

The UNCITRAL Arbitration Rules

Adrian Hughes QC & John Denis-Smith 39 Essex Chambers

1. INSTITUTIONAL HISTORY AND ORGANISATIONAL FRAMEWORK

1.1 How is the institution organised and run and what is its history?

The United Nations Commission on International Trade Law (UNCITRAL) has been the core legal body of the United Nations system in the field of international trade law for more than 40 years. Its aims are to remove or reduce legal obstacles to the flow of international trade and to progressively modernise and harmonise trade laws. It achieves these aims through UNCITRAL legislative texts, such as conventions, model laws and legislative guides. These may be adopted by states through the enactment of domestic legislation and through UNCITRAL non-legislative texts, such as the UNCITRAL Arbitration Rules 1976, which can be used by parties to international trade contracts. The latter are developed by working groups comprising all the member states, following which they are submitted to UNCITRAL for finalisation and adoption.

UNCITRAL can justifiably claim to have done more than any other institution to develop and promote international commercial arbitration. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), the UNCITRAL Arbitration Rules 1976 and the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) (Model Law) are three of the most important legal instruments to have assisted the worldwide development of international commercial arbitration.

The UNCITRAL Arbitration Rules 1976 (the Rules) are the world's leading set of ad hoc arbitration rules and are often used for conducting an arbitration without the oversight of an arbitral institution or other permanent administering body. The Rules are also frequently used in institutional arbitration and many arbitral institutions offer to administer arbitrations conducted under the Rules or have adopted (or substantially adopted) the Rules as their own institutional rules. Arbitration under the Rules has also regularly been agreed for disputes referred to arbitration under bilateral investment treaties.

The Rules were revised and reissued with effect from 15 August 2010 and amended with a new art.1(4) adopted in 2013, introducing the UNCITRAL

Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency), which came into effect on 1 April 2014.

2. REGIONAL SCOPE AND STATISTICS

2.1 Which regions are covered by the institution?

Legislation based upon the Model Law has been implemented in at least 60 states. The Rules are the world's leading set of ad hoc arbitration rules, and are used globally either on an ad hoc basis or in institutional arbitration.

3. RULES

3.1 Which arbitration rules are associated with your institution? What are the main areas covered by those rules? Are there any distinguishing features, for example, with respect to expedited formation? Have your rules recently changed or are they about to change? If so, how?

The Model Law

The Model Law was adopted by UNCITRAL in 1985 and is designed to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process, from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice.

Amendments to the Model Law were adopted by UNCITRAL in 2006. The revisions included modernisation of the requirements for an enforceable arbitration agreement and a more comprehensive legal regime dealing with interim measures in support of arbitration.

The UNCITRAL Arbitration Rules, as revised in 2010 and 2013

The Rules provide a comprehensive set of procedural rules upon which the parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. One of the key features of the Rules is that no institution acts as secretariat or reviews an award. Save for the possible involvement of an outside authority in the appointment of the tribunal where appointment cannot be agreed, the arbitration process is in the hands of the parties and their chosen tribunal.

The original Rules were adopted in 1976 and have been used for the settlement of a broad range of commercial disputes, both through arbitral institutions and ad hoc as well as investor–state disputes and state–state disputes. In 2006, the Commission decided that the Rules should be revised to address the changes in arbitral law and practice over the preceding 30 years. After a four-year review project conducted by the UNCITRAL Working Group on International Arbitration, the Rules were revised with a view to increasing the efficiency of arbitration but not altering the structure, spirit or

drafting style of the original text.

The revised Rules have been effective since 15 August 2010, having been adopted by UNCITRAL at its 43rd session, and apply to arbitration agreements concluded after that date. Essentially, the revisions fill a number of gaps which had become apparent in the existing Rules and take account of modern technology, such as email and videoconferencing. The main amendments include provisions addressing multiple party arbitration and joinder and revised procedures for the replacement of an arbitrator and for challenges to tribunal-appointed experts. New measures are included to ensure the reasonableness of costs and more detailed provisions have been introduced for interim measures. A new art.1(4), adopted in 2013, provides for utmost clarity in relation to the application of the Rules on Transparency in investor–state arbitration initiated under the Rules. In all other respects, the 2013 Rules remain unchanged from the 2010 Rules. Where the revised Rules are subject to comparative comment in the text below, they are referred to as the “2013 Rules” as opposed to the earlier “1976 Rules”.

4. COMPLEX ARBITRATIONS

4.1 Have your arbitration rules developed specific provisions to address common joinder and consolidation issues which arise in multi-party arbitrations? How do you add an additional party to an ongoing arbitration? How do you pursue claims arising out of multiple contracts in a single arbitration and combine two or more separate but related arbitrations?

Article 10 addresses appointment where there are multiple parties at the outset. Article 10(1) provides that, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator. In the event that there is a failure to constitute the arbitral tribunal, art.10(2) empowers the appointing authority, on the request of any party, to constitute the arbitral tribunal and, in doing so, to revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator. There is no time limit on the exercise of art.10(2).

Article 17(5), introduced by the 2010 Rules, allows the tribunal to widen its jurisdiction, at the request of a party, by allowing the joinder of one or more third persons in the arbitration. Such third persons must be parties to the arbitration agreement. The tribunal may, having heard all the parties (including the persons sought to be joined), determine that joinder should not be permitted because of prejudice to any of them. The absence of the third person’s opportunity to take part in the appointment of the tribunal may in certain circumstances be considered such a factor.

