The UNCITRAL Arbitration Rules
A Commentary
(With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)
Second Edition

DAVID D. CARON
LEE M. CAPLAN

OXFORD UNIVERSITY PRESS
Table of Contents

Table of Cases and Other Practice  xxvii
Table of Instruments  lix
List of Abbreviations  lxxxiii

Chapter 1: Introduction  1
1. Introduction  1
2. The International Arbitral Process and the Work of UNCITRAL  2
3. The Development of the UNCITRAL Rules of Procedure  3
   A. The Drafting of the 1976 Rules  3
   B. The UNCITRAL Rules and the Iran–US Claims Tribunal  4
      (1) The Origins and Structure of the Iran–US Claims Tribunal  4
      (2) The Tribunal’s Use of the UNCITRAL Arbitration Rules  5
   C. The UNCITRAL Rules and the 1985 UNCITRAL Model Law  6
   D. Adoption of the UNCITRAL Rules in other Public and Private Institutions  6
   E. Investor–State Arbitration and the UNCITRAL Rules  7
   F. The 2010 UNCITRAL Rules  8
   G. The Work of UNCITRAL on Rules for Transparency in Investor–State Arbitration  9
4. How to Use this Commentary  10
   A. Navigating the Text  10
   B. The Interplay between the 1976 Rules and 2010 Rules in Application and Interpretation  10
   C. The Extracts  10
   D. Further Research  11
5. Conclusion  11

PART I: FUNDAMENTAL PRINCIPLES AND THE LEGAL FRAMEWORK WITHIN WHICH THE ARBITRAL TRIBUNAL OPERATES  13

Introduction  13

Chapter 2: Scope of Application, General Provisions, and Place of Arbitration  16
1. Introduction  16
2. Scope of Application—Article 1  16
   A. Text of the 2010 UNCITRAL Rule  16
   B. Commentary  17
      (1) General comments  17
      (2) Scope of application  18
      (3) No writing requirement for agreement to arbitration  18
      (4) Party autonomy and modification of the Rules  19
      (5) Presumptive scope of application  20
# Table of Contents

(6) Future transparency rules for investor–state arbitration 23
(7) Model arbitration clause 24
(8) Comparison to the 1976 UNCITRAL Rules 24

C. Extracts from the Practice of Investment and other Tribunals
(1) Article 15(1) (1976 Rules)—scope and modification 26
(2) Article 15(2) (1976 Rules)—non-derogation from mandatory law 28

3. General Provisions—Article 17
A. Text of the 2010 UNCITRAL Rule 29
B. Commentary
(1) Basic principles—Article 17(1)
   (a) Artrial autonomy and its limits 30
   (b) Confidentiality in UNCITRAL arbitration 30
   (c) Non-disputing party (amicus) participation in UNCITRAL arbitration 36
   (d) The nature of the proceedings before the Iran–US Claims Tribunal 41
   (e) Concluding comments 45
(2) Provisional timetable and modification of time periods—Article 17(2)
   (a) Provisional timetable 46
   (b) Modifications of time periods 47
   (c) Issues of general application 49

(3) Right to a hearing—Article 17(3)
   (a) Scope of hearings 49
   (b) Timing of hearing requests 51
   (c) Preliminary meetings 52
(4) Communication of documents—Article 17(4) 53
(5) Join in of third parties—Article 17(5) 54
(6) Consolidation of claims 57
(7) Comparison to the 1976 UNCITRAL Rules 58

C. Extracts from the Practice of Investment and other Tribunals
(1) Article 15(1) (1976 Rules)—general 59
(2) Article 15(1) (1976 Rules)—amicus submissions 61

D. Extracts from the Practice of the Iran–US Claims Tribunal
(1) General and Tribunal Rules (1983), Article 15(1) 69
(2) Tribunal Rules (1983), Article 15(2) 74

4. Place of Arbitration—Article 18
A. Text of the 2010 UNCITRAL Rule 77
B. Commentary
(1) Meaning of “place of arbitration” 78
(2) Selection of the place of arbitration—Article 18(1)
   (a) Considerations to be taken into account
      (1) Nature and suitability of the local law 80
      (2) Enforceability of the award 81
      (3) Neutrality 85
      (4) Practical considerations 87
   (b) Decision on place of arbitration not procedural: consultation with the parties 91
(3) Where the award is “deemed to have been made” 92
(4) The location of tribunal deliberations and meetings “for any other purpose, including hearings”—Article 18(2) 93
(5) Comparison to the 1976 UNCITRAL Rules 95
C. Extracts from the Practice of Investment Tribunals 96
D. Extracts from the Practice of the Iran–US Claims Tribunal 109
Chapter 3: Applicable Law, *Amiable Compositeur*

1. Introduction 111
2. Applicable Law—Article 35 111
   A. Text of the 2010 UNCITRAL Rule 112
   B. Commentary 112
      (1) The primary rule—Article 35(1) 112
         (a) The principle of party autonomy and its application 112
         (b) Choice of applicable law where not designated by the parties 118
      (2) *Amiable compositeur* or *ex aequo et bono*—Article 35(2) 119
      (3) The significance of the contract and of trade usages—Article 35(3) 121
      (4) Comparison to the 1976 UNCITRAL Rules 123
   C. Extracts from the Practice of Investment Tribunals 129
   D. Extracts from the Practice of the Iran–US Claims Tribunal 131
      (1) Tribunal Rules (1983), Article 33(1) 131
      (2) Tribunal Rules (1983), Article 33(2) 140
      (3) Tribunal Rules (1983), Article 33(3) 140
      (4) Other practice of the Iran–US Claims Tribunal 142

