

1994

International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement

John D. Franchini

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 Fordham L. Rev. 2223 (1994).

Available at: <https://ir.lawnet.fordham.edu/flr/vol62/iss7/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

INTERNATIONAL ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES: A CONTRACTUAL PROVISION FOR IMPROVEMENT

JOHN D. FRANCHINI

INTRODUCTION

The United Nations Commission on International Trade Law ("UNCITRAL" or "Commission") developed the UNCITRAL Arbitration Rules ("Rules")¹ to arbitrate international trade disputes² between countries with different legal, social, and economic systems.³ Currently, many international privatization contracts provide that future disputes will be resolved through binding arbitration under the Rules.⁴

The Iran-United States Claims Tribunal ("Tribunal") has utilized the Rules extensively.⁵ The Tribunal was created to arbitrate the almost four thousand claims⁶ arising from the 1979 United States hostage crisis in Iran.⁷ Despite the Tribunal's successful application of the Rules, the Tribunal's experience has also highlighted the Rules' inherent weaknesses.⁸ These weaknesses, or ambiguities, are present in the articles of the Rules discussing: representative capacity,⁹ the binding effect and content of the statement of claim,¹⁰ justifications for extending filing deadlines,¹¹ the appointment and challenge process of arbitrators,¹² the scope of discovery,¹³ the permissible uses of rebuttal and expert witnesses,¹⁴ and the ex-

1. See Stewart A. Baker & Mark D. Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 Int'l Law. 81, 81 n.1 (1989); Andrew G. Weiss, Note, *The Status of the UNCITRAL Model Law on International Commercial Arbitration Vis-a-Vis the ICC, LCIA and UNCITRAL Arbitration Rules: Conflict or Complement*, 13 Syracuse J. Int'l L. & Com. 367, 371 (1986).

2. UNCITRAL, The United Nations Commission On International Trade Law at 28, U.N. Sales No. E.86.V.8 (1986) [hereinafter UNCITRAL Text].

3. See Weiss, *supra* note 1, at 371.

4. One example is a privatization contract for the sale of a Czech enterprise by the Czech Republic (selling country) to a German Corporation (private foreign investor). The contract provides for all disputes to be resolved through binding arbitration under the Rules. See *infra* note 152.

5. See generally Charles N. Brower & Mark D. Davis, *The Iran-United States Claims Tribunal After Seven Years: A Retrospective View From the Inside*, 43 Arb. J., Dec. 1988, at 16, 21 (describing the experience of the Tribunal in its first seven years).

6. See *id.* at 22; David P. Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-84*, 16 Law & Pol'y Int'l Bus. 677, 683 (1984).

7. The majority of the claims were for breach of contract due to the hostile revolutionary party expelling the American business people living in Iran. See *id.* at 19; *infra* notes 57-64 and accompanying text.

8. See Baker & Davis, *supra* note 1, at 84.

9. See *infra* notes 79-84 and accompanying text.

10. See *infra* notes 85-96 and accompanying text.

11. See *infra* notes 97-105 and accompanying text.

12. See *infra* notes 106-26 and accompanying text.

13. See *infra* notes 127-30 and accompanying text.

14. See *infra* notes 131-36, 142-51 and accompanying text.

tent of the tribunal's authority to issue interim measures of protection.¹⁵

Lawyers negotiating contracts that provide for arbitration under the Rules must address these deficiencies to achieve greater success from the Rules. Part I of this Note discusses the creation of UNCITRAL and the content of the Rules. Part II examines the Tribunal's experience with the Rules. Specifically, this Part discusses the weaknesses of the Rules and proposes solutions to those weaknesses. Finally, Part III of this Note suggests a contractual provision that may be added to international privatization contracts to eliminate the Rules' inherent weaknesses.

I. UNCITRAL AND THE UNCITRAL ARBITRATION RULES

This Part discusses the creation of UNCITRAL and the method by which it functions. Furthermore, it describes the Rules developed by UNCITRAL and adopted by the United Nations General Assembly.

