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ASSESSMENT OF THE NEW UNCITRAL ARBITRATION RULES OF 2010

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Abstract

UNCITRAL Arbitration rules of 2010 made arbitration provisions up to date with the modern practice of international commercial arbitration. 2010 Rules have reflected new developments and change in the international commercial arbitration since the adoption of the UNCITRAL Arbitration Rules of 1967. However, in order to keep the rules short, efficient and attractive to the business community, it was impossible to deal with all the issues which could arise and cause problems in the arbitral proceedings. Furthermore, it can be argued that in order to retain popularity of the UNCITRAL arbitration rules, they should be revised more frequently. This article will focus on the main changes made in the rules of 2010 and compare it with it's older edition of 1967.

Key words

UNCITRAL Arbitration rules; revision; rules of 2010; comparison; rules of 1967;

Introduction

After four years of intense work and debate, The United Nations Commission on International Trade Law (UNCITRAL) had adopted the new UNCITRAL Arbitration Rules of 2010 (2010 Rules) which came into force on 15 August 2010. 2010 Rules have reflected a new practice and

change in international commercial arbitration since the adoption of the UNCITRAL Arbitration Rules of 1967 (1967 Rules). UNCITRAL Arbitration Rules are specifically designed for *ad hoc* arbitration. However, new improvements in 2010 Rules suggest that the involvement of an institution – The Permanent Court of Arbitration (PCA) and especially the Secretary-General of the PCA, will bring quite different interpretation as it will be observed later in this article. In addition, the revision of the UNCITRAL Arbitration rules is a very challenging work, not only because of the public character of The United Nations (UN) which involves a substantive number of international participants with different legal backgrounds and different law systems, but also, in order to be successful and to attract the application of such rules around the commercial world - these rules must reflect the needs of modern arbitration practice, while being short, concise, clear and efficient. Such an objective can be very challenging. Furthermore, 2010 Rules were rather late amendment, compared with other internationally recognised rules such as ICC or LCIA. However, the practice and application of mentioned institutional rules gave UN drafters an invaluable source which could answer complex arbitration questions and see which amendments could be useful and which one's were not so welcome. Consequently, a critical analysis of the changes introduced by 2010 Rules could answer whether such rules are compatible with modern commercial practice.

Agreement to arbitrate

Firstly, it should be mentioned that the Commission was generally of the view that any revision of the UNCITRAL Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the

text[1]. One of the main changes in 2010 Rules, as compared with 1967 Rules, is the agreement to arbitrate which no longer must be "in writing" and therefore, any record of an agreement to arbitrate in accordance with the UNCITRAL Arbitration Rules will be sufficient. A requirement that the agreement to arbitrate must be "in writing" was mainly influenced by the requirements of The New York Convention[2]. However, new ways of communication and liberalization of legal requirements brought a different approach to the interpretation of an agreement to arbitrate which had also influenced the Commission's view. In addition, "in writing" requirement was not compatible with new amendments of the UNCITRAL Model law 2006 and also with other internationally recognised rules such as ICC[3], SCC[4] or Swiss arbitration[5] rules which also reflected more liberal approach to agreements to arbitrate. The writing requirement was also influenced by case law, because courts had interpreted such a requirement more broadly. For example, in *Compagnie de Navigation et Transport SA v MSC*[6], Swiss federal tribunal stated that because of the development of modern means of communication and current needs of commercial activity, the "agreement in writing" should be interpreted as broadly as possible.

Notwithstanding the willingness of courts to interpret "in writing" requirement more broadly, some problems may still arise, especially in non-Model Law countries, where national legislation is not so liberal, causing problems of the enforcement of the award. Furthermore, there were some concerns among practitioners whether such change

[1] Note by the Secretariat. A/CN.9/WG.II/WP.143;
[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958;
[3] International Chamber of Commerce Arbitration Rules 1998;
[4] The Stockholm Chamber of Commerce Arbitration Rules 2010;
[5] The Swiss Rules of International Arbitration 2006 Art 1;
[6] Compagnie de Navigation et Transport SA v MSC (Mediterranean Shipping Company), XXI YBCA 690 (1996);

would bring unwelcome results and not encourage parties to a best practice. They argued that it might not be a good idea for the UNCITRAL Rules to seem to be encouraging people not to have a written agreement, because it just invites a great deal of disagreement over what the terms of the agreement are[7].