PART II: ARBITRAL PROCEDURES TO CONTROL
THE SELECTION AND CONDUCT OF ARBITRATORS

Introduction 145

Chapter 4: The Number and Selection of Arbitrators

1. Introduction 148
2. Designating and Appointing Authorities—Article 6 148
   A. Text of the 2010 UNCITRAL Rule 148
   B. Commentary 149
      (1) Opportunities for agreement on an appointing authority—Article 6(1) 149
      (2) The role of the designating authority—Article 6(2) and (4) 151
      (3) Suspension of time periods in the absence of an appointing authority—Article 6(3) 153
      (4) The role of the appointing authority—Article 6(5)–(7) 153
   C. Extracts from the Practice of the Iran–US Claims Tribunal 155
3. The Number of Arbitrators—Article 7 157
   A. Text of the 2010 UNCITRAL Rule 157
   B. Commentary 157
      (1) The default rule on the number of arbitrators—Article 7(1) 157
      (2) The exception to the default rule of three arbitrators—Article 7(2) 160
      (3) A number of arbitrators other than one or three 161
4. Appointment of the Sole Arbitrator—Article 8 162
   A. Text of the 2010 UNCITRAL Rule 162
   B. Commentary 163
5. Appointment of a Three-Person Panel—Article 9 164
   A. Text of the 2010 UNCITRAL Rule 164
   B. Commentary 164
      (1) The right of each party to appoint an arbitrator 164
      (2) The appointment of the presiding arbitrator 165
   C. Extracts from the Practice of Investment Tribunals 166
6. Appointment in Multi-Party Arbitration—Article 10
   A. Text of the 2010 UNCITRAL Rule 169
   B. Commentary 169
      (1) The requirements for appointment—Article 10(1) and (2) 169
      (2) The power of the appointing authority to appoint and reappoint—Article 10(3) 170

7. Comparison to the 1976 UNCITRAL Rules 172

Chapter 5: The Challenge of Arbitrators

1. Introduction 177
   A. An Overview of Challenges before Investment and other Tribunals 178
      (1) Challenge decision of April 15, 1993 178
      (2) Challenge decision of January 11, 1995 179
      (3) Challenge decision by a Division of the LCIA—October—December 2005 179
      (4) The US Government’s challenge of Professor James Anaya in the Grand River arbitration—2007 180
      (5) The Argentine Government’s challenge of Mr Judd L. Kessler in the National Grid arbitration—2007 180
         (a) The Argentine Government’s first challenge—2007 181
         (b) The Argentine Government’s second challenge—2008 181
      (7) The Argentine Government’s challenge of Mr Stanimir Alexandrov in the ICS arbitration—2009 182
      (8) The claimant’s challenge to Mr J Christopher Thomas in the Gallo arbitration—2009 182
   B. An Overview of the Challenges before the Iran–US Claims Tribunal 183
      (1) The Iranian Government challenge of Nils Mangård—1982 183
      (2) The US Government challenge of Judges Kashani and Shafeiei—1984 184
      (3) The first Iranian Government challenge of Judge Briner in Case No 55, Amoco Iran and Islamic Republic of Iran—1988 184
      (4) The second Iranian Government challenge of Judge Briner—1989 184
      (5) The third Iranian Government challenge of Judge Briner—1989 185
      (6) The US claimant’s challenge of Judge Noori in Case No 248, Carlson and Melli Industrial Group—1990 186
      (7) The Iranian Government challenge of Judge Arango-Ruiz—1991 186
      (8) The Iranian Government challenges of Judge Krysztof Skubiszewski—1999 186
      (9) The US Government challenge of Judge Bengt Broms—2001 186
      (10) The US claimant’s challenge of Judge Bengt Broms in connection with Case No 485, Frederica Lincoln Riahi—2004 187
      (13) The Iranian Government challenge of Judge Krysztof Skubiszewski and Judge Gaetano Arango-Ruiz—2009 189
      (14) The US Government challenge of Judge Seyed Jamal Seifi—2010 190
      (15) The Iranian Government challenge of Judge Charles Brower—2010 190
   C. The Exclusivity of the UNCITRAL Challenge Procedure 191
Table of Contents

2. The Duty to Disclose—Article 11 194
   A. Text of the 2010 UNCITRAL Rule 194
   B. Commentary 195
      (1) The duty to disclose 195
      (2) Model statements of independence 198
      (3) Disclosure guidelines of the Iran–US Claims Tribunal 200
   C. Extracts from the Practice of Investment Tribunals 201
   D. Extracts from the Practice of the Iran–US Claims Tribunal 202
      (1) General 202
      (2) Disclosure by the US Arbitrators 205

3. The Grounds for Challenge—Article 12 207
   A. Text of the 2010 UNCITRAL Rule 207
   B. Commentary 208
      (1) Challenge on the ground of justifiable doubts as to impartiality or independence—general remarks on Article 12(1) 208
         (a) The standard for impartiality and independence is objective 208
         (b) The same standard applies to party-appointed and non-party appointed arbitrators 209
         (c) Criteria regarding and examples of justifiable doubts 211
      (2) Challenge on the ground of justifiable doubts as to impartiality or independence 212
         (a) The meaning of "impartiality" and "independence" 213
         (b) When are doubts as to impartiality or independence justified? 213
            (1) An arbitrator's relationship with a witness 215
            (2) An arbitrator's financial relationship with a party (shareholding) 216
            (3) An arbitrator's financial relationship with a party (salary) 217
            (4) An arbitrator's previous employment by the parent corporation of a party 217
            (5) An arbitrator's representation in another forum that is adverse to a party 218
            (6) An arbitrator's previous advocacy on behalf of a country formerly adverse to a sovereign party 218
            (7) An arbitrator's representation of a third party with a right to intervene in the proceedings 219
            (8) An arbitrator's handling of the proceedings 220
            (9) An arbitrator's statement regarding a party or the dispute 222
            (10) An arbitrator's decision-making 222
            (11) An arbitrator's breach of the confidentiality of deliberations 223
            (12) An arbitrator's physical assault of a fellow arbitrator 225
         (c) The standard of independence and impartiality does not vary according to the stage of the proceedings 225
         (d) A failure to disclose under Article 11 may give rise to, but does not per se establish, justifiable doubts as to impartiality or independence 226
         (e) Are there any limitations on the circumstances which may be used as the basis for justifiable doubts? 228
      (3) Article 12(1) as providing the exclusive grounds for challenge 228
      (4) When may a party challenge the arbitrator it has appointed?—Article 12(2) 230
   C. Extracts from the Practice of Investment and other Tribunals 231
   D. Extracts From the Practice of the Iran–US Claims Tribunal 235
      (1) Tribunal Rules (1983), Article 10(1) 235
      (2) Tribunal Rules (1983), Article 10(2) 240
### Table of Contents

