meeting the specific needs of the parties. The parties are free to determine their own rules, or to adopt established rules and modify them as they see fit. Because of this flexibility, ad hoc arbitration is frequently preferred where one or more of the disputing parties is a state, for example in *American Independent Oil Company v Kuwait*.<sup>16</sup> However, in the absence of pre-determined rules, one

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<sup>11</sup> Pryles, Waincymer and Davies, above n 5, 501.

<sup>12</sup> Examples include the American Arbitration Association, the Inter-American Commission of Commercial Arbitration, the International Centre for the Settlement of Investment Disputes, the International Chamber of Commerce, and the London Court of International Arbitration.

<sup>13</sup> Redfern and Hunter, above n 6, § 1-77.

<sup>14</sup> James Carter, 'The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?' (1994) 15 *Michigan Journal of International Law* 785, 787.

<sup>15</sup> Franchini, above n 1, 2227.

<sup>16</sup> (1982) 66 ILR 518, 21 ILM 976 (1982) ('*Aminoil*'); See also Alan Redfern, 'The Arbitration between the Government of Kuwait and Aminoil' (1984) 55 *British Yearbook of International Law* 65.

party can significantly delay the first stages of the arbitration process, for example, by challenging the appointment of an arbitrator, or raising jurisdictional issues.

### B *Background to the Arbitration Rules*

Effective international arbitration depends on the ability of the successful party to enforce an arbitral award through a court in a country where the losing party holds assets. The 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*')<sup>17</sup> is the most widely accepted treaty regarding the recognition and enforcement of arbitral awards, providing a solid foundation for international commercial arbitration. Although it post-dates the *New York Convention*, UNCITRAL has been actively involved in promoting the *New York Convention*, and ensuring that UNCITRAL's work complements it.

The Arbitration Rules were prepared by experts representing the key arbitral institutions and traditions, and drew heavily upon the experience of existing arbitration regimes. Incorporating procedures from common law and civil law systems, they attempt to strike a balance between providing sufficient guidance and procedural protections for the disputing parties on the one hand, and providing the parties with maximum flexibility to respond to their particular circumstances on the other.<sup>18</sup> The Arbitration Rules were adopted by UNCITRAL on 28 April 1976 and by the General Assembly of the UN on 15 December 1976.<sup>19</sup>

### C *Overview of the Arbitration Rules*

The Arbitration Rules are comprised of 41 articles grouped into four sections relating to the different stages of an arbitral proceeding. The following overview tracks those four sections to provide a flavour of the key elements of the Arbitration Rules and place them in the context of commercial arbitration practice.

#### 1 *Introductory Rules: Section I*

The Arbitration Rules are specified to apply where the parties to a contract have so declared in writing. The requirement of writing is found in all international arbitration conventions, and is designed to protect parties so that clear evidence of their decision is required to exclude the jurisdiction of national courts.<sup>20</sup> The form of communication required to satisfy the writing requirement will depend upon the national laws of the countries where the arbitration occurs and where its award is enforced. The Arbitration Rules also expressly authorise the parties to modify the Arbitration Rules in writing.

The Arbitration Rules include a Model Arbitration Clause, which parties can include in their written contracts to satisfy the writing requirement and determine

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<sup>17</sup> Opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

<sup>18</sup> Carter, above n 14, 788.

<sup>19</sup> GA Res 98, UN GAOR (99<sup>th</sup> plen mtg), UN Doc A/Res/31/98 (1976), 15 ILM 701 (1976).

<sup>20</sup> Redfern and Hunter, above n 6, § 3–48.

the scope of the arbitrator's role.<sup>21</sup> The Model Arbitration Clause is drafted in a broad inclusionary manner to permit the resolution of all disputes concerning the contract. The Arbitration Rules also note that the parties may wish to consider adding to their contract details as to: the appointing authority; the number of arbitrators; the place of arbitration; and the language of arbitration.<sup>22</sup> It is good practice to include *at least* these elements in any arbitration clause.<sup>23</sup>

The Arbitration Rules are expressly subject to mandatory domestic laws (namely, domestic laws out of which the parties cannot contract).<sup>24</sup> While inconsistencies between domestic laws and the Arbitration Rules are rare, they do arise. For example, domestic law may provide that challenges to the appointment of an arbitrator are within the exclusive jurisdiction of the court, regardless of the procedure set out in the Arbitration Rules or otherwise agreed to by the parties.<sup>25</sup>