Notice of Arbitration

1967 Rules stated that the Notice of Arbitration (Notice) was deemed to have been received if it was physically delivered to the addressee. The new Article 2(1) of 2010 Rules allows Notices to be transmitted "by any means of communication that provides or allows for a record of its transmission". Such new requirement reflects modern means of communication and enables Notices to be delivered by e-mail or facsimile if certain rules of Article 2(2) are complied with. Furthermore, 2010 Rules successfully avoided a situation where a party could prevent the arbitral proceedings from continuing by simply refusing to accept receiving its correspondence by Article 2(4) and 2(5).

Another change in 2010 Rules under Article 4 is welcome, because a respondent party has the opportunity to reply and comment to the Notice of Arbitration. This rectifies the procedural imbalance between the claimant and the respondent which existed under the 1976 Rules, which did not provide for a response to the Notice of Arbitration before important questions of procedure, such as the selection of arbitrators and the determination of a procedural timetable, were settled[8].

However, it can be argued that the confusion of the rules considering the content of Notice had not been

[7] "Round Table on the Assessment of the Revision of the UNCITRAL Rules on International Commercial Arbitration". David D. Caron, ICCA Congress Series No. 14 (Dublin 2009), Berg (ed) (2009);
[8] Report of the Working Group A/CN.9/614;

avoided. 1967 Rules stated the Notice of Arbitration "may" also include the statement of claim. Respectively, Article 20 of 2010 Rules states that the claimant "may" elect to treat its notice of arbitration as a statement of claim. The same provision applies to the Response to the notice and the Statement of defence. Therefore, it can be argued that a claimant or respondent could use this provision in his favour. For example, in a case when the claimant sends his Notice of arbitration as a Statement of claim, but the respondent replies "only" with a Response to the notice. So in such situation, the respondent could be better off, because he would have an advantage of time and or an ability to bring new legal grounds or arguments in his Statement of defence. Consequently, it can be argued that other rules, for example, Article 10, (1) (d) of CIETAC[9] rules, which states that the request for arbitration "shall" include the claim of the claimant, is more clear and avoids possible confusion and impediment of arbitral proceedings.

Composition of the arbitral tribunal

First of all, new changes have been made in 2010 Rules considering the number of arbitrators if parties have not previously agreed on the number. In comparison, 1967 Rules implied default position of three arbitrators, but the new Article 7 (2) of 2010 Rules brought a greater scope for the appointment of a sole arbitrator. Such a new provision bought some flexibility and probably will attract smaller and less expensive arbitrations, because automatic default position of three arbitrators meant significant increase in costs of arbitration. In addition, such new provision could be useful in situation where a respondent does not participate in arbitral proceedings.

[9] China International Economic and Trade Arbitration Commission Arbitration Rules 2005;

Furthermore, 2010 Rules brought more detailed provisions which deal with multi-party arbitration. Article 10 of 2010 Rules bought a new provision, which was not found in 1967 Rules, stating that in a case where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator. In addition, under Article 10(3) the appointing authority has the power to reconstitute the tribunal or revoke earlier appointments where one party fails to appoint an arbitrator. However, it can be argued that such provision seems to provide substantially more powers to the appointing authority than 1967 Rules and in case of reconstitution of the tribunal or revoking of earlier appointments under Article 10(3), parties could face their claim before arbitrators of whom they know nothing about – a situation contrary to the *ad hoc* arbitration. Notwithstanding such possibility, new changes which brought more powers to the appointing authority will also have advantageous aspects. These measures will, amongst other things, assist the resolution of deadlocks and procedural quagmires[10].

Arbitrator's duty of disclosure

In order to escape problems encountered in *Commonwealth CC v. Continental Casualty*[11] or *AT&T v SCC*[12] which dealt with arbitrator's disqualification and duty to disclose any circumstances likely to give rise to doubts to his impartiality or independence, 2010 Rules brought new, more modern provisions concerning this matter. 1967 Rules stated that an arbitrator, once appointed or chosen, shall disclose such circumstances to the parties. In comparison, 2010 Rules now