4. The Initiation of the Challenge and the Potential for Agreement to the Challenge—Article 13
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) When notice of challenge must be made—Article 13(1)
         (a) General comments on the travaux préparatoires
         (b) When circumstances "became known" to the challenging party
            (1) Burden of proof
            (2) Actual prior knowledge
      (2) To whom should notice be sent; what form should notice take; sufficiency of the notice; who may send notice—Article 13(2)
      (3) Procedure if challenge is accepted by all parties or challenged arbitrator withdraws—Article 13(3)
      (4) Timeline for seeking a decision on a challenge—Article 13(4)
   C. Extracts from the Practice of Investment Tribunals
   D. Extracts from the Practice of the Iran–US Claims Tribunal
      (1) Tribunal Rules (1983), Article 11(1)
      (2) Tribunal Rules (1983), Article 11(2)
      (3) Tribunal Rules (1983), Article 11(3)

5. The Resolution of the Challenge
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) Which authority shall make the decision on the challenge if the other party does not agree to the challenge or the challenged arbitrator does not withdraw?
      (2) When may a party seek the assistance of the PCA Secretary-General in designating an appointing authority?
      (3) What procedures the appointing authority may follow in deciding the challenge
      (4) Limitations on the powers of the appointing authority
   C. Extracts from the Practice of Investment Tribunals
   D. Extracts from the Practice of the Iran–US Claims Tribunal
      (1) Tribunal Rules (1983), Article 12(1)
      (2) Tribunal Rules (1983), Article 12(2)

6. Comparison to the 1976 UNCITRAL Rules

### Chapter 6: Failure to Act, other Disruptions, and the Replacement of an Arbitrator

1. Introduction
2. Failure to Act and other Disruptions—Article 12(3)
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) Drafting history of the rule and general comments
      (2) Iran—US Claims Tribunal practice with respect to an arbitrator's failure to act
      (3) Iran—US Claims Tribunal practice with respect to other disruptions
         (a) A note on substitute arbitrators
         (b) A note on truncated proceedings
            (1) The absence of Mr Sani, Fall 1983
            (2) The absence of Judge Mostafavi, Spring 1988
            (3) The practice of the Tribunal regarding absence from the hearing
Table of Contents

(4) The practice of the Tribunal regarding the rendering of awards despite a refusal to sign 286
(5) The practice of the Tribunal regarding the rendering of awards on agreed terms despite no participation by an arbitrator 286
(6) The practice of the Tribunal regarding the holding of pre-hearing conference despite the absence of an arbitrator 286
(c) A note on resignation of an arbitrator 286
(4) Comparison to the 1976 UNCITRAL Rules 289
C. Extracts from the Practice of Investment Tribunals 289
D. Extracts from the Practice of the Iran–US Claims Tribunal 290
(1) Tribunal Rules (1983), Article 13(1)—Resignation 290
(2) Tribunal Rules (1983), Article 13(2)—Failure to act 291
(3) Tribunal Rules (1983), Article 13(3) 302
(4) Tribunal Rules (1983), Article 13(4) 302
(5) Tribunal Rules (1983), Article 13(5) 302
3. Replacement of an Arbitrator—Article 14 305
A. Text of the 2010 UNCITRAL Rule 305
B. Commentary 305
(1) Rationale for the revised approach: the problem of spurious resignations 305
(2) Procedures when an arbitrator “has to be replaced”—Article 14(1) 307
(3) Replacement of an arbitrator in “exceptional circumstances”—Article 14(2) 308
(a) Depriving a party of its right to appoint 308
(b) Procedural requirements 311
(c) Exclusivity of the discretion of the appointing authority 312
(d) Agreement between the parties 313
(4) Comparison to the 1976 UNCITRAL Rules 314
(a) The express power to proceed 315
(b) The inherent power to proceed 317
4. Repetition of Hearings in the Event of Replacement of an Arbitrator—Article 15 318
A. Text of the 2010 UNCITRAL Rule 318
B. Commentary 318
(1) General comments 318
(2) Comparison to the 1976 UNCITRAL Rules 320
C. Extracts from the Practice of the Iran–US Claims Tribunal 322

Chapter 7: Exclusion of Liability for Arbitrators and other Participants

1. Introduction 325
2. Exclusion of Liability for Arbitrators and other Key Actors—Article 16 325
A. Text of the 2010 UNCITRAL Rule 325
B. Commentary 326
(1) General 326
(2) Practice of the Iran–US Claims Tribunal 330
(3) Comparison to the 1976 UNCITRAL Rules 330
C. Extracts from the Practice of Investment Tribunals 330
D. Extracts from the Practice of the Iran–US Claims Tribunal 331
# Table of Contents