There is no provision in the 2013 Rules for consolidation. It would therefore be necessary to achieve agreement on an ad hoc basis, taking into account requirements concerning fairness arising from the law of the seat and/or jurisdiction in which enforcement is contemplated.

5. COSTS OF THE ARBITRATION

5.1 How do you calculate fees and what are the parties' obligations in this respect? Are arbitrators' fees and the fees of the institution charged on an ad valorem or hourly basis? Do you require a provisional advance or any advance on costs? Is there provision for separate advances on costs?

Jurisdiction of the tribunal

Article 40 provides that a tribunal should fix the "costs" of the arbitration in its final award. Such costs include:

- the tribunal's fees;
- the reasonable expenses of the tribunal, such as travel costs;
- the reasonable costs of experts and any other assistance given to the tribunal;
- reasonable witness expenses;
- the fees and expenses of any appointing authority; and
- the legal and other costs incurred by the parties.

Fees and expenses of the tribunal

The Rules require the fees to be charged by the tribunal or the individual arbitrators to be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and "any other relevant circumstances". The Rules themselves do not include a particular schedule or range of fees for arbitrators but, if an appointing authority is used and that appointing authority has a schedule of fees, then that schedule should be taken into consideration and the fees shall be fixed after consultation with the authority.

The 2013 Rules have, by art.41, introduced greater accountability to the parties on tribunal fees and expenses. Promptly after its constitution, the tribunal is now required to inform the parties "as to how it proposes to determine its fees and expenses including any rates it intends to apply".

Deposit of costs/default

Article 43 provides that the tribunal may require each party to deposit equal amounts as a deposit for the tribunal's costs. The tribunal may request supplementary deposits as the arbitration proceeds.

Award as to costs

Article 42 makes clear that the general principle for the award of costs should be that they be borne by the unsuccessful party in the arbitration. However, the tribunal may apportion costs if it is "reasonable, taking into account the circumstances of the case". Under art.40(e), the definition of costs covers "the legal and other costs incurred by the parties in relation to the arbitration", whereas the 1976 Rules had limited coverage to the legal costs of the successful party alone. The tribunal's discretion is therefore now extended to addressing all parties' costs. By way of example, this would cover circumstances which might warrant a partial costs order against a successful party due to conduct which has caused unnecessary waste of costs. It may also cover costs arising out of third party funding arrangements.

5.2 How does your institution address any mandatory local tax requirements, such as in relation to value added or goods and services tax, with respect to the charging and payment of arbitrator fees?

Article 43 does not explicitly address mandatory local tax requirements.

5.3 If money is held in advance of arbitration costs, is the interest credited to parties or the institution? What procedures are available if a party is unhappy with the proposed or actual costs? What are the consequences of one party refusing to pay any required advance on costs? Are there any provisions dealing with security for costs?

Article 43 does not explicitly address whether interest earned on a deposit should be credited to the parties or to the institution. Past practice of tribunals has been not to order the payment of interest on the deposit to the parties (see, for example, *ICS Inspection and Control Services Ltd v Argentine Republic* Permanent Court of Arbitration Case No.2010-09, Award on Jurisdiction dated 10 February 2012, citing at [22] the terms of its Procedural Order No.1 of 18 May 2010 under the identical 1976 Rules and *Guaracachi America Inc and Rurelec Plc v Plurinational State of Bolivia* Permanent Court of Arbitration Case No.2011-17, Terms of Appointment and Procedural Order No.1 at [10] under the 2010 Rules).

Under art.41, if dissatisfied with the proposed costs, the parties can refer the proposed determination to the appointing authority or, if there is none, to the Secretary-General of the Permanent Court of Arbitration (PCA), for review, either of whom can, if appropriate, adjust the fees, which would then be binding on the tribunal. Under art.43, if a party defaults on its share of the deposits within 30 days of a request for it to do so, the tribunal will inform the parties in order that one of them may make the required payment. If the deposit is not paid, the tribunal can order that the arbitration be either suspended or terminated. After an award is made, the tribunal should account for its use of the deposits and return any unused portion.

Article 26(2)(c) empowers the tribunal to order a party to “preserve assets out of which a subsequent award may be satisfied” and art.26(6) provides that “[t]he arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure”.

It is arguable that the scope of a tribunal’s powers under art.26(2)(c) includes the power to order a party to provide security for costs, given that the tribunal would be empowered to make an award ordering it to pay costs.

6. AGREEMENTS TO ARBITRATE

6.1 Does your institution recommend a standard form arbitration clause? If so, please provide details.

In contrast to the 1976 Rules, art.1 of the 2013 Rules (and 2010 Rules) does not require the arbitration agreement to have been in writing. It also extends the scope of an arbitrable dispute beyond a claim in contract to any situation in which the parties

“have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration

under the UNCITRAL Arbitration Rules”.

The Rules will govern the arbitration only to the extent that they do not conflict “with a provision of the law applicable to the arbitration from which the parties cannot derogate”. In such circumstances, such a provision will prevail over the Rules.