The arbitral proceedings begin when the respondent receives a notice of arbitration from the claimant. The Arbitration Rules state that the notice must include, *inter alia*: a demand that the dispute be referred to arbitration; a reference to the contract to which the dispute relates; the general nature of the claim and the amount involved; and the relief or remedy sought. The notice of arbitration may also contain a statement of claim, including: the names and addresses of the parties; a statement of the facts supporting the claim; the points at issue; and the relief or remedy sought.<sup>26</sup> If the notice of arbitration does not include a statement of claim, the arbitral tribunal will set a date, normally within 45 days after the notice is issued, by which the claimant must provide a statement of claim to the respondent and the arbitral tribunal.<sup>27</sup>

Under the Arbitration Rules, the parties may be represented by persons of their choice, provided that the names and addresses of those persons are communicated to the other party.

## 2 *Composition of the Arbitral Tribunal: Section II*

The appointment of an appropriate arbitral tribunal is critical to the success of an international commercial arbitration.<sup>28</sup> A fundamental principle in international commercial arbitration is the impartiality and independence of the arbitrator, and the Arbitration Rules require that all arbitrators be both impartial and independent.<sup>29</sup> Impartiality means the arbitrator must not be biased or

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<sup>21</sup> Arbitration Rules, art 1.

<sup>22</sup> Pieter Sanders, 'Commentary on UNCITRAL Arbitration Rules' (1977) 2 *Yearbook Commercial Arbitration* 172, 180-1.

<sup>23</sup> Note that the Arbitration Rules provide for the resolution of these questions if they have not been specified in the arbitration clause: see arts 6-8, 16 and 17. However, the arbitration process is obviously quickened if the parties have already agreed on these questions and included them in the clause.

<sup>24</sup> Arbitration Rules, art 1.

<sup>25</sup> Sanders, above n 22, 179.

<sup>26</sup> Arbitration Rules, art 3.

<sup>27</sup> *Ibid* art 18, 23.

<sup>28</sup> For further information on the selection of arbitrators, see generally Garylee Cox, 'The Selection Process and the Appointment of Arbitrators' (1991) 46 *Arbitration Journal* 28.

<sup>29</sup> Arbitration Rules, art 6(4).

prejudiced in favour of one party or issue. Independence means the arbitrator must have no financial connection or relationship with either of the parties.

Under the Arbitration Rules, the number of arbitrators must be uneven to permit majority decisions and reduce the possibility of deadlock, and is capped at three in the interests of economy. Thus the choice under the Arbitration Rules is simply whether to have one or three arbitrators. The Arbitration Rules provide that if the parties have not agreed on whether one or three arbitrators are to be appointed within 15 days after the receipt by the respondent of the notice of arbitration, three arbitrators will be appointed.<sup>30</sup> This is the most common number of arbitrators in international commercial arbitrations where large amounts are in dispute.

Appointment of a single arbitrator may be advantageous in terms of speed and cost of the arbitration. Where the parties have agreed that a single arbitrator should be appointed but cannot agree upon the actual appointment, the Arbitration Rules provide for an appointing authority to appoint an arbitrator. The parties must provide the appointing authority with information as set out in the Arbitration Rules. If the parties cannot agree on the appointing authority, it is determined by the Secretary-General of the Permanent Court of Arbitration. The appointing authority considers the independence and impartiality of the arbitrator in making an appointment, and typically follows a 'list-procedure' set out in the Arbitration Rules in doing so.<sup>31</sup>

Where three arbitrators are to be appointed, the Arbitration Rules adopt the common practice of each party selecting an arbitrator of its own nationality, and those two arbitrators selecting a third arbitrator from a neutral country.<sup>32</sup> This practice gives each party confidence in the arbitral tribunal, and is especially useful in the context of international arbitrations, where there may be differences in culture, language and legal background. Where one party fails to choose an arbitrator, that party's arbitrator is chosen by the appointing authority, or failing that, the Secretary-General of the Permanent Court of Arbitration. If the first two arbitrators cannot agree on the third, the process for the appointment of a single arbitrator is followed.<sup>33</sup>

Linked to the principles of impartiality and independence is the requirement of disclosure. If, at any stage, arbitrators become aware of circumstances likely to give rise to justifiable doubts as to their impartiality or independence in resolving a dispute, they must disclose those circumstances to the parties. In recent years there has been an increase in the number of challenges made to arbitrators in international commercial disputes. This is partly the result of parties more often making deliberate tactical objections, aiming to take advantage of the resulting delay and disturbance.