[10] The revised UNCITRAL arbitration rules of 2010: A commentary by Justice Clyde Croft, AMINZ-IAMA Alternative Dispute Resolution Conference: Challenges and Change. Christchurch, New Zealand, 2010;
[11] Commonwealth Coatings Corp v. Continental Casualty Co 393 U.S. 145;
[12] AT&T Corporation v Saudi Cable Co [2000] APP.L.R. 05/15;

state that an arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators. Therefore, important improvements can be observed. Firstly, under 2010 Rules an arbitrator has a continuing duty of disclosure throughout the arbitral proceedings. It is a welcome change, because it is important to clarify that no distinction should be made regarding the stage of the arbitral procedure[13] and an arbitrator should bear in mind that after his statement of independence at the beginning of process, his duty of disclosure remains throughout the whole arbitral proceeding. Secondly, under 2010 Rules an arbitrator is obliged to disclose circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality to other arbitrators also, where in 1967 Rules, he or she had to disclose such information only to the parties.

Furthermore, new model statements of independence can be found in the annex 2010 Rules. The model statements of independence were not contained in the 1976 version of the Rules. The purpose of including those statements in the Rules is to provide guidance on the required content of disclosure[14].

Replacement of an arbitrator

As mentioned above, new changes under 2010 Rules brought more powers to the appointing authority. Therefore, in a case of replacement of arbitrator, Article 14 of 2010 Rules gives the appointing authority the right (in the exceptional circumstances of the case) to deprive a party of its right to appoint a substitute arbitrator. However, an appointing authority should give an opportunity for parties and arbitrators

[13] IBA Guidelines on Conflicts of Interest in International Arbitration 2004 3 (d);
[14] Note by the Secretariat A/CN.9/WG.II/WP.151;

to express their views. Such wider powers of appointing authority are quite similar to other institutional arbitration rules, such as Article 11.1 of LCIA[15] rules which state that the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process. However, it could discourage parties to use 2010 Rules in *ad hoc* arbitration, where parties' opinions and requirements have a greater impact to proceedings than in an institutional arbitration.

Another change is found in Article 15 of 2010 Rules which deals with repetition of hearings in the event of the replacement of an arbitrator. In comparison with 1967 Rules, which stated that in case where the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated, the 2010 Rules does not make a distinction between presiding arbitrator or solo arbitrator and states that if an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions. In both cases, the arbitral tribunal has the right to make other decision. The new provisions of Article 15 were brought up to avoid truncated tribunals. However, there were concerns by practitioners that under new provisions of Article 15, the possibility of an award made by an even number of arbitrators could arise. Thus the possible situation that the even number of arbitrators cannot reach agreement and a deadlock arises is not regulated[16].

A reasonable opportunity to present a case

New Article 17 of 2010 Rules is brought to ensure fair and efficient process for resolving the parties' dispute and states that the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and

[15] The London Court of International Arbitration rules 1998;
[16] Compilation of comments by Governments and international organizations. Milan Club of Arbitrators, A/CN.9/704/Add.4;

expense. However, in comparison with 1967 Rules the requirement that each party is given a full opportunity of presenting his case (Article 15 of 1967 Rules) is changed into the requirement that each party is given a reasonable opportunity of presenting its case. Therefore, changing the requirement from full opportunity to reasonable opportunity could cause problems. Firstly, it could be not compatible with Article V of the New York Convention which states that "*recognition and enforcement of the award may be refused if (...) the party against whom the award is invoked (...) was unable to present his case"* and cause problems of enforcement. However, interpretation of such clause may differ among states. Also, what constitutes a reasonable opportunity to present a case will depend one the nature of the case advanced by both parties and the nature of procedure agreed upon by the parties or adopted by the tribunal[17]. In addition, unlike in 1967 Rules, there is no requirement (in case of modification of rules) that such modification should be agreed in writing (Article 1(1) of 2010 Rules). Therefore, in case of challenging the award on the grounds that a party was unable to present its case and there is no writing agreement of modification of rules of procedure, the results could be unpredictable or at least unexpected by one of the parties.

Notwithstanding problems of enforcement that could arise of such change, the requirement of reasonable opportunity in Article 17 of 2010 Rules is also not compatible with Article 18 of UNCITRAL Model law (as revised in 2006) which also states that each party shall be given a full opportunity of presenting his case. However, Article 17 of 2010 Rules is similar with other institutional rules such as LCIA, ICC or SCC. A requirement of reasonable opportunity could be

[17] Handbook of ICC arbitration: commentary, precedents, materials. Michael W. Bühler, Thomas H. Webster 2005 p.199;

justified in order to make arbitral proceedings more flexible and faster and also, more efficient in multi-party arbitration. Though generally is can be argued that there is no sense of faster and presumably cheaper arbitration when the award is not enforceable. In addition, a requirement to allow each party a fair opportunity to present its evidence and arguments as stated in AAA's Code of ethics for arbitrators in commercial disputes[18], could be safer and would retain flexibility.