Recommended UNCITRAL arbitration clause

The model arbitration clause recommended by UNCITRAL (as set out in the Annex to the Rules) reads as follows:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.”

The model clause further suggests that the parties may wish to consider adding the following details to their arbitration clause:

- “(a) The appointing authority shall be ... [name of institution or person];
- (b) The number of arbitrators shall be ... [one or three];
- (c) The place of arbitration shall be ... [town and country];
- (d) The language to be used in the arbitral proceedings shall be ...”

It is preferable for the parties to agree as many of these details as possible in advance, in order to avoid delay and difficulty in the event of the need to resolve any dispute. Selection of an appointing authority at the outset can save delay in the event of disagreement over the choice of arbitrator(s).

Probably the most important issue to agree is the location or “seat” of the arbitration. This choice will greatly affect how the arbitration proceeds, as the seat or place of arbitration will determine the procedural law that applies to the arbitration. The substance of that procedural law can vary between different jurisdictions, as can the attitude of local courts to the arbitration process. Finally, the award will be made at the place of arbitration. Such considerations need to be taken into account at the time of drafting. If the parties have not so agreed, the tribunal will determine the place of arbitration under art.18. Article 18 also deals with other geographical issues. The tribunal may hold meetings between the members of the tribunal or for any purpose, including hearings in any location it deems appropriate.

It is also in the interests of the parties to agree the applicable language or languages. This covers the language to be used for the pleadings, submissions and oral hearings. Once again, if not agreed, the tribunal will determine the applicable language or languages to be used in the proceedings under art.19.

7. INITIATING PROCEEDINGS

7.1 What must a party wishing to commence an arbitration submit to the institution (that is, required documents)? What are the contents of such a submission? What are the procedural requirements? Who has responsibility for serving the proceedings, the institution or the initiating party?

Article 3 of the Rules provides that an arbitration is commenced by the initiating party (the claimant) communicating to the other party or parties (the respondent(s)) a Notice of Arbitration (the Notice) and commencement is deemed to take place upon receipt of the Notice by the respondent.

Article 3(3) stipulates that the Notice must contain certain particulars, including:

- a demand that the dispute be referred to arbitration;
- names and details of the parties;
- identification of the arbitration agreement;
- details of the contractual or other legal relationship;
- the claim, amount or remedy sought; and
- a proposal as to the number of arbitrators, place of arbitration and language(s).

Article 3(4) provides that the Notice may also include proposals for the designation of an appointing authority and, where relevant, a proposal for the appointment of a sole arbitrator and a notification of appointment of an arbitrator. Article 3(5) expressly addresses inadequacies in the Notice, providing that the constitution of the tribunal shall not be affected by any controversy concerning the sufficiency of the Notice.

The 2013 Rules provide, by art.4, for the respondent to communicate a response to the claimant, within 30 days of receipt of the Notice, containing substantially the same particulars as the Notice. The response should also include any challenge to jurisdiction and a description of any counterclaim or set-off as well as notice of any claim against another party.

The procedure and requirements for transmission of the Notice or of any other communication are addressed in art.2. The 2013 Rules provide that notice can be given by “electronic means such as facsimile or e-mail” to a designated or authorised address. Unless the arbitration is to be administered by an institution which takes responsibility for the transmission of documents, responsibility for the service of all notices and communications, including the Notice and response, will rest with the parties.

8. INTERIM RELIEF

8.1 Are there any provisions dealing with interim relief prior to the formation of the tribunal? Are there any provisions dealing with the appointment of an “emergency arbitrator”?

The 2013 Rules (and 2010 Rules) adopt the much fuller approach concerning interim measures contained in Ch.IVA of the Model Law. Article 26 sets out a definition of categories of interim measures which go further than its predecessor art.26 of the 1976 Rules, which were limited to the preservation of the subject matter of the dispute. The revised art.26 extends the scope of interim measures to ensure the maintenance of the status quo to include, for example, the preservation of a party’s assets and items of evidence.

The applicant for such measures must satisfy the tribunal that it has a reasonable chance of success on the merits of its claim, that harm not adequately reparable by damages is likely to result and that a balance of the risk of harm to either party favours interim protection. The tribunal may require the applicant to provide appropriate security. It may impose a duty of continuing material disclosure. The tribunal may also subsequently make an award of costs or damages against the applicant if suffered as a result of interim measures which the tribunal later determines should not have been granted. No application to a court or judicial authority for interim measures will be considered inconsistent with the agreement to arbitrate.

The Rules anticipate that any right to interim relief prior to the formation of the tribunal will be a matter for the national courts. There are no provisions in the Rules for the appointment of an “emergency arbitrator”.

9. SELECTION / APPOINTMENT / CHALLENGE OF ARBITRATORS & TRIBUNAL SECRETARIES

9.1 How are arbitrators appointed? Are there any requirements as to the number of arbitrators? How are their independence and availability ensured? Are there any restrictions placed on the nationality of arbitrators? What is the procedure with respect to sole arbitrators, co-arbitrators and the selection of the chairman?

There are no special requirements regulating qualification of arbitrators in the Rules or any specific restrictions imposed upon the nationality of arbitrators. There are, however, detailed provisions governing appointment, duties and challenge procedures.