The Arbitration Rules state that a party may only challenge an arbitrator where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Further, a party can only challenge an arbitrator appointed by that party for reasons that come to light after the appointment has

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<sup>30</sup> Ibid art 5.

<sup>31</sup> Ibid art 6(3).

<sup>32</sup> Sanders, above n 22, 187–8; Redfern and Hunter, above n 6, § 3–48.

<sup>33</sup> Arbitration Rules, art 7.

been made.<sup>34</sup> Challenges must be made within 15 days of the establishment of the arbitral tribunal or within 15 days of becoming aware of circumstances justifying a challenge. The challenge must be notified to the other party and to all members of the arbitral tribunal. Where both parties do not agree to the challenge, and the arbitrator does not resign, the merits of the challenge are determined by the appointing authority.<sup>35</sup> The effect of failing to challenge an arbitrator on the basis of lack of impartiality or independence within the 15 day time limit will depend on the relevant national law. However, there is a strong policy argument that a failure to challenge within that period amounts to a waiver of the right to do so.

Apart from a challenge, if an arbitrator dies, resigns, refuses to act or becomes incapable of acting, they must be replaced. The Arbitration Rules set out particular procedures for the appointment of another arbitrator in these circumstances.<sup>36</sup>

If the presiding arbitrator is replaced at any stage, the entire arbitration hearings must be repeated. If any other arbitrator is replaced, the arbitral tribunal has discretion whether to continue as a truncated tribunal or to repeat the arbitration hearings with another arbitrator.<sup>37</sup> This decision will be affected by practical considerations relating to the stage of the proceedings reached and the sensitivity of the parties to further delay.

### 3 *Arbitral Proceedings: Section III*

Unlike proceedings in national courts, there are no set rules of procedure for international commercial arbitrations. They are conducted in accordance with the agreement of the parties, subject to mandatory laws of the place of arbitration and the requirements of international commercial arbitration conventions. Under the Arbitration Rules, the parties transfer control of the proceedings to the arbitral tribunal once it is established.<sup>38</sup> This is a sensible measure, because it is often easier for the parties to apply to the arbitral tribunal for orders regarding procedure than to agree between themselves. This also recognises that one of the benefits of arbitration is the ability to rely upon the expertise of the arbitrators.

Following the establishment of the arbitral tribunal, the autonomy of the parties is not completely abrogated. The Arbitration Rules preserve the right of the parties to request hearings for the presentation of evidence or oral argument and to determine the place and language of the arbitration. Only in the absence of a request for hearings or agreement about the place and language of arbitration will the arbitral tribunal determine these matters.<sup>39</sup> Determining the place of arbitration is particularly important, because the law of the place of arbitration, the *lex arbitri*, is the law that governs the arbitration process. It is this

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<sup>34</sup> Ibid art 10.

<sup>35</sup> Ibid art 11.

<sup>36</sup> Arbitration Rules, art 13.

<sup>37</sup> Ibid art 14.

<sup>38</sup> Ibid art 15(1).

<sup>39</sup> Ibid arts 16–17.

law that the court will apply, for example, in determining a request to preserve goods pending the outcome of the arbitration.<sup>40</sup>

The Arbitration Rules contain certain procedural safeguards for the parties. Each party must be treated equally and given a proper opportunity to present its case. The parties must also exchange a statement of claim and a statement of defence. The arbitral tribunal determines whether any further documents, evidence or exhibits are required from the parties. However, the Arbitration Rules provide that if the arbitral tribunal appoints an expert, the parties must have the opportunity to interrogate the expert.<sup>41</sup>