Chapter 8: The Institution of the Appointing Authority

1. Evolution of the UNCITRAL Approach? 337
2. The Appointing Authority and Composition Generally 338


Introduction 345

Chapter 9: Representation and Assistance

1. Introduction 347
2. Representation and Assistance—Article 5 347
   A. Text of the 2010 UNCITRAL Rule 347
   B. Commentary 348
      (1) The right to representation and assistance by persons chosen 348
      (2) Communicating the identity and role of representatives and advisers 351
      (3) Proof of a representative's authority 352
      (4) Practice of the Iran–US Claims Tribunal 353
      (5) Comparison to the 1976 UNCITRAL Rules 354
   C. Extracts from the Practice of Investment Tribunals 355
   D. Extracts from the Practice of the Iran–US Claims Tribunal 356

Chapter 10: The Notice Initiating Arbitration and the Response

1. Introduction 359
2. The Notice Initiating Arbitration—Article 3 360
   A. Text of the 2010 UNCITRAL Rule 360
   B. Commentary 361
      (1) The requirement to communicate a notice of arbitration—Article 3(1) 361
      (2) The date of commencement of arbitration proceedings—Article 3(2) 362
      (3) Mandatory information provided in the notice of arbitration—Article 3(3) 363
      (4) Additional information provided in the notice of arbitration—Article 3(4) 363
      (5) Insufficiency of the notice of arbitration—Article 3(5) 364
      (6) International investment agreements and the notice of arbitration 364
      (7) The notice of arbitration at the Iran–US Claims Tribunal 365
      (8) Comparison to the 1976 UNCITRAL Rules 366
   C. Extracts from the Practice of Investment Tribunals 368
3. The Response to the Notice of Arbitration—Article 4 369
   A. Text of the 2010 UNCITRAL Rule 370
   B. Commentary 370
      (1) The requirement to respond to the notice of arbitration—Article 4(1) 370
      (2) Mandatory contents of the response to the notice of arbitration—Article 4(1) 372
      (3) Optional contents of the response to the notice of arbitration—Article 4(2) 373
Table of Contents

(4) Absence, lateness, or insufficiency of the response to the notice of arbitration—Article 4(3) 373
(5) Comparison to the 1976 UNCITRAL Rules 373

Chapter 11: The Choice of Language

1. Introduction 375
2. The Choice of Language—Article 19 376
   A. Text of the 2010 UNCITRAL Rule 376
   B. Commentary
      (1) Determination of the language of arbitration—Article 19(1) 376
      (2) Translation of documents and exhibits—Article 19(2) 382
      (3) Comparison to the 1976 UNCITRAL Rules 384
   C. Extracts from the Practice of Investment Tribunals 384
   D. Extracts from the Practice of the Iran–US Claims Tribunal
      (1) Tribunal Rules (1983), Article 17(1) 385
      (2) Tribunal Rules (1983), Article 17(2) 387

Chapter 12: Notice and the Calculation of Periods of Time

1. Introduction 393
2. Notice and Calculation of Periods of Time—Article 2 394
   A. Text of the 2010 UNCITRAL Rule 394
   B. Commentary
      (1) What form notice may take—Article 2(1) 395
      (2) When notice becomes effective—Article 2(2)–(4)
         (a) A notice is “deemed to have been received” 397
         (b) Means of delivery, including by electronic communication
            (1) Electronic communications 399
            (c) Application of Article 2(1) of the 1976 UNCITRAL Rules by the
               Iran–US Claims Tribunal 401
      (3) How to calculate periods of time under the rules—Article 2(5)–(6) 402
      (4) Comparison to the 1976 UNCITRAL Rules 403
   C. Extracts from the Practice of Investment Tribunals 404
   D. Extracts from the Practice of the Iran–United States Claims Tribunal
      (1) Tribunal Rules (1983), Article 2(1) 404
      (2) Tribunal Rules (1983), Article 2(2) 405
      (3) Tribunal Rules (1983), Article 2(3) 405
      (4) Tribunal Rules (1983), Article 2(4) 407
      (5) Tribunal Rules (1983), Article 2(5) 407

Chapter 13: Statements of Claim and Defence

1. Introduction 409
2. The Statement of Claim—Article 20 410
   A. Text of the 2010 UNCITRAL Rule 410
   B. Commentary
      (1) Submission of the statement of claim 411
      (2) Contents of the statement of claim 412
      (3) Sanctions for an inadequate statement of claim 414
      (4) A note on the Iran–US Claims Tribunal 415
      (5) Comparison to the 1976 UNCITRAL Rules 416
   C. Extracts from the Practice of Investment Tribunals 417
Table of Contents

D. Extracts from the Practice of the Iran–US Claims Tribunal
   (1) Tribunal Rules (1983), Article 18(1) 419
   (2) Tribunal Rules (1983), Article 18(2) 419

3. The Statement of Defence—Article 21
   A Text of the 2010 UNCITRAL Rule 422
   B Commentary
      (1) Submission of the statement of defence 422
      (2) Contents of the statement of defence 423
      (3) Submission of counterclaims and claims for the purpose of set-off
         (a) General issues 424
         (b) The counterclaim or the claim for a set-off must be within the
             jurisdiction of the arbitral tribunal 426
      (4) Supplementary provisions on counterclaims and claims for the purpose
          of set-off 428
      (5) Comparison to the 1976 UNCITRAL Rules 429

C. Extracts from the Practice of Investment Tribunals

D. Extracts from the Practice of the Iran–US Claims Tribunal
   (1) Tribunal Rules (1983), Article 19(1) 434
   (2) Tribunal Rules (1983), Article 19(2) 434
   (3) Tribunal Rules (1983), Article 19(3) 436
   (4) Tribunal Rules (1983), Article 19(4) 436