The usual position is that parties have agreed in their arbitration clause on the number of arbitrators and how they should be appointed. However, this is not always the case. Sometimes the parties must agree these issues after the dispute has arisen. This is not always an easy thing to do, as the relationship between the parties may have broken down completely. The difficulty is compounded by the fact that the Rules are for ad hoc arbitration, such that there is no institution in place to assist the process. If the parties are unable to reach agreement on the number of arbitrators or how they should be appointed, the Rules set out in detail the procedure for the parties to follow.

The appointing authority

Article 6 enables a party to propose an institution or person as an appointing authority in the event that this has not already been agreed. If there is no agreement following a party’s proposal, the fallback position is that the Secretary-General of the PCA may be requested to designate an appointing authority. The Secretary General of the PCA is similarly empowered to appoint a substitute appointing authority in the event of the initial appointing authority failing to make a timely appointment or to decide upon any challenge.

Methods of appointment

Article 7 makes clear that, in the event that the parties have not agreed on whether to have one or three arbitrators, three arbitrators shall be appointed. The parties have 30 days after the respondent receives the Notice to agree whether or not to have a sole arbitrator. If they have not reached agreement by then, three arbitrators will be appointed.

Articles 8-10 provide for the appointment of arbitrators. Article 8 addresses the appointment of a sole arbitrator, art.9 deals with the appointment of a three-member tribunal and art.10 addresses appointment where there are multiple parties.

Appointment of a sole arbitrator under Article 8

Either party may suggest to the other the names of possible candidates for appointment as sole arbitrator. If, after such a suggestion, the parties cannot agree on the choice, the sole arbitrator is appointed by the appointing

authority. The appointing authority will use a list-procedure to make the appointment, unless the parties agree otherwise or the authority in its discretion determines that the list-procedure is not appropriate in the circumstances.

The list procedure works as follows. The appointing authority will communicate an identical list of at least three possible arbitrators to each party. Within 15 days of receipt of this list, each party returns the list to the appointing authority, having deleted the names to which that party objects and having ranked the other names in order of preference. The appointing authority will then make the appointment from the names left on the lists returned to it and in accordance with the parties' ranked preferences. If, for any reason, the appointment cannot be made using this procedure, the appointing authority may exercise its discretion in the appointment.

Appointment of a three-member tribunal under Article 9

If three arbitrators are to be appointed, the usual course is that each party appoints an arbitrator and the two party-appointed arbitrators then choose the third (presiding) arbitrator. Complications arise when one party refuses or fails to appoint their party-appointed arbitrator within 30 days of the other party's notification of its arbitrator. In that situation, art.9(2) provides that the party that has appointed its arbitrator may apply to the agreed appointing authority, which will then appoint the second arbitrator at its discretion.

If the two appointed arbitrators cannot agree on the third presiding arbitrator within 30 days, the presiding arbitrator is appointed by the appointing authority in the same manner as a sole arbitrator is appointed under art.8.

Appointment where there are multiple parties under article 10

Article 10 addresses appointment in multi-party arbitrations. Unless otherwise agreed, the multiple parties jointly, whether as claimant or respondent, shall appoint an arbitrator. In the event of disagreement over a joint appointment, the appointing authority shall, at the request of any party, constitute the tribunal and, in doing so, may revoke or confirm any appointment already made.

Disclosure by an arbitrator

Article 11 provides that any prospective arbitrator shall disclose "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence". This duty is an ongoing one, such that an arbitrator must disclose any such circumstances that develop after having been appointed as well as prior to appointment. Annexed to the 2013 Rules (and 2010 Rules) are model statements of independence to be completed, signed and submitted by a proposed arbitrator. These must be sent to the parties to assist them in their assessment of whether there are circumstances that give rise to justifiable doubts as to the arbitrator's independence or impartiality.

9.2 What are the procedures for mounting challenges, including when and how the parties may submit objections and how arbitrators' appointments can be challenged after the event? How can arbitrators be replaced once removed/unable to continue with the appointment? Does the institution publish arbitrator challenge decisions?

Disclosures by and challenges to the appointment of an arbitrator

If circumstances exist that give rise to “justifiable doubts” as to an arbitrator’s impartiality or independence, the arbitrator can be challenged (art.12). Insofar as a party wishes to challenge the arbitrator appointed by it, it can do so only for reasons of which it becomes aware after the appointment has been made.

Under art.13, a party intending to challenge an arbitrator shall send notice of its challenge within 15 days of that arbitrator’s appointment, or within 15 days of becoming aware of circumstances giving rise to justifiable doubts as to his or her impartiality or independence. The notice should be in writing, stating the reasons for the challenge, and should be sent to the other party, to the arbitrator being challenged, and to the other members of the tribunal (if any).

There are a number of possible responses to a challenge. The other party may agree to the challenge, the arbitrator may withdraw, or, in the absence of either of these, the challenge may proceed. In the first two cases, the arbitrator’s reputation is not impugned, as neither result implies that the reason for the challenge was valid; the arbitrator is then simply replaced in accordance with the original appointment procedures under arts 8–10.

If the other party does not agree to the challenge and the arbitrator does not withdraw, a party may, within 30 days of the notice of challenge, seek a decision by the appointing authority under art.13(4).