A. UNCITRAL

Before establishing UNCITRAL in 1966,¹⁶ the United Nations General Assembly noted the conflict among the laws of different States in the international community.¹⁷ Convinced that these legal differences inhibited world trade, the General Assembly, in 1965, requested the Secretariat to prepare a comprehensive report on the "development of the law of international trade."¹⁸ The report, submitted to the General Assembly the following year, recommended that a Commission be created to "accelerate the process of harmonization and unification of the law of international trade."¹⁹

The General Assembly, in 1966, adopted Resolution 2205 (XXI) to establish the recommended commission—UNCITRAL.²⁰ Also through Resolution 2205 (XXI), the General Assembly mandated UNCITRAL, "as the core legal body within the United Nations system in the field of international trade law,"²¹ to further the "progressive harmonization and

15. See *infra* notes 137-41 and accompanying text.

16. See UNCITRAL Text, *supra* note 2, at 4; Weiss, *supra* note 1, at 368 n.8.

17. See UNCITRAL Text, *supra* note 2, at 3.

18. *Id.*; Emmanuel Gaillard, *International Unification of Private Law: The Multilateral Approach*, American Society of International Law, Panel Session April 9-12, 1986 available in Westlaw, JLR file 80 ASILPROC 233 at 1.

19. See Gaillard, *supra* note 18, at 4; Weiss, *supra* note 1, at 368 n.8.

20. See G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, § 1, at 41, 42, U.N. Doc A/6394/Add.1/Add.2 (1966).

21. The United Nations Conference on Trade and Development ("UNCTAD") examines the economics of international trade. UNCTAD was created by the United Nations General Assembly in 1964, "to monitor trends in international trade and to recommend policies and programs that would make the international economic system a greater facilitator of development in the developing nations." Stanley J. Michalak, Jr., *United Nations Conference on Trade and Development, An Organization Betraying Its Mission* 1 (1983).

unification of the law of international trade."²²

UNCITRAL is represented by thirty-six nations²³ from various geographic, economic, and legal systems throughout the world.²⁴ UNCITRAL's members are elected for six-year terms, with half of the members elected every three years.²⁵ UNCITRAL meets annually, alternating between New York and Vienna.²⁶

UNCITRAL is composed of a Bureau, a Secretariat, and several Working Groups.²⁷ The Bureau is responsible for the organization of UNCITRAL and includes a "chairman, . . . three vice-chairmen and a rapporteur."²⁸ The Secretariat of UNCITRAL researches legal matters, prepares reports, drafts preliminary texts, and comments on draft legal

22. G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, § 2, at 41, 43, U.N. Doc A/6394/Add.1/Add.2 (1966).

The General Assembly mandate provided that UNCITRAL was to accomplish its goals of harmonization and unification of the law of international trade by:

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
- (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;
- (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;
- (e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
- (f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- (g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;
- (h) Taking any other action it may deem useful to fulfil its functions.

Id.

23. See General Assembly Resolution 3108, U.N. GOAR, 28th Sess., Supp. No. 90, at 145, 146, U.N. Doc. No. A/9030 (1973). From its inception until 1973, the Commission was composed of 29 States. See G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, § 2, at 41, 42, U.N. Doc A/6394/Add.1/Add.2 (1966).

24. See General Assembly Resolution 3108, U.N. GOAR, 28th Sess., Supp. No. 90, at 145, 146, U.N. Doc. No. A/9030 (1973). Membership is representative of the following five regions: African States, Asian States, East European States, Latin American States, and West European and other States. The United States, under Western Europe and other States, has been a member of UNCITRAL since its inception in 1966. See Gaillard, *supra* note 18, at 1; see also UNCITRAL Text, *supra* note 2, at 5.

25. See G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, § 2, at 43, U.N. Doc A/6394/Add.1/Add.2 (1966); General Assembly Resolution 3108, U.N. GOAR, 28th Sess., Supp. No. 90, at 146, U.N. Doc. No. A/9030 (1973).