Chapter 14: Objections to the Jurisdiction of the Arbitral Tribunal

1. Introduction 449
2. Objections to Jurisdiction—Article 23
   A. Text of the 2010 UNCITRAL Rule 450
   B. Commentary
      (1) The power of the tribunal to determine its own jurisdiction—Article
          23(1) 450
      (2) Objections to the existence or validity of the contract of which the
          arbitration agreement is a part and the doctrine of separability—Article
          23(1) 453
      (3) When objections should be raised—Article 23(2) 455
      (4) When objections should be ruled upon—Article 23(3) 457
      (5) Comparison to the 1976 UNCITRAL Rules 458

C. Extracts from the Practice of Investment Tribunals

D. Extracts from the Practice of the Iran–US Claims Tribunal
   (1) Tribunal Rules (1983), Article 21(1) 463
   (2) Tribunal Rules (1983), Article 21(2) 463
   (3) Tribunal Rules (1983), Article 21(3) 463
   (4) Tribunal Rules (1983), Article 21(4) 464

Chapter 15: Amendments to the Claim or Defence

1. Introduction 467
2. Amendments to the Claim or Defence—Article 22
   A. Text of the 2010 UNCITRAL Rule 467
   B. Commentary
      (1) General 468
      (2) The amendment must not fall outside the jurisdiction of the arbitral
          tribunal 469
Table of Contents

(3) Grounds for rejecting an amendment: delay, prejudice or other circumstances 471
(4) Procedural questions 474
(5) Comparison to the 1976 UNCITRAL Rules 475
C. Extracts from the Practice of Investment Tribunals 475
D. Extracts from the Practice of the Iran–US Claims Tribunal 479

Chapter 16: Further Written Statements and Time Limits on Submission

1. Introduction 491
2. Further Written Statements—Article 24 491
   A. Text of the 2010 UNCITRAL Rule 491
   B. Commentary 492
      (1) General comments 492
      (2) Comparison to the 1976 UNCITRAL Rules 496
   C. Extracts from the Practice of Investment Tribunals 496
   D. Extracts from the Practice of the Iran–US Claims Tribunal 498
3. Time Limits on Submission—Article 25 505
   A. Text of the 2010 UNCITRAL Rule 505
   B. Commentary 505
      (1) General comments 505
      (2) Comparison to the 1976 UNCITRAL Rules 508
   C. Extracts from the Practice of Investment Tribunals 508
   D. Extracts from the Practice of the Iran–US Claims Tribunal 508

Chapter 17: Interim Measures

1. Introduction 513
2. Interim Measures—Article 26 514
   A. Text of the 2010 UNCITRAL Rule 514
   B. Commentary 515
      (1) The precondition of a request by a party—Article 26(1) 516
      (2) Types of interim measures that may be granted—Article 26(2) 517
         (a) Maintain or restore the status quo 518
         (b) Prevent prejudice to the arbitral process itself 518
         (c) Preserve assets for possible satisfaction of award 519
         (d) Preserve evidence 519
      (3) Conditions for the ordering of interim measures—Article 26(3) 520
         (a) A likely harm not adequately reparable by an award of damages 521
         (b) An appropriate balance of likely harms 522
         (c) A reasonable possibility of success on the merits 522
         (d) Further conditions imposed by the agreement of the parties 524
      (4) Conditions relaxed for the preservation of evidence—Article 26(4) 524
      (5) The form (award or order) in which interim measures are granted 524
      (6) Tribunal’s power to modify, suspend or terminate interim measures—Article 26(5) 525
      (7) Security for the costs of interim measures—Article 26(6) 526
      (8) Disclosure by any party of any material change—Article 26(7) 527
      (9) Liability for costs and damages—Article 26(8) 528
      (10) Relations between the arbitral tribunal and municipal courts in issuing interim measures—Article 26(9) 529
      (11) Issuance of preliminary orders 530
      (12) Comparison to the 1976 UNCITRAL Rules 532
# Table of Contents

C. Extracts from the Practice of Investment Tribunals  
   533

D. Extracts from the Practice of the Iran–US Claims Tribunal  
   (1) Tribunal Rules (1983), Article 26(1)  
   (2) Tribunal Rules (1983), Article 26(2)  
   (3) Tribunal Rules (1983), Article 26(3)  
   543

## PART IV: THE PRESENTATION OF THE CASE:
EVIDENCE AND HEARINGS

### Introduction

553

### Chapter 18: Evidence

1. Introduction  
2. Evidence—Article 27  
   A. Text of the 2010 UNCITRAL Rule  
   B. Commentary  
      (1) Burden of proof—Article 27(1)  
      (2) Definition of “witnesses”—Article 27(2)  
         (a) General comments  
         (b) Practice of the Iran–US Claims Tribunal  
      (3) Written witness statements—Article 27(2)  
      (4) Production of documents—Article 27(3)  
         (a) General comments  
         (b) Production of documents at the request of a party  
         (c) “Enforcement” of production orders  
      (5) Admissibility, relevance, materiality, and weight of the evidence—Article 27(4)  
      (6) Comparison to the 1976 UNCITRAL Rules  
   C. Extracts from the Practice of Investment Tribunals  
      (1) Article 27(1) (1976 Rules)—Burden of proof  
      (2) Article 27(2) (1976 Rules)—Definition of “witnesses”  
      (3) Article 27(2) (1976 Rules)—Written witness statements  
      (4) Article 27(3) (1976 Rules)—Production of documents  
      (5) Article 27(4) (1976 Rules)—Admissibility, relevance, materiality, and weight of the evidence  
   D. Extracts from the Practice of the Iran–US Claims Tribunal  
      (1) Tribunal Rules (1983), Article 24(1)—Burden of proof  
      (2) Tribunal Rules (1983), Article 24(2)—Summary of evidence  
      (3) Tribunal Rules (1983), Article 24(3)—Document production  
      (4) Tribunal Rules (1983), Article 25(5)—Written witness statements  
      (5) Tribunal Rules (1983), Article 25(6)—Admissibility, relevance, materiality, and weight of the evidence  