If the appointing authority sustains the challenge, art.14 provides that a new arbitrator must be appointed in accordance with the appointment procedure discussed above, save in the circumstances set out in art.14(2), in which the appointing authority will assume the appointing role or, after closure of hearings, may authorise the remaining arbitrators to proceed. Article 14 will apply to any circumstance in which an arbitrator has to be replaced during the course of the proceedings.

Article 15 provides that, in the event of replacement, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless the tribunal decides otherwise.

The 2013 Rules (and 2010 Rules) provide at art.16 for the waiver by the parties of any claim against the arbitrators, the appointing authority or any person appointed by the tribunal, based upon any act or omission in connection with the arbitration, to the fullest extent permissible under the applicable law. Article 16 expressly excludes “intentional wrongdoing” from this waiver.

Under the Rules on Transparency, in arbitrations to which those Rules apply, art.3 provides that, subject to the exclusion of confidential information dealt with under art.7, decisions and awards, which would include decisions concerning challenges to arbitrators, shall be made publically available.

In respect of other arbitration proceedings, the UNCITRAL Secretariat has

established a system for collecting and disseminating information on court decisions and arbitral awards: the system, known as the Case Law on UNCITRAL Texts (“CLOUT”) can be accessed online via the UNCITRAL website (available at: <https://uncitral.un.org/> [Accessed 2 November 2018]). UNCITRAL does not itself publish a list of arbitrator challenge decisions as such but the outcome of some challenges where the Rules were applicable can be found elsewhere. The London Court of International Arbitration, for example, maintains an online Challenge Decision Database with decisions from 2010 onwards, some of which entailed application of the Rules, which are available at: <http://www.lcia.org/challenge-decision-database.aspx> [Accessed 15 May 2018]. Likewise, the International Arbitration Database published by the International Arbitration Forum contains a section dealing with arbitration under the UNCITRAL Rules, available at: <https://arbitration.org/taxonomy/term/252> [Accessed 15 May 2018], and can be searched generally for challenges in proceedings under the Rules.

9.3 What is your institution’s policy on the appointment of tribunal secretaries and payment of their fees?

As the Rules apply to ad hoc arbitration, there is no express provision for the appointment of tribunal secretaries and such appointment and provision for payment of fees would be a matter for the rules of the relevant institution or for agreement between the parties and arbitral tribunal.

10. RESOLUTION OF JURISDICTIONAL ISSUES/SUMMARY DISMISSAL

10.1 Does the institution play a role in determining jurisdictional disputes? How does the role of the institution interplay with the role of the tribunal and the national courts in this regard?

The Rules are adopted in a wide variety of jurisdictions, where the extent of support from the courts for commercial arbitration may vary. The extent to which the procedural law of a particular jurisdiction is supportive of arbitration will be a factor to be taken into account in the choice of the seat of the arbitration at the time of the drafting and agreement of an arbitration clause or agreement.

The Rules expressly state, by art.23, that a tribunal has the power to rule on its own jurisdiction and that an arbitration clause within a contract shall be treated as an agreement independent of the other terms of the contract, such that a decision by the tribunal that the contract is null shall not automatically entail the invalidity of the arbitration clause.

Procedurally, any party wishing to raise an argument that the tribunal does not have jurisdiction must do so no later than in its statement of defence or, if in relation to a counterclaim, in the reply to the counterclaim. As described above, art.4 provides for a response to the Notice to be served by the respondent, and this gives the respondent the formal opportunity to notify a challenge to jurisdiction at an earlier stage than the statement of defence, although the latter remains the latest point at which the challenge can be made.

Article 23(3) sensibly suggests that a plea on jurisdiction should be decided as a preliminary issue, in order to save the time and cost of proceeding with

the substantive arbitration if there is a valid challenge to jurisdiction. The 2013 Rules (and 2010 Rules) expressly provide that

“the arbitral tribunal may continue the arbitral proceedings and make an award notwithstanding any pending challenge to its jurisdiction before a court”.

10.2 Are there any provisions for the summary dismissal of arbitral claims?

There is no provision for summary dismissal of arbitral claims within the Rules although, as set out more fully in s.12 below, art.34(1) provides that the arbitral tribunal may make separate awards on different issues at different times. Hence, a partial award may deal with a specific issue in a case or part of an issue, which may lead to dismissal of a case.

11. TYPICAL AND/OR REQUIRED PROCEDURES

11.1 In brief, what are the key documents which must be filed by the parties (for example, request for arbitration, defence, reply) and the timescales for filing them?

The Rules expressly provide for pleadings to follow the Notice, including a statement of claim (provided this was not included with the Notice) (art.20) and a statement of defence incorporating any counterclaim or claim to a set-off (art.21) to which a reply would be required.

As mentioned above, art.4 now provides for a Response to the Notice of Arbitration within 30 days of receipt of the Notice, thereby giving the respondent the opportunity to notify a challenge to jurisdiction or an indication of a counterclaim or claim to a set-off.

Article 20 sets out the specific information that should be contained in the statement of claim to be served by a date ordered by the tribunal:

“the names and addresses of the parties; a statement of the facts supporting the claim; the points at issue, the relief or remedy sought and the legal grounds or arguments supporting the claim”.

Further, the contract or other legal instrument in dispute and the arbitration agreement (if not within the contract) should be attached. The claimant is required to provide all documents and other evidence relied upon at the same time “as far as possible”.