Efficiency of proceedings and joinder of third parties

2010 Rules explicitly require the tribunal, when in exercising its discretion, to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. In addition, 2010 Rules brought provisions which regulate the establishment of the provisional timetables, extensions and shortenings of any time periods prescribed under the Rules or agreed by the parties. In comparison with 1967 Rules, which did not have such provisions, the new rules were brought up with the intention to run trough proceedings faster and more smoothly.

Another new provision under Article 17 (5) of 2010 Rules, which was not found in 1967 Rules, allows the arbitral tribunal, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement. However, the arbitral tribunal, after giving all parties, including the person or persons to be joined, the opportunity to be heard, may not permit joinder because of prejudice to other parties. While drafting this provision, practitioners argued that joinder of a third party may have negative effects to the enforceability of

[18] The American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes 2004;

the award, because joining a third party may deprive that party of its fundamental right to participate in the constitution of the arbitral tribunal, and this may have consequences for the validity of the award. Furthermore, practitioners proposed that there should be some additional language that would provide the arbitral tribunal other grounds upon which a joinder could be denied[19]. However, it can be argued that unenforceability and invalidity of the award could also fall into a term of "prejudice" and that additional grounds for refusing to include third parties to proceedings would needlessly burden the text and lead to time-consuming interpretations.

Waiver of claims and exclusion of liability

Unlike in 1967 Rules, there is a new provision in Article 16 of 2010 Rules which provides the arbitrators, the appointing authority and any person appointed by the arbitral tribunal the immunity of (to the fullest extent permitted under the applicable law) any claim, except in a case of intentional wrongdoing. Rules which regulate the liability of arbitrators differ among states and make this provision difficult to apply. For example, in common law countries, arbitrators enjoy a quasi-judicial status – in *Patrick Redahan v. Minister for Education and Science* [20] the High Court of Ireland held that the defendant arbitrator was acting in a quasi-judicial capacity sufficient to attract immunity from suit at common law and recognised that arbitrators and judges enjoys the same immunity on the basis that they both perform and adjudicative function[21]. However, liability of an arbitrator in civil law

[19] Compilation of comments by Governments and international organizations. Norway, A/CN.9/704/Add.2;
[20] Patrick Redahan v. Minister for Education and Science, [2005] I.E.H.C. 271
[21] Micheal Hwang. Claims against arbitrators for breach of ethical duties. Contemporary issues in international arbitration and mediation. The Fordham papers 2007;

systems is usually determined on the basis of contract or tort[22]. Therefore, a new provision in Article 16 of 2010 provides immunity from claims not only to the arbitrator, but also for the appointing authority and any person appointed by the arbitral tribunal. Notwithstanding the differences between civil and common law systems, such new provision which regulates the immunity of arbitrators and other persons in arbitration could be very useful and improve the proceedings of arbitration, because arbitrators can pursue proceedings more freely and be confident that unsatisfied parties could not use claims against them in order to make a pressure to an arbitrator. Consequently, such provision will improve efficiency of arbitration under UNCITRAL rules. Though, it should be mentioned that under Article 6 of 2010 Rules, in a case there is no agreement by the parties, the PCA is the default appointing authority and drafters argued that as an intergovernmental organization, the PCA already enjoys immunity against legal process under various agreements and international conventions[23].

Objections to jurisdiction

Article 23 of 2010 Rules has more detailed rules which regulate pleas to the jurisdiction of the arbitral tribunal, as compared with 1967 Rules. In addition, while drafting such new provision, main objective was to make rules compatible with the Arbitration Model Law. Article 23 consists of the same *Kompetenz-Kompetenz* principle and doctrine of Separability of the arbitration agreement. However, in comparison with 1967 Rules, there is a new provision which states that a party is not precluded from raising a plea that the arbitral tribunal does not have jurisdiction for the reason that it has appointed, or participated in the appointment of an