### Chapter 19: The Hearings

1. Introduction  
2. The Hearings—Article 28  
   A. Text of the 2010 UNCITRAL Rule  
   B. Commentary  
      (1) Notice of hearing—Article 28(1)  
      (2) The conduct of the hearing—Article 28(2)–(4)  

557

557

557

561

563

564

565

567

570

571

574

576

577

577

579

580

580

587

588

593

594

601

602

602

602

604
Chapter 20: Tribunal-Appointed Experts

1. Introduction 635
2. Tribunal-Appointed Experts—Article 29 636
   A. Text of the 2010 UNCITRAL Rule 636
   B. Commentary 637
      (1) General comments 637
      (2) Appointment by the tribunal and terms of reference—Article 29(1)–(2) 638
         (a) Appointment 638
         (b) Terms of reference 640
      (3) Objections to the qualifications of or the impartiality and independence of the tribunal-appointed expert—Article 29(2) 642
      (4) The provision of relevant information to the tribunal-appointed expert—Article 29(3) 644
      (5) The tribunal-appointed expert's report—Article 29(4) 645
      (6) Expert hearings—Article 29(5) 646
      (7) Note on party-appointed “expert witnesses” 647
      (8) Comparison to the 1976 UNCITRAL Rules 648
   C. Extracts from the Practice of Investment Tribunals 648
   D. Extracts from the Practice of the Iran–US Claims Tribunal 650
      (1) Tribunal Rules (1983), Article 27(1)—appointment and terms of reference 650
         (a) The Shahin Shaine Ebrahimih case 650
         (b) The Arco Exploration case 653
         (c) The Starrett Housing case 655
Table of Contents

(d) The Richard D Harza case 656
(e) The Behring International case 660
(2) Tribunal Rules (1983), Article 27(2)—provision of relevant information 662
(3) Tribunal Rules (1983), Article 27(3)—expert report 663
(a) The Shahin Shaine Ebrahimi case 663
(b) The Aro Exploration case 664
(c) The Behring International case 665
(d) The Richard D Harza case 665
(e) The Starrett Housing case 665
(4) Tribunal Rules (1983), Article 27(4)—expert hearing 667

PART V: DEFAULT AND WAIVER

Introduction 669

Chapter 21: Default

1. Introduction
2. Default—Article 30
   A. Text of the 2010 UNCITRAL Rule 671
   B. Commentary
      (1) General comments 671
      (2) Failure to file early written submissions—Article 30(1) 672
      (3) Failure to appear at a hearing—Article 30(2) 675
      (4) Failure to produce documentary evidence—Article 30(3) 677
   C. Extracts from the Practice of Investment Tribunals 678
      D. Extracts from the Practice of the Iran–US Claims Tribunal
         (1) General and Tribunal Rules (1983), Article 28 683
         (2) Tribunal Rules (1983), Article 28(2) 685
         (3) Tribunal Rules (1983), Article 28(3) 687

Chapter 22: Waiver

1. Introduction
2. Waiver—Article 32
   A. Text of the 2010 UNCITRAL Rule 691
   B. Commentary
      (1) General comments 691
      (2) The level of knowledge required 692
      (3) Comparison to the 1976 UNCITRAL Rules 693
   C. Extracts from the Practice of Investment Tribunals 695
   D. Extracts from the Practice of the Iran–US Claims Tribunal 696

PART VI: THE AWARD

Introduction 697

Chapter 23: Deliberations and Decisions

1. Introduction
2. Decisions—Article 33 699
   700
Table of Contents

A. Text of the 2010 UNCITRAL Rule 700
   B. Commentary 700
      (1) Awards and other Decisions by Majority Vote—Article 33(1) 700
          (a) General comments 700
          (b) Majority decision-making by the Iran–US Claims Tribunal 704
             (1) The dynamics of deliberations 704
             (2) The practice of deliberating and drafting awards 705
      (2) Decision-Making on Procedural Questions—Article 33(2) 706
          (a) The meaning of "questions of procedure" 709
          (b) Revision 710
      (3) Confidentiality of deliberations—Article 31, Note 2 of the 1983 Tribunal Rules 711
          (a) The scope of the rule of confidentiality 712
          (b) Enforcing the rule of confidentiality 715
             (1) Censure of written statements 715
             (2) Statements of disapproval by fellow arbitrators 716
             (3) Challenge proceedings 716
      (4) Comparison to the 1976 UNCITRAL Rules 716
   C. Extracts from the Practice of Investment and other Tribunals 717
   D. Extracts from the Practice of the Iran–US Claims Tribunal 719
      (1) Tribunal Rules (1983), Article 31(1) 719
      (2) Tribunal Rules (1983), Article 31(2) 722
      (3) Tribunal Rules (1983), Article 31, Note 2—Confidentiality of deliberations 723

Chapter 24: Form and Effect

1. Introduction 732
2. Form and Effect—Article 34 732
   A. Text of the 2010 UNCITRAL Rule 732
   B. Commentary 733
      (1) Discretion to make separate awards—Article 34(1) 733
      (2) The award is "final and binding" and the parties must "carry out the award without delay"—Article 34(2)
         (a) General commentary on "final and binding" 738
            (1) "Final" 738
            (2) "Binding" 741
         (b) Waiver of recourse against the award—optional provision 742
      (3) Written award and designation of the date and place of the award's making—Article 34(2) and (4) 745
      (4) Obligation to sign and failure to sign the award—Article 34(4)
         (a) General comments on the travaux préparatoires 746
         (b) Practical matters regarding the statement of reasons for the absence of an arbitrator's signature 749
      (5) Statement of reasons for the award and dissenting opinions—Article 34(3)
         (a) Statement of reasons for the award 750
         (b) Dissenting and separate opinions 752
      (6) Publication of the award—Article 34(5) 755
      (7) Copies of the award to the parties—Article 34(6) 757
      (8) Filing and registration of the award 759
      (9) Comparison to the 1976 UNCITRAL Rules 759
## Table of Contents