Article 21 sets out similar requirements for the content of the statement of defence and documents to be served with it, all again within a period of time to be determined by the tribunal. The respondent may make a counterclaim or claim to a set-off provided that the tribunal has jurisdiction over it. The counterclaim and claim to a set-off must be made in the statement of defence unless the tribunal allows this to be done at a later stage.

Provided that any such amendment falls within the jurisdiction of the tribunal, the parties may amend or supplement their pleadings unless the tribunal deems it

“inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to the other parties or any other circumstances” (art.22).

In addition, the tribunal can decide that further written statements or pleadings in addition to the statement of claim and statement of defence are required or permitted, and fix times for these to be submitted (art.24).

A claimant will be given the opportunity to reply to any counterclaim or claim to a set-off.

Article 25 provides that the periods of time for provision of written statements should generally not exceed 45 days but gives flexibility in allowing the tribunal to extend these if necessary.

11.2 How is the procedural timetable established? What written submissions/memorials are typically required? What are the general rules with respect to document production and hearings, and the typical length of proceedings?

Overall approach to the proceedings and case management

Article 17 sets out the overriding approach for a tribunal to the arbitration proceedings. The tribunal can conduct the proceedings “in such manner as it considers appropriate” provided that:

“the parties are treated with equality and that at any stage of the proceedings each party is given a reasonable opportunity of presenting its case”.

The 2010 Rules introduced the express requirement that the tribunal, in exercising its discretion:

“shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”.

Although this approach will no doubt have been recognised as an implicit requirement of the pre-2010 practice, the overriding importance of these considerations is now enshrined in the text.

A further new provision introduced by the 2010 Rules to assist efficient case management is the mandatory requirement for the tribunal, as soon as practicable after its constitution and after inviting the parties to express their views, to establish the provisional timetable of the arbitration.

The Rules do not descend into the detail of preliminary meetings or the content of case management directions, but this gap is filled by the detailed and helpful UNCITRAL Notes on Organizing Arbitral Proceedings 1996, subsequently superseded by the UNCITRAL Notes on Organizing Arbitral Proceedings 2016 (the Notes). The Notes were issued as suggested guidelines for arbitrators and for parties to international arbitration. While non-binding and not intended to affect the Rules, they provide a useful checklist of matters to be addressed early in the proceedings to ensure that the tribunal and the parties have a clear understanding of the proposed steps and requirements of the arbitration. In particular, the Notes address:

- the timetabling for submissions;
- the approach to the definition of the issues and documentary evidence;
- the tribunal’s approach to disclosure;
- the approach to the preparation and hearing of witness evidence;
- the involvement of experts; and

- the approach to hearings.
They are designed for universal use and are not intended to promote any particular practice as best practice. They are, however, a helpful guide for both the tribunal and the parties to ensure clarity and good communication.

Hearings and evidence

Article 5 states that each party may be “represented or assisted by persons chosen by it”. The contact details of any such representatives must be sent to the other side, together with confirmation of whether the appointment is made for the purpose of representation or assistance. Where a person is appointed to act as a representative, the tribunal may require proof of authority to act.

Article 27 confirms the basic principle that each party has the burden “of proving the facts relied on to support its claim or defence”.

Orders for disclosure or production

The tribunal has a broad power to order disclosure of documents or production of evidence. The 2013 Rules (and 2010 Rules) retain the broad discretion granted by the earlier 1976 Rules by providing that, at any time during the proceedings, the tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as ordered (art.27).

When the parties are from different legal traditions, they may agree to apply the International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010) or another agreed procedure.

If a party invited by the tribunal to produce documentary evidence fails, without showing due cause, to do so within the required time, the tribunal may make its award on the evidence before it (art.30).

The 2013 Rules (and 2010 Rules) expressly permit, by art.27(2), individuals to act as factual or expert witnesses despite their being a party to the arbitration or being related to a party, thus dispelling any doubt arising from civil law procedural codes which might preclude witness evidence from the parties themselves.

If an oral hearing is to be held, the tribunal is obliged, by art.28, to give the parties adequate notice. The tribunal is free to determine the manner in which witnesses are examined. Witness evidence may, but is not required to be, presented in the form of signed witness statements. The 2013 Rules (and 2010 Rules) expressly introduce permissible examination through modern methods of telecommunication, such as videoconferencing, which do not require the physical presence of the witness at the hearing.

In appropriate cases, a tribunal may wish to enlist the help of an independent expert witness. Article 29 expressly allows a tribunal, after consultation with the parties, to appoint its own expert or experts to report to it in writing on specific issues. It does, however, require the tribunal to disclose to the parties the expert’s terms of reference. The proposed expert must also submit to the tribunal and the parties a CV and statement of impartiality and independence. The parties may submit (within the time allowed by the tribunal) any objections to the proposed instruction of the expert and the tribunal must rule promptly on any challenge.

The parties must give to the expert any relevant information, documents or evidence the expert requires; if there is any dispute between an expert and a party on the extent or relevance of assistance to be given, this is for the tribunal to resolve. Once the tribunal receives the expert's report, it should communicate the report to the parties for their written comment. At the request of a party, the expert may be heard at a hearing, be cross-examined by the parties and present evidence from their own experts on the points at issue.