[22] Margaret L. Moses. The principles and practice of international commercial arbitration 2008 p. 148;
[23] Compilation of comments by Governments and international organizations. The Permanent Court of Arbitration (PCA), A/CN.9/704;

arbitrator. Article 21 of the 1967 Rules does not contain such a provision. Furthermore, it can be stated that rules which regulate the time of such pleas are of great importance to the parties and to the enforcement of the award. Article V of the New York Convention states that recognition and enforcement of the award may be refused if (...) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Therefore, a party which is not satisfied with the arbitral tribunal or its jurisdiction should recourse to the court as soon as possible, because if it would not take such measures, later it can be argued that it did not object the jurisdiction of the tribunal. Though under 2010 Rules, other party is safe from delay of arbitral proceedings, because rules state that the arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court. Therefore, it can be observed that Article 23 of 2010 makes arbitral proceedings fast and efficient and also complies with requirement of fairness to both parties.

Place and language

Place of arbitration is of a major importance to arbitration, not only because of procedural law of the country where arbitration takes place, but also because language, local court's approach to arbitration and also convenience of location. 2010 Rules reflect the modern practice and differentiates in the location of hearings and the seat of arbitration. However, terminology can be quite confusing at a first glance, because other internationally recognised rules use a term of "seat of arbitration" which is the jurisdiction in which the arbitration will have its legal grounding (nationality of international arbitral award) and a "venue" to define a location where hearings can be held. For example, Article 16 of LCIA

rules states that the parties may agree in writing the seat (or legal place) of their arbitration. Notwithstanding the terminology of 2010 Rules, it is more important that rules make a distinction between a place where the award is made and the place where hearings are held. As it is stated in Article 18 of 2010 Rules - the arbitral tribunal may meet at any location it considers appropriate for deliberations. In addition, unlike in 1967 Rules which stated that the award shall be made at the place of arbitration, 2010 Rules only state that the award shall be deemed to have been made at the place of arbitration. Such a new improvement in 2010 Rules will make arbitral proceedings more flexible and less formalistic.

There were no substantial changes in provisions which regulate the language of proceedings. However, while drafting such rules, there were some concerns among practitioners which argued that the language of the place of arbitration should also prevail in arbitral proceedings and that adopting the language of the law applicable to arbitration makes it easier on the parties and the arbitrators to quote legal provisions and case law and doctrine without any need for translation, or appointment of legal experts[24]. However, it can be argued that such provisions would be a step back in a process of making internationally attractive rules where there are parties from different countries and backgrounds, with different places of business and also it would be contrary with the principle of parties' autonomy in international arbitration.

Interim measures

2010 Rules brought more specified provisions which regulate the interim measures. In comparison with 1967 Rules, there are more detailed procedural rules and more

[24] Compilation of comments by Governments and international organizations. Arab Association for International Arbitration (AAIA). A/CN.9/704;

protection for both parties - whether one is seeking an interim measure or one that had injured in damages by such interim measures. Firstly, Article 26 of 2010 Rules contains examples of interim measures which the tribunal can order and which were not found in 1967 Rules. For example, - tribunal may order a party to maintain or restore the status quo pending determination of the dispute. However, it should be stated that a list in not limited and according to the rules, the tribunal can grant any other temporary measure.

Furthermore, according to a new provision in Article 26 (3) a party requesting an interim measure, must satisfy the requirements set in Articles 26 (3) (a) and (b), which state that a harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted and that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. Such requirements are quite similar as the principle of necessity which requires that there should be a realistic danger and measures taken must be adequate and proportionate.

In addition, unlike in 1967 Rules, there is a new provision which imposes a liability on the party which requested an interim measure if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings. Consequently, it can be stated that such new provisions brought in 2010 Rules, will make UNCITRAL rules more attractive, not only because of more detailed rules of process of granting interim measures which means predictability, but also, a party against whom those measures are granted is not so exposed to actions of confronting party and has more protection against its assets. New provisions will be useful for both parties.