During the course of an arbitration, it may be necessary for the arbitral tribunal or a national court to take measures to preserve evidence, or to protect perishable goods or goods that are the subject of the dispute. Under the Arbitration Rules, these are termed 'interim measures of protection'. A party may resort to a court because, for example, the arbitral tribunal has not yet been established, or the tribunal's jurisdiction is limited to the parties and preservation of third party goods is required. In addition, the wording of the Arbitration Rules, which refer to 'the subject-matter of the dispute' and 'conservation of the goods forming the subject-matter in dispute', suggests that such measures may not be available to prevent the removal of assets or more generally preserve the status quo.<sup>42</sup>

If a party seeks such measures from the arbitral tribunal, the tribunal may grant the relief in the form of an interim award. If a party seeks such measures from a court, this could be seen as a breach of the parties' agreement to submit the dispute to arbitration. The Arbitration Rules specify that such a request is compatible with the arbitration agreement and does not constitute a waiver of that agreement.<sup>43</sup>

In some international commercial arbitrations, one party (typically the respondent) refuses to participate. If the applicant has failed to communicate its claim within the prescribed time, without sufficient cause, the Arbitration Rules state that the arbitration is terminated.<sup>44</sup> In all other cases, the tribunal can continue the arbitration and make its determination without the assistance of both parties.

A more common feature of international commercial arbitration is objection to jurisdiction. The jurisdiction of arbitral tribunals is limited by the agreement of the parties, and may be further limited by national laws that declare that certain matters must be heard by their courts. Examples of jurisdictional questions include: the validity of the arbitration clause or agreement; whether the arbitral tribunal is properly constituted; whether the matters submitted to arbitration fall within the arbitration clause or agreement; and whether those matters are arbitrable. The 'inherent' power of arbitral tribunals to decide their jurisdiction (the doctrine of Competence/Competence) is made explicit in the

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<sup>40</sup> *Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, 130.

<sup>41</sup> Arbitration Rules, art 27(4).

<sup>42</sup> *Ibid* art 26(3).

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* art 28(1).

Arbitration Rules.<sup>45</sup> Of course, this power cannot be used to oust the jurisdiction of the relevant national court, which holds the ultimate power to decide jurisdictional questions.

If a party objects to the jurisdiction of the arbitral tribunal, it is important that it makes a formal objection promptly. The Arbitration Rules require that such objections 'be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.'<sup>46</sup> Although this suggests that the right to object is lost after this stage in the proceedings, whether the right has been waived will depend upon the applicable national law. On the other hand, a party who knows that the Arbitration Rules have not been complied with and who fails to object promptly to the non-compliance, is deemed to have waived its right to object.

#### 4 *The Award: Section IV*

International commercial arbitration often involves more than one system of law. Different laws may govern:

- (a) the proceedings of the arbitral tribunal (the *lex arbitri*);
- (b) the recognition and enforcement of the award; and
- (c) the issues in dispute (the 'applicable law').

In relation to the applicable law, the Arbitration Rules apply the principle of party autonomy by providing for the arbitral tribunal to apply the law designated by the parties as being applicable to the dispute. Where the parties have not made any such designation, the arbitral tribunal determines the applicable law on the basis of the rules of private international law. In some cases the parties request the arbitral tribunal to resolve their dispute as *amiable compositeur* or *ex aequo et bono*, meaning by reference to what is fair and right rather than on the basis of a fixed and recognisable system of law. The Arbitration Rules can be used to give effect to such a request, provided that both parties agree to it and it is permitted by the *lex arbitri*.<sup>47</sup>

Whether an arbitral tribunal is applying a system of law or acting as *amiable compositeur*, the Arbitration Rules require it to 'decide in accordance with the terms of the contract [taking] into account the usages of the trade applicable to the transaction.'<sup>48</sup> As long as the terms of the contract are clear, they will thus take precedence over any inconsistent trade usages.

In an arbitral tribunal consisting of three arbitrators, it is preferable for the arbitral award to be made unanimously. However, the Arbitration Rules do permit an award to be made by majority. In some cases, this may arise from a compromise between two arbitrators. In questions of procedure only, a unanimous or majority decision is not necessarily required, and it is possible for the presiding arbitrator to make an executive decision. The Arbitration Rules do not define which matters are procedural. However, by way of example, the

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<sup>45</sup> Ibid art 21.

<sup>46</sup> Ibid art 21(3).

<sup>47</sup> Ibid art 33.