Finally, the tribunal has the discretion to decide if it thinks it is necessary, "owing to exceptional circumstances", to reopen the hearings at any time before the award is made (art.31).

Default proceedings

Article 30 provides for what happens in the event of certain types of default (default in production or disclosure is addressed above). If the claimant does not serve its claim within the time limit set by the tribunal without showing sufficient cause, the tribunal can issue an order for the termination of the proceedings save that the tribunal may still address residual matters; arguably, this would extend to costs suffered by a respondent, which might require an award to be recoverable.

If the respondent does not serve its response in time or its statement of defence in accordance with the tribunal's time limit without showing sufficient cause, the tribunal may order that the arbitration shall continue, without treating such failure as an admission of the claimant's allegations. The tribunal will then make a ruling on the merits.

If a party does not attend a hearing, having been duly notified and without sufficient cause, the tribunal can proceed with the arbitration.

12. AWARDS

12.1 Are there any time limits for the rendering of awards? What is the scope of awards available (for example, interim, partial, final)? What is the process for scrutiny of the tribunal's award by the institution and its internal bodies?

Approach to an award

Article 35 expressly states that the tribunal must make its award by applying the law designated by the parties as applicable to the dispute. If the parties have not so designated a law, the tribunal will make its award after applying the law that it determines is applicable to the dispute. No guidance is given to the tribunal to assist with this determination. The tribunal will only decide as *amiable compositeur* or *ex aequo bono*, in other words, applying general principles of fairness as opposed to applying particular legal principles, if the parties have expressly authorised it to do so. In all cases, the tribunal should decide its award in accordance with the terms of the contract in dispute, if any, and take into account any trade usages applicable to the transaction.

When there is more than one arbitrator, art.33(1) requires the award to be made by a majority. Article 33(2) allows the presiding arbitrator to decide procedural issues only if there is no majority or the tribunal has authorised the presiding arbitrator to do so, although these decisions can later be revised by the tribunal.

No institutional approval/scrutiny

An award made by a tribunal under the Rules, which is not also subject to the supervision of a particular institution, does not undergo an approval or scrutinising process before it is made and issued to the parties. In such a case, the parties will have placed their faith in the quality of the arbitrators forming the tribunal.

Essential requirements of an award

Article 34 sets out the formal requirements for an award. Besides expressly stating at art.34(1) that the tribunal may make separate awards on different issues at different times such that a partial award may deal with a specific issue or part of an issue in a case, an award must comply with the following requirements:

- it must be in writing;
- the tribunal must state the reasons on which the award is based, unless the parties have agreed otherwise;
- it must be signed by the arbitrators, and must state the date and place where it is made;
- the award may only be made public with the consent of all parties, unless required under a legal duty; and
- the tribunal shall send signed copies to the parties.

Apart from the constraints of art.35 set out above, there are no express limits on the tribunal's powers in relation to the relief that can be given, save for the general principles governing the approach of the tribunal to the resolution of the dispute considered above.

Article 36 enables the tribunal to issue an award incorporating the terms of a settlement agreement to assist with enforceability if necessary. The tribunal also has the power to terminate the proceedings either in circumstances of settlement or where continuation becomes unnecessary or impossible.

Clarification, corrections and further awards

Article 37 deals with interpretation of an award, art.38 with correction and art.39 with making an additional award.

Article 37 enables a party, within 30 days of receipt of the award, to request an interpretation of the award from the tribunal. Such an interpretation should be given in writing within 45 days of the request and thereafter forms part of the award.

Article 38 allows a party, within the same period of 30 days of receipt, to request the tribunal to correct any "error in computation, any clerical or typographical error, or any error or omission of a similar nature". Any such correction must be made within 45 days of receipt of the request. In addition, within 30 days of making the award, the tribunal may make such corrections on its own initiative.

Finally, art.39 enables a party to request the tribunal to make an additional award in respect of claims made in the arbitration but omitted from the award. If the tribunal considers that the request is justified, it shall make such an additional award within 60 days, though it may extend this time period.

Right to appeal

By agreeing to art.34(2), the parties have agreed that the award “shall be final and binding on the parties”, and that they undertake to carry out the award without delay.

The Rules contain an optional “Waiver Statement” in the Annex in the following terms:

“The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.”

If the parties sign up to this waiver, then under most jurisdictions the award would be final and binding, and they would be unable to appeal to a court or other authority on the merits or the law. The Rules do not address grounds upon which an award may be set aside.

13. CONFIDENTIALITY

13.1 What are the rules as to confidentiality of the work of the institution, the materials generated during the proceedings, the documents and evidence produced and the award rendered by the tribunal? What are the duties of confidentiality of the parties, the institution members and staff and the arbitrators?

The Rules contain two provisions on confidentiality. Article 28.3 relates to hearings, and provides that “hearings shall be held in camera unless the parties agree otherwise”. Article 32.5 relates to awards and provides that

“the award may be made public with the consent of both parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority”.

Under the Rules on Transparency, in arbitrations to which the Rules on Transparency apply, art.3 provides that subject to the exclusion of confidential information dealt with under art.7, parties’ submissions (notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party), any available list of exhibits, any submissions of third parties, transcripts of hearings where available and the tribunal’s orders, decisions and awards shall be made publically available. In addition, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal. Such information to be made available to the public under the Rules on Transparency is published on the Transparency Registry via the UNCITRAL website through the UNCITRAL Secretariat and is available at:

<http://www.uncitral.org/transparency-registry/registry/index.jsp> [Accessed 15 May 2018].