C. Extracts from the Practice of Investment and other Tribunals
   (1) Article 32(1) (1976 Rules)—Types of award
   (2) Article 32(2) (1976 Rules)—Final and binding
   (3) Article 32(2) and (4) (1976 Rules)—Date, place, and signature
   (4) Article 32(4) (1976 Rules)—Failure to sign the award
   (5) Article 32(7) (1976 Rules)—Filing and registration of an award

D. Extracts from the Practice of the Iran–US Claims Tribunal
   (1) Tribunal Rules (1983), Article 32(1)—Types of award
   (2) Tribunal Rules (1983), Article 32(2)—Final and binding award
   (3) Tribunal Rules (1983), Article 32(3) and (4)—Date, place, and signature
   (4) Tribunal Rules (1983), Article 32(3)—Reasons for the award
   (5) Tribunal Rules (1983), Article 32(4)—Failure to sign the award
      (a) Statements of reasons for failure to sign the award
      (b) Improper statements of reasons and post-award exchanges
   (6) Tribunal Rules (1983), Article 32(5)—Publication of the award

## Chapter 25: Settlement and other Grounds for Termination

1. Introduction
2. Settlement and other Termination—Article 36
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) Settlement—Article 36(1)
         (a) Types of settlement agreement and the practice of awards on agreed terms
         (b) Discretion to record a settlement agreement
         (c) Pre-settlement negotiations
      (2) Other grounds for termination—Article 36(2)
         (a) Continuation of the arbitration is "unnecessary" or "impossible"
         (b) The existence of "remaining matters"
         (3) Technical requirements for awards on agreed terms—Article 36(3)
   C. Extracts from the Practice of Investment Tribunals
   D. Extracts from the Practice of the Iran–US Claims Tribunal
      (1) Tribunal Rules (1983), Article 34(1)
      (2) Tribunal Rules (1983), Article 34(2)

## Chapter 26: Post-Award Proceedings

1. Introduction
2. Interpretation of the Award—Article 37
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) General
      (2) Comparison to the 1976 UNCITRAL Rules
   C. Extracts from the Practice of Investment Tribunals
   D. Extracts from the Practice of the Iran–US Claims Tribunal
      (1) Tribunal Rules (1983), Article 34(1)
      (2) Tribunal Rules (1983), Article 34(2)
3. Correction of the Award—Article 38
   A. Text of the 2010 UNCITRAL Rule
   B. Commentary
      (1) General
      (2) Comparison to the 1976 UNCITRAL Rules
   C. Extracts from the Practice of Investment Tribunals
### Table of Contents

D. Extracts from the Practice of the Iran–US Claims Tribunal  
   (1) Request for correction granted 815  
   (2) Request for correction denied 817  

4. Additional Award—Article 39 821  
   A. Text of the 2010 UNCITRAL Rule 821  
   B. Commentary 821  
   (1) General 821  
   (2) Comparison to the 1976 UNCITRAL Rules 824  
   C. Extracts from the Practice of Investment Tribunals 825  
   D. Extracts from the Practice of the Iran–US Claims Tribunal 825  
   (1) Request for additional award granted 825  
   (2) Request for additional award denied 825  

5. The Finality of Awards and the Inherent Power to Reconsider 827  
   A. Commentary 827  
   B. Extracts from the Practice of Investment Tribunals 831  
   C. Extracts from the Practice of the Iran–US Claims Tribunal 832  
   (1) Limited power of review 832  
   (2) Revision to address fraud or corruption 836  

### Chapter 27: The Costs of Arbitration

1. Introduction 840  

2. The Costs of Arbitration—Article 40 841  
   A. Text of the 2010 UNCITRAL Rule 841  
   B. Commentary 841  
   (1) The duty to fix the costs of arbitration 841  
   (2) Costs defined 843  
      (a) Subparagraph (a) 843  
      (b) Subparagraphs (b) and (c) 844  
      (c) Subparagraph (d) 844  
      (d) Subparagraph (e) 845  
      (e) Subparagraph (f) 846  
   (3) The costs of interpretation, correction and completion of an award—Article 40(3) 847  
   (4) Note on the costs of the Iran–US Claims Tribunal 848  
   (5) Comparison to the 1976 UNCITRAL Rules 848  

C. Extracts from the Practice of Investment and other Tribunals 849  

3. Arbitrators’ Fees—Article 41 852  
   A. Text of the 2010 UNCITRAL Rule 852  
   B. Commentary 853  
   (1) Regulation of the arbitrators’ fees and expenses under the Rules—general background, Article 41(1) and (2) 853  
   (2) Determining the fees and expenses of the arbitral tribunal and potential review by a neutral arbiter—Article 41(3)–(6) 855  
      (a) The manner in which fees and expenses will be determined—Article 41(3) and (5) 856  
         (1) Transparency 857  
         (2) Neutral Mechanism 858  
         (3) Efficiency 859  
      (b) The computation of the arbitral tribunal’s fees and expenses—Article 41(4)–(6) 860  
         (1) Transparency 860  
         (2) Neutral Mechanism 860  
         (3) Efficiency 861
Table of Contents