<sup>48</sup> Ibid art 33(3).

language of the arbitral proceedings is a question of procedure, whereas the place of arbitration is probably not.<sup>49</sup>

Arbitral tribunals must be able to make a ‘final award’ that resolves any outstanding issues before the tribunal. However, it is possible for a number of awards to be made during the course of an arbitral proceeding. The Arbitration Rules state that an arbitral tribunal is also entitled to make interim, interlocutory and partial awards. Thus in response to a challenge to its jurisdiction, an arbitral tribunal may resolve this threshold question by making a partial award. There may be other discrete issues which can also be addressed by a partial award to simplify the proceedings. Interim measures for protection, discussed in ‘Arbitral Proceedings: Section III’ above, are examples of interim awards.

All of these awards are final in the sense that they dispose of the particular issues addressed and are binding on the parties, subject to any rights of appeal, interpretation or correction. Such rights may arise under the Arbitration Rules, which provide that either party may request the arbitral tribunal to give an interpretation of an award, or to correct errors of a computational, clerical or typographical nature. Interestingly, the Arbitration Rules also permit the arbitral tribunal to make an additional award regarding claims presented in the arbitral proceedings but omitted from the original award.<sup>50</sup> For example, a party may have claimed interest but the arbitral tribunal may have omitted to address this in the award. The opportunity to correct such an omission under the Arbitration Rules is important given that certain domestic laws recognise failure to deal with a claim as a ground for challenging an arbitral award.

The costs of a commercial arbitration can be very high. They are often substantially greater than proceedings in a domestic court because of the need to pay for the arbitral tribunal, administrative costs and accommodation expenses. Under the Arbitration Rules, the arbitral tribunal fixes its own costs, which are restricted to: the fees of each arbitrator, including travel and other expenses; the costs of expert advice and other assistance; the travel and other expenses of witnesses approved by the tribunal; the costs of legal representation of the successful party to the extent approved by the tribunal; and the fees and expenses of the appointing authority.<sup>51</sup>

The Arbitration Rules provide guidelines for arbitrators in fixing their fees under these categories. The fees must be reasonable in view of the value, complexity and length of the proceedings. In certain cases, the arbitrators must take account of the appointing authority’s schedule of fees. In accordance with typical practice in domestic litigation and international arbitrations, the cost of the proceedings is borne by the unsuccessful party. However, the arbitral tribunal has the power to apportion the costs between the parties taking into account the circumstances of the case. Finally, the Arbitration Rules provide for the parties to make sufficient deposits in relation to the costs and fees of the arbitral tribunal. At the conclusion of the arbitration, the arbitral tribunal must render an

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<sup>49</sup> Sanders, above n 22, 194.

<sup>50</sup> Arbitration Rules, art 37.

<sup>51</sup> Ibid art 38.

accounting to the parties of the deposits received and return any unexpended balance.<sup>52</sup>

In commercial arbitration, as in litigation, parties commonly reach a settlement before the proceedings are completed. In this case, the Arbitration Rules provide for the arbitral tribunal to issue either an order terminating the arbitral proceedings, or, upon request of both parties, a consent award on agreed terms. Since the jurisdiction of the arbitral tribunal is based on the parties' consent, it is also open to the parties to complete a settlement agreement and terminate the arbitral proceedings themselves. However, the parties may prefer an award to be made by the arbitral tribunal for various reasons. For example, where the settlement contains an element of future performance, enforcement will generally be easier if it is in the form of an award.<sup>53</sup>

#### D *Notes on Organising Arbitral Proceedings*

The Arbitration Rules only contain broad statements as to the procedure to be followed in an arbitration. Although this provides arbitrators with a wide discretion as to how individual arbitrations should be conducted, many practical questions remain unanswered. In 1996 UNCITRAL published its Notes on Organising Arbitral Proceedings ('Notes')<sup>54</sup> to assist arbitrators and parties with such questions. The Notes provide a useful checklist of procedural matters that should be considered early in the proceedings to reduce uncertainty and the risk of the parties being surprised.<sup>55</sup> In all cases, rather than stipulating a particular approach to procedural issues, the Notes simply assist in highlighting the issues and factors relevant to resolving them. For example, they suggest that it may be useful to agree on the order in which the parties will present their arguments and evidence. The Notes are not only relevant to arbitrations conducted under the Arbitration Rules; they may also be used in other ad hoc as well as institutional arbitrations. Certainly, they represent a very practical addition to the Arbitration Rules.