The applicable law

International commercial arbitration, unlike its domestic counterpart, usually involves more than one system of law or legal rules[25]. A substantial difference can be observed in rules which regulate the determination of applicable substantive law. Article 33 of 1967 Rules stated that if there is no agreement by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. However, new provision in Article 35 of 2010 Rules requires the arbitral tribunal to apply the law which it determines to be appropriate. The arbitral tribunal is free to decide what applicable law should be selected. A requirement to apply the law which the tribunal determines to be appropriate is also found in other internationally recognised rules, for example, under Article 15 of ICC rules, the tribunal is free to apply any rules the arbitral tribunal may settle on. In addition, under 2010 Rules the tribunal is required to apply the rules of law designated by the parties, where there was a requirement in 1967 Rules to apply the law designated by the parties. This is intended to extend the parties' choice, since "law" is usually interpreted to mean a state law, whereas "rules of law" are deemed to be any body of rules, not necessarily emanating from a state. Non-binding restatements of principles such as the UNIDROIT Principles of International Commercial Contracts (UPICC), may not be considered to be a law, but are rules of law[26]. Furthermore, a term of "rules of law" is more compatible with Model law where there is also a term of "rules of law" rather then a term of "the law designated by the parties".

[25] Redfern & Hunter on International Arbitration Fifth Edition. Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter. 2009, p. 165;

[26] Giuditta Cordero Moss. Revision of the UNCITRAL Arbitration Rules: further steps 2010. International Arbitration Law Review;

Notwithstanding more modern and easier to apply terminology in new 2010 Rules, there still remain problems of contradiction of different national laws and procedural rules of arbitration. However, it can be stated that it is not a problem of UNCITRAL rules of arbitration, but rather a broader problem of international arbitration itself.

The award

2010 Rules brought more clarity to provisions which regulate the form of award, because there are no interim, interlocutory, or partial awards as it was in 1967 Rules. More uniform and flexible provision was chosen, which states that the arbitral tribunal may make separate awards on different issues at different times.

There were also changes in 2010 Rules in provisions which regulate the process of correction of the award. In comparison with 1967 Rules, in case a request for correction is made by a party to the arbitration and the tribunal decides to make it, the tribunal had to do it within 30 days, but in new rules the period in expanded to 45 days.

However, it can be stated that the most important change, in relation to rules regulating the award, was made in Article 34 (5), which states that an award may be made public with the consent of all 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. A possibility of making an award public was only in a case of agreement by parties in 1967 Rules. Therefore, it can be stated that such new provision can be contradictory with other party's view who wishes a greater extend of confidentiality. However, as mentioned above, arbitration rules face a lot of contradictions with national laws and in some cases it is impossible to avoid

requirements imposed by national authority. In addition, there were concerns by practitioners who argued that provisions did neither mention any confidentiality regarding the arbitration proceedings, communications, documents or evidence submitted, nor any provisions on the confidentiality of the arbitrators' deliberations[27]. However, UNCITRAL rules are mainly used in *ad hoc* arbitration and parties are free to agree on specific issues of confidentiality and also modify the rules to their needs. Though again, parties could not avoid the provisions of national laws.

The costs of arbitration

In some cases, a party which has greater financial resources could pressure other party to arbitration agreement not to pursue its claim in arbitration, because if the award would be not in favour of a "poorer" party, such party could bear a huge amount of costs of arbitration (especially the legal and representation costs). Fortunately, in 2010 Rules, the provision of reasonableness of costs and a right of discretion of the arbitral tribunal when deciding the allocation of costs remained.

In addition, 2010 Rules brought a new obligation to the tribunal – Article 41 (3) states that the tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Furthermore, the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated and if either party is unsatisfied, it may refer for the review of such determination to the appointing authority or the Secretary-General of the PCA. Notwithstanding more clarity of calculation of costs which was brought by 2010 Rules, it can be

[27] Compilation of comments by Governments and international organizations. Arab Association for International Arbitration (AAIA), A/CN.9/704;

argued that the fees of arbitrators are usually determined before the arbitral proceedings commence and are agreed upon with parties. However, a situation when an arbitrator changes his fees and expenses after the proceedings, brings the same question of the immunity of an arbitrator discussed above – is an arbitrator acting in a quasi-judicial capacity or on the basis of contract. If latter, he would be in a breach of contract.

Conclusion

In conclusion, it can be stated the revision of 2010 Rules made provisions more clear and up to date with modern practice of international commercial arbitration. However, in order to keep the rules short, efficient and attractive to the business community, it is impossible to deal with all issues which could arise and cause problems in arbitral proceedings. Furthermore, it can be argued that in order to retain popularity of the UNCITRAL arbitration rules, they should be revised more frequently, because the revision after 34 years, seems not to go with hand with modern-day global business which changes a lot faster than it was before 30 years.

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