(3) Comparison to the 1976 UNCITRAL Rules 862
C. Extracts from the Practice of Investment Tribunals 863
4. Apportionment of Costs—Article 42 865
A. Text of the 2010 UNCITRAL Rule 865
B. Commentary 865
   (1) Apportioning and awarding costs 865
   (2) “The circumstances of the case” 870
      (a) The degree of success of the parties 870
      (b) The conduct of the parties 871
      (c) The nature of the parties 873
      (d) The nature of the dispute resolution mechanism 874
   (3) Requirements for making a claim for costs 875
      (a) Documentation 875
      (b) Timing of requests 875
      (c) Proof of reasonable legal costs 876
   (4) Comparison to the 1976 UNCITRAL Rules 877
C. Extracts from the Practice of Investment Tribunals 877
   (1) Article 40(1) and (2) (1976 Rules)—General 877
   (2) Article 40(1) and (2) (1976 Rules)—“Circumstances of the case” 879
      (a) The success of the parties 879
      (b) The conduct of the parties 882
      (c) The nature of the dispute resolution mechanism 887
D. Extracts from the Practice of the Iran–US Claims Tribunal 891
   (1) Tribunal Rules (1983), Article 40(1) and (2)—General 891
   (2) Tribunal Rules (1983), Article 40(1) and (2)—“Circumstances of the case” 892
      (a) The success of the parties 892
      (b) The conduct of the parties 894
5. Deposit of Costs—Article 43 896
A. Text of the 2010 UNCITRAL Rule 896
B. Commentary 897
   (1) The request for deposits 897
   (2) Consultation with the appointing authority 897
   (3) Failure to make requested deposits 899
   (4) The right to an accounting and the return of unexpended deposits 900
   (5) Comparison to the 1976 UNCITRAL Rules 901
C. Extracts from the Practice of Investment Tribunals 901
D. Extracts from the Practice of the Iran–US Claims Tribunal 903

Appendices
Appendix 1—UNCITRAL Arbitration Rules (as revised in 2010) 907
Appendix 2—UNCITRAL Arbitration Rules (1976) 925
Appendix 3—A Tabular Comparison of the 1976–2010 UNCITRAL Arbitration Rules 939
Appendix 4—UNCITRAL Notes on Organizing Arbitral Proceedings (May 28–June 14, 1996) 967
Appendix 6—Recommendations to Assist Arbitral Institutions and Other Interested Bodies with regard to Arbitration under the UNCITRAL Arbitration Rules as revised in 2010 1007

Select Bibliography
Index

1021
1033
### Table of Cases and Other Practice

#### THE PRACTICE OF TRIBUNALS APPLYING THE UNCITRAL RULES

**A. Iran–US Claims Tribunal**

1. **Awards, decisions, and orders**
   
   (a) State-to-state claims
   
<table>
<thead>
<tr>
<th>Case No</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>No A1</td>
<td>287, 594, 719, 769, 785–6, 788</td>
</tr>
<tr>
<td>No A2</td>
<td>368, 440, 873–4, 894</td>
</tr>
<tr>
<td>No A3</td>
<td>53, 76, 288–9, 304, 618–19, 734, 791, 827, 830, 834, 873</td>
</tr>
<tr>
<td>No A4</td>
<td>544</td>
</tr>
<tr>
<td>No A8</td>
<td>53, 76, 288–9, 304, 618–19, 734, 791, 827, 830, 834, 873</td>
</tr>
<tr>
<td>No A9</td>
<td>53, 76, 288–9, 304, 618–19, 734, 791, 827, 830, 834</td>
</tr>
<tr>
<td>No A11</td>
<td>704, 721</td>
</tr>
<tr>
<td>No A12</td>
<td>444</td>
</tr>
<tr>
<td>No A14</td>
<td>53, 76, 288–9, 304, 618–19, 734, 791, 827, 830, 834</td>
</tr>
<tr>
<td>No A15</td>
<td>68, 189–90, 292, 524, 544–5, 549–50, 738, 767</td>
</tr>
<tr>
<td>No A16</td>
<td>594, 624</td>
</tr>
<tr>
<td>No A17</td>
<td>40, 798, 817</td>
</tr>
<tr>
<td>No A18</td>
<td>464–6, 753</td>
</tr>
<tr>
<td>No A20</td>
<td>560, 596, 832</td>
</tr>
<tr>
<td>No A21</td>
<td>43, 292</td>
</tr>
<tr>
<td>No A24</td>
<td>521, 549–50</td>
</tr>
<tr>
<td>No A25</td>
<td>380</td>
</tr>
<tr>
<td>No A26 (I, II and III)–FT</td>
<td>790</td>
</tr>
<tr>
<td>No A27</td>
<td>810, 821, 823, 827, 837</td>
</tr>
<tr>
<td>No A28</td>
<td>187, 223, 229, 421, 706, 712, 714–16, 727–8, 754, 767</td>
</tr>
<tr>
<td>No A30</td>
<td>591</td>
</tr>
<tr>
<td>No A33</td>
<td>506, 512, 710</td>
</tr>
<tr>
<td>No B1</td>
<td>223–4, 282, 302, 421, 424, 446, 458, 466, 549, 567, 709–10, 723, 738</td>
</tr>
<tr>
<td>No B9</td>
<td>141</td>
</tr>
<tr>
<td>No B12</td>
<td>141</td>
</tr>
<tr>
<td>No B16</td>
<td>53, 76</td>
</tr>
<tr>
<td>No B25</td>
<td>783</td>
</tr>
<tr>
<td>No B36</td>
<td>116, 140, 803, 813, 820, 836</td>
</tr>
<tr>
<td>No B61</td>
<td>189–90, 205, 211, 251, 266, 288–9, 304, 603, 618–19, 713, 734, 791, 823, 827, 830, 834</td>
</tr>
</tbody>
</table>

(b) Claims of Nationals