#### E *Influence and Acceptance of the Arbitration Rules*

Because of the private nature of international commercial arbitration, it is difficult to determine the precise level of acceptance of the Arbitration Rules and the extent of their influence. Nevertheless there is strong anecdotal evidence that the Arbitration Rules are widely and successfully used to resolve international trade law disputes. More concrete evidence of their influence is found in the number of institutional centres that have adopted the Arbitration Rules as their institutional rules in whole or in part. These include the members of the Inter-American Commercial Arbitration Commission, the Singapore International

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<sup>52</sup> Ibid art 41(5).

<sup>53</sup> Ibid art 34.

<sup>54</sup> *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, 51 UN GAOR Supp No 17, UN Doc A/51/17 (1996). See generally Howard Holtzmann, 'Introduction to the UNCITRAL Notes on Organizing Arbitral Proceedings: Introduction' (1997) 5 *Tulane Journal of International and Comparative Law* 407.

<sup>55</sup> Alan Uzalac, 'UNCITRAL Notes on Organizing Arbitral Proceedings: A Regional View' (1997) 4 *Croatian Arbitration Yearbook* 135, 139.

Arbitration Centre, the International Centre for Arbitration, and the Hong Kong International Arbitration Centre. Many other institutions have also drawn heavily on the Arbitration Rules.

The jurisprudence of the Arbitration Rules has developed significantly as a result of their adoption (in a slightly modified form) by two important international arbitration tribunals. The first was the Iran-United States Claims Tribunal ('Claims Tribunal'), which was established in 1981 pursuant to the *Algiers Accords* (which addressed issues arising from the Iranian revolution in which the Shah was overthrown).<sup>56</sup> Under the *Algiers Accords*, American hostages in Iran were released, Iranian assets frozen in the US were released, and commercial lawsuits in the US relating to Iran were suspended<sup>57</sup> in favour of determination by the Claims Tribunal. The Claims Tribunal considered thousands of cases, many of which involved the most important and difficult procedural aspects of international commercial arbitration.<sup>58</sup> This experience, combined with the publication of its decisions and awards, provides a valuable resource for understanding the application of the Arbitration Rules.<sup>59</sup> The Claims Tribunal publications are particularly important because private arbitrations are not published.

The second important international tribunal to adopt the Arbitration Rules was the United Nations Compensation Commission ('UNCC'). The UN Security Council established the UNCC in 1991 to process the millions of claims and compensation requests arising from Iraq's invasion and occupation of Kuwait.<sup>60</sup> Like the Claims Tribunal, decisions of the UNCC are published, and provide useful and in-depth analysis of various legal issues that arise frequently in international commercial arbitration.<sup>61</sup>

The Arbitration Rules have also played an important role in introducing countries to international commercial arbitration.<sup>62</sup> Countries with little previous experience in international commercial arbitration have felt increasingly comfortable with it, and arbitral institutions established in these countries frequently adopt the Arbitration Rules. However, even in countries with a long

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<sup>56</sup> *Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration)* (1981) 1 Iran-US Cl Rep 3; 'Iran-US Claims Tribunal' (1982) 7 *Yearbook Commercial Arbitration* 255.

<sup>57</sup> 'Suspension of Litigation against Iran (Executive Order 12294 of February 24, 1981)', reproduced in (1982) 7 *Yearbook Commercial Arbitration* 260.

<sup>58</sup> Herrmann, above n 4, 90.

<sup>59</sup> Charles Brower and Jason Brueschke, *The Iran-United States Claims Tribunal* (1988); George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (1996); Stewart Baker and Mark Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992); Jacomijn van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-United States Claims Tribunal* (1991).

<sup>60</sup> SC Res 692, 46 UN SCOR (2987<sup>th</sup> mtg), UN Doc S/RES/692 (1991). See also SC Res 687, 46 UN SCOR (2981<sup>st</sup> mtg), UN Doc S/Res/687 (1991). See generally Roger Alford and Peter Bekker, 'International Courts and Tribunals' (1998) 32 *The International Lawyer* 499, 502-5; Keith Hight, Peter Bekker and Roger Alford, 'International Courts and Tribunals' (1997) 31 *The International Lawyer* 599, 602-5.

