

PROPOSED REVISIONS TO THE UNCITRAL ARBITRATION RULES

Report of the Association of the Bar of the City of New York

Pursuant to a request from Renaud Sorieul, Secretary of the United Nations Commission on International Trade Law (UNCITRAL), in a letter dated 29 March 2010 to Alan Rothstein, General Counsel of the Association of the Bar of the City of New York, the Association hereby submits to UNCITRAL its comments on the proposed revisions to the UNCITRAL Arbitration Rules, as adopted by Working Group II of the Commission at its New York session 1 – 5 February 2010. The Association is mindful of Mr. Sorieul's request that the Association submit "specific and succinct comments on the individual provisions" of the proposed amendments.

The Association generally approves the proposed revisions to the Rules, subject to the following comments on certain individual provisions. The comments are not in the numerical order of the Rules, but are in the order of their importance, as judged by the Association.

Draft article 34. Form and effect of the award.

While it may be that parties cannot exclude by contract or by adopting the UNCITRAL Arbitration Rules a right to oppose confirmation of an award pursuant to the New York Convention, or to move for a set aside pursuant to applicable law, including the Model Law, the Association does not approve a flat waiver of such rights within the body of the Arbitration Rules. All too often parties or their counsel are not sufficiently conversant with the applicability of legal instruments such as the New York Convention, the Model Law, or other applicable law, and might well believe that they have no recourse whatever against an award if the UNCITRAL Arbitration Rules say precisely that without qualification of any kind. At the least, such a rule would be misleading. In the Association's view, article 34 should contain a reference to the New York Convention, the Model Law, or other applicable law as possibly providing recourse, after a final award has been rendered, to a judicial or other competent authority on the basis of any of the grounds stated in those instruments or other applicable law. In the Association's view, should the parties wish to have a flat waiver, they should include it in the arbitration clause itself.

Draft article 41. Fees and expenses of the arbitrators.

In the Association's view, the existing system governing arbitrators' fees, as structured in Article 39 of the existing Rules, is sufficient for purposes of preventing abuse and bad faith on the part of UNCITRAL arbitrators. Expenses should also be addressed in the same manner as fees. In any event, the Association does not judge the problem to be serious. Further, Article 39 of the current Rules provides a significant role for the appointing authority with respect to arbitrators' fees, if the appointing authority consents. The proviso "if the appointment authority consents" should be deleted from the clause in both instances in which it appears. In the Association's view, no further changes need be made except for the addition of expenses. The system works well as it stands. By its terms, the proposed draft article 41 could add two months to the proceedings just to settle the matter of arbitrators' fees. There is no sufficient reason for such delay.

Draft article 29. Experts appointed by the arbitral tribunal.

Draft article 29 (5) provides that an expert appointed by the arbitral tribunal "*may* be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert." In the Association's judgment, this provision is deficient. Parties should have a clearly stated and explicit right to question a tribunal-appointed expert at a hearing.

Draft article 4.2 (f). Assertion of a claim by respondent against a party to the arbitration agreement other than the claimant.

The Association suggests adding to Article 4.2(f) "subject to the provisions of Article 17.5" to make it clear that a respondent may not add a third person without permission of the tribunal and subject to the procedures of Article 17.5. In making the decision to add a third person, the tribunal can take into consideration and work with the parties to resolve such issues as the appointment of the arbitrators.

Draft article 17.5. Joinder and Consolidation.

Article 17.5 as drafted limits the ability of the tribunal to add third persons to the case where "such person is a party to the arbitration agreement."

In the Association's view, the draft rules should also give the tribunal the discretion to consolidate arbitration claims where they arise out of the same transaction. For example, where there are two or more agreements between the same or substantially the same parties that relate to the same transaction, with common issues of law and fact, and the

Claimant asserts a claim under one contract and Respondent asserts a claim under another contract, the claims could be consolidated at the discretion of the arbitral tribunal.

Draft articles 20, 21, 27. Statements of claim, defense, and evidence.

Arts. 20 and 21 seem to require sequential submission of statements of claim and defense that are memorials and counter-memorials accompanied by submission of "all documents and other evidence relied upon" or contain references to them. But draft article 27 on evidence permits but does not require witness statements. This would seem to leave open the possibility of presenting oral testimony at the hearing that has not been part of the "evidence relied upon" to be submitted with the statements of claim and defense. The draft article should also include a clearly stated and explicit right to cross-examine a witness who has submitted a written statement.