14. INSTITUTIONAL ADVANTAGES

14.1 What are the main advantages and strengths of the institution? Are there any other unique institutional features which make arbitrating under its auspices more attractive relative to other similar service providers?

The Rules attempt to reflect widely accepted best practice in international arbitration. At the same time, they attempt to preserve widespread acceptability among users from very different legal cultures by maintaining flexibility and avoiding excessive detail. The proof of their success is in their continued widespread usage, and their popularity is likely to continue following the adoption of the revised Rules in 2010 and 2013.

15. OTHER DISPUTE RESOLUTION SERVICES

15.1 Are there any other mediation, expert determination or alternative dispute resolution services offered by your organisation?

Apart from the Model Law, the Rules and the New York Convention, other significant UNCITRAL legislative and non-legislative texts in the field of international arbitration and dispute resolution include:

- the UNCITRAL Conciliation Rules 1980;
- recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules 1982;
- the UNCITRAL Notes on Organizing Arbitral Proceedings 1996;
- the UNCITRAL Model Law on International Commercial Conciliation 2002; and
- Technical Notes on Online Dispute Resolution 2016.

A comprehensive bibliography is published on the UNCITRAL website and is available at: <http://www.uncitral.org/uncitral/en/publications/bibliography> [Accessed 2 November 2018].

16. RECENT DEVELOPMENTS

16.1 What recent developments are particularly relevant to arbitrations conducted under your institution's rules?

The most important recent development is the introduction of the Rules on Transparency. 23 states have signed the Mauritius Convention on Transparency (the Convention), which entered into force on 18 October 2017: as at 1 May 2018, it has been ratified by Canada, Mauritius and Switzerland.

The Convention is an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the Rules on Transparency. The Convention supplements existing investment treaties with respect to transparency-related obligations. Article 2 determines when and how the Rules on Transparency shall apply to investor–state arbitration within the scope of the Convention. In contrast to the Rules on Transparency, whether the arbitration is initiated under the Rules or not does not have any impact on the application of the Convention. The general rule of application is stipulated in para.1 (covering bilateral or multilateral application) and para.2 refers to the application of the Rules on Transparency when only the

respondent state (and not the state of the investor–claimant) is a party to the Convention (i.e. as a unilateral offer of application). A party to the Convention may formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the Rules. A party may also declare that it will not provide a unilateral offer of application. Further, should the Rules on Transparency be revised, a party may also declare, within a limited period of time after such revision, that it will not apply that revised version. The Convention and any reservation thereto apply prospectively, that is to arbitral proceedings commenced after the entry into force of the Convention for the party concerned.

The Rules on Transparency, effective as of 1 April 2014, are a set of procedural rules for making publicly available information on investor–state arbitrations arising under investment treaties. The Rules on Transparency apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 when investor–state arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree. The Rules on Transparency are also available for use in investor–state arbitrations initiated under rules other than the UNCITRAL Arbitration Rules and in ad hoc proceedings. In relation to investment treaties concluded prior to 1 April 2014, the Rules on Transparency apply, inter alia, when parties to the relevant investment treaty agree to their application.

Given the link between the UNCITRAL Arbitration Rules and the application of the Rules on Transparency, a new version of the UNCITRAL Arbitration Rules (with new art.1(4) as adopted in 2013) came into effect on 1 April 2014. In all other respects, the UNCITRAL Arbitration Rules 2013 remain unchanged from the UNCITRAL Arbitration Rules (as revised in 2010).

Article 1(1) of the Rules on Transparency provides that they apply to investor–state arbitration under a “treaty”, defined as:

“encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or co-operation agreement”.

In summary, the Rules on Transparency provide, first, under art.3, that documents relating to investor–state arbitration are generally to be made publicly available, as considered previously above. Secondly, art.4 provides for third party submissions or *amicus curiae* briefs in investor–state arbitration. Thirdly, art.5 provides for the tribunal to invite submissions on issues of treaty interpretation from a non-disputing party to the treaty and on further matters within the scope of the dispute from a non-disputing party to the treaty. Fourthly, according to art.6(1) of the Rules on Transparency, the basic rule is that hearings for the presentation of evidence or for oral argument (but not case management conferences or procedural hearings) are public.

16.2 In light of their increasing use, how does your institution address situations where one of the parties to an arbitration, or an arbitrator, is subject to sanctions or similar prohibitions or restrictions under the laws of one or more countries?

As the UNCITRAL Rules themselves apply in the case of ad hoc arbitration, there is no overall approach to addressing circumstances in which sanctions or similar prohibitions have been applied and the UNCITRAL Rules do not make express provision for such situations. The matter would fall to be addressed by the tribunal and/or the Courts of the relevant seat.

16.3 Has the institution committed to any diversity pledges or other institutional best practices?

As the UNCITRAL Rules are designed for use in ad hoc arbitration or under the aegis of another institution, commitment to diversity pledges such as the Equal Representation in Arbitration Pledge does not arise. The principal development in term of best practice is the introduction of the Rules on Transparency, considered above.