<sup>61</sup> See Arthur Rovine and Grant Hanessian (eds), *Gulf War Claims Reporter* (1992); United Nations Compensation Commission, *Index of Jurisprudence* <<http://uncciojweb.uncc.ch/ioj/>> at 30 April 2002.

<sup>62</sup> Herrmann, above n 4, 90.

history of international commercial arbitration, the Arbitration Rules play a useful cross-pollination role. As the Arbitration Rules represent the best features of the common law and the civil law, they introduce the parties to new ways of addressing legal issues, and techniques that can be employed in improving their own domestic systems.<sup>63</sup>

According to the experience of the Arbitration Rules in international tribunals and private arbitrations, the sensible level of discretion afforded to the arbitral tribunal as well as their international and neutral nature make the Arbitration Rules one of the best approaches to resolving international trade law disputes.<sup>64</sup> They have proven to be practical and flexible enough to meet the enormously different needs of parties in particular disputes.

#### IV UNCITRAL CONCILIATION RULES (1980)

##### A *Key Features of the Conciliation Rules*

The Conciliation Rules were adopted by UNCITRAL on 23 July 1980<sup>65</sup> and by the General Assembly of the UN on 4 December 1980.<sup>66</sup> Like the Arbitration Rules, they are written in plain English and sequentially correspond with the process they describe. They are also concise, consisting of just 20 articles and a short Model Conciliation Clause. Below we examine three key features of the Conciliation Rules.<sup>67</sup>

First, the Conciliation Rules preserve the ‘freedom and voluntariness’ of the parties at all stages of the proceedings. Examples of this principle are found in article 1, which states that the Conciliation Rules only apply where the parties have agreed they should, and that the parties can exclude or modify the Conciliation Rules in any way.<sup>68</sup> Similarly, article 2 requires both parties to consent to conciliation proceedings. The Conciliation Rules also contain a number of other articles that maintain the parties’ control and choice, particularly where there are financial implications. For example, although the conciliator can arrange administrative assistance, he or she must first obtain the consent of both parties.<sup>69</sup>

Second, the Conciliation Rules empower the conciliator to be flexible as to the procedure adopted, subject only to the duty to act in ‘an independent and impartial manner’<sup>70</sup> and to be ‘guided by principles of objectivity, fairness and

<sup>63</sup> See Reynolds, ‘The Role of the Solicitor’ (1988) 54 *Arbitration* 85–92; Hellings, ‘Arbitration: An Advocate’s View’ (1988) 54 *Arbitration* 78, 78–85, cited in Herrmann, above n 4, 91.

<sup>64</sup> Herrmann, above n 4, 91.

<sup>65</sup> 35 UN GAOR Supp No 17, UN Doc A/35/17, [105]–[106].

<sup>66</sup> 35 UN GAOR (81<sup>st</sup> plen mtg), UN Doc A/Res/35/52 (1980); the UN General Assembly recommended the use of the Conciliation Rules ‘in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation’.

<sup>67</sup> See generally Herrmann, above n 4, 88–9.

<sup>68</sup> Conciliation Rules, art 1.

<sup>69</sup> *Ibid* art 7.

<sup>70</sup> *Ibid* art 7(1).

justice'.<sup>71</sup> At any stage of the proceedings the conciliator may put settlement proposals to the parties, request additional information from the parties, or invite the parties (together or separately) to communicate with the conciliator.

Third, the Conciliation Rules clearly distinguish conciliation from adversarial proceedings, recognising that conciliation involves a mind-set that is quite different from that in other dispute resolution processes. Resort to arbitral or judicial proceedings is discouraged while conciliation is underway. Unlike typical adversarial proceedings, the parties to a conciliation bear the costs equally, unless otherwise agreed. This reflects the notion that conciliation aims for a win-win result. Articles 19 and 20 prohibit the parties from taking certain actions in subsequent adversarial proceedings. Article 19 restricts the parties from using the conciliator other than as agreed for the purpose of the conciliation. Article 20 prohibits the parties from introducing the following as evidence: views expressed or suggestions made by the other party in respect of a possible settlement; admissions made by the other party; proposals made by the conciliator; and the fact that the other party had indicated a willingness to accept a proposal for settlement made by the conciliator. However, Herrmann states that these two articles 'are not really concerned with subsequent adversarial proceedings but help to enhance openness of the parties during conciliation and thus decrease the need for later adversarial proceedings.'<sup>72</sup>

### B *Conciliation Process*

Conciliation begins with one party sending an invitation to another party to conciliate under the Conciliation Rules, briefly identifying the subject of the dispute. If the other party accepts, the conciliation begins. A conciliator is appointed, and the parties make brief written statements to the conciliator describing the general nature of the dispute and the points at issue. The conciliator may request further documentation at any stage. The parties may be represented by persons of their choice, including lawyers or other advisers. The conciliator assists the parties to reach an amicable settlement of their dispute. When the conciliator believes a settlement is possible, he or she formulates the terms of settlement and submits them to the parties. If either of the parties or the conciliator does not believe a settlement is possible, they may terminate the conciliation process.

### C *Influence and Acceptance of the Conciliation Rules*

Holtzmann suggests that most international conciliations occur under institutional conciliation rules rather than the Conciliation Rules.<sup>73</sup> However, as he notes, original features of the Conciliation Rules, such as protecting confidential information, have been adopted in many institutional conciliation rules. While other conciliation rules (for example, those of the International Chamber of Commerce) may facilitate less formal arbitration, the Conciliation

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<sup>71</sup> Ibid art 7(2).

<sup>72</sup> Herrmann, above n 4, 89.

<sup>73</sup> Howard Holtzmann, 'Recent Work on Dispute Resolution by the United Nations Commission on International Trade Law' (1999) 5 *ILSA Journal of International and Comparative Law* 425, 426.

Rules provide a useful avenue for resolution of international trade law disputes. The fact that the Arbitration Rules are used more frequently than the Conciliation Rules to resolve trade law disputes is most likely a reflection of the continuing preference for arbitration over conciliation generally, rather than any failing of the Conciliation Rules.

## V WORKING GROUP ON ARBITRATION

In 1999 UNCITRAL commenced a process of evaluating the ‘extensive and favorable experience with ... the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules’<sup>74</sup> with a view to their future development.<sup>75</sup> UNCITRAL entrusted this work to the Working Group on Arbitration (‘Working Group’).<sup>76</sup> In relation to conciliation, the Working Group was instructed to consider the development of a model law to support the increased use of conciliation and, specifically, to facilitate the enforcement of settlement agreements and reduce the potential for delay in conciliation proceedings. At UNCITRAL’s 35<sup>th</sup> session (19 to 30 November 2001), the Working Group completed its draft model law on international commercial conciliation.<sup>77</sup> In relation to arbitration, the Working Group was instructed to examine the requirement that arbitration agreements be in writing, the enforceability of interim protection measures issued by arbitral tribunals, and the enforceability of awards that have been set aside in the state of origin. The Working Group is continuing its work on these issues.<sup>78</sup>

## VI CONCLUSION

The UNCITRAL Arbitration and Conciliation Rules represent an important contribution to contractual dispute resolution in international trade. In the case of the Arbitration Rules, they have been tested by two international tribunals considering extremely important and varied claims, and emerged with most positive reports as to their adaptability and usefulness. Although the market for arbitration and conciliation systems is dynamic and competitive, with new rules continuing to emerge and vie as the system of choice to settle disputes between international parties, both the Arbitration Rules and the Conciliation Rules have been widely used and recommended since their inception. The current review process should be welcomed, because the Rules can only remain useful and effective in resolving international trade law disputes if they are regularly reviewed and improved.

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<sup>74</sup> *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Second Session*, 54 UN GAOR Supp No 17, UN Doc A/54/17 (1999) [337].

<sup>75</sup> See, eg, Vivienne Ashman, ‘UNCITRAL: Evolving Issues in International Commercial Arbitration’ (1999) 222 *New York Law Journal* 3.

<sup>76</sup> Working Group on Arbitration, *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes — Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement*, UN Doc A/CN.9/WG.II/WP.108 (20–31 March 2000).

<sup>77</sup> *Report of the Working Group II (Arbitration) on the Work of Its Thirty-Fifth Session*, UN Doc A/CN.9/506 (2001).

<sup>78</sup> See *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Written Form for Arbitration Agreements*, UN Doc A/CN.9/WG.II/WP.118 (2002); *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection*, UN Doc A/CN.9/WG.II/WP.119 (2002).