26. See UNCITRAL Text, *supra* note 2, at 8. Prior to the transfer of the UNCITRAL Secretariat in 1979, the Commission met alternately between New York and Geneva. See G.A. Res. 2205, U.N. GOAR, 21st Sess., Annex II, § 2, at 43, U.N. Doc A/6394/Add.1/Add.2 (1966).

27. See UNCITRAL Text, *supra* note 2, at 5-6.

28. See *id.* at 5.

texts.²⁹ The International Trade Law Branch of the United Nations Office of Legal Affairs serves as the Secretariat³⁰ and all of the Secretariat's professional members are trained lawyers.³¹ Finally, the Working Groups, created according to the subject matter to be studied,³² conduct the preparatory work at UNCITRAL.³³

The General Assembly delegated authority to UNCITRAL to determine the areas of international trade law that it would examine.³⁴ At its first session in 1968, UNCITRAL adopted nine topics for review, including international commercial arbitration.³⁵ In addressing these nine topics, UNCITRAL has utilized a multitude of flexible approaches to achieve its goals.³⁶ For example, UNCITRAL attempted to harmonize international commercial arbitration by creating the Rules.³⁷

B. *The UNCITRAL Arbitration Rules*

UNCITRAL adopted the Rules at its ninth session³⁸ upon " 'extensive consultation with arbitral institutions and centres of international arbitration' and exhaustive deliberations of the proposed text."³⁹ The General Assembly of the United Nations adopted the Rules in 1976 pursuant to Resolution 31/98.⁴⁰ The Rules were intended to guide "ad hoc" arbi-

29. *See id.* at 6.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* at 7.

35. *See Report of the United Nations Commission on International Trade Law*, 23rd Sess., Supp. No. 16, at 12, 13, U.N. Doc. A/7216 (1968). The other eight topics included: international sale of goods, transportation, insurance, international payments, intellectual property, elimination of discrimination in laws affecting international trade, agency, and legalization of documents. International commercial arbitration, along with international sale of goods and international payments were given priority status. *See id.*

36. The techniques include:

(a) International conventions;

(b) Model treaty provisions, to be incorporated in future treaties or to be used in revisions of existing treaties;

(c) Uniform legal rules designed to serve as models for legislation by States (model laws);

(d) Sets of uniform rules to be incorporated by parties in their contracts or other agreements;

(e) Legal guides, identifying legal issues arising in a particular area, discussing various approaches and discussing possible solutions, in order to establish international common understanding in particular fields, or to promote healthier and more uniform practices in such fields;

(f) Recommendations encouraging Governments and international organizations that elaborate legal texts to eliminate unnecessary legal hindrances to international trade.

See UNCITRAL Text, *supra* note 2, at 11.

37. *See id.*

38. UNCITRAL's ninth session was held in New York from April 12-May 7, 1976. *See Weiss*, *supra* note 1, at 371 n.32 (1986).

39. *See id.* at 371 (citation omitted).

40. U.N. GAOR, 21st Sess., Supp. No. 39, at 182, U.N. Doc. A/31/39 (1976); Stew-

trations, however, they are often used to guide administered arbitrations in agencies such as the International Chamber of Commerce ("ICC") and the American Arbitration Association ("AAA").⁴¹ In such a case, where the Rules are used to guide an institutional arbitration, the parties generally have stipulated in the contract that the UNCITRAL Rules are to substitute for the institution's rules, such as ICC's Rules of Conciliation and Arbitration or AAA's Commercial Arbitration Rules.⁴²

The UNCITRAL Rules consist of 41 articles categorized in the following four sections.⁴³ Articles 1-4, classified as "Introductory Rules," prepare the parties for arbitration under the Rules.⁴⁴ Articles 5-14, classified as "Composition of the Arbitral Tribunal," describe the process by which arbitrators are chosen, challenged, and replaced.⁴⁵ Articles 15-30,

art A. Baker & Mark D. Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-U.S. Claims Tribunal*, 23 Geo. Wash. J. Int'l L. & Econ. 267, 268 (1989); Weiss, *supra* note 1, at 371.

41. See David J. Branson & W. M. Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 Va. J. Int'l L. 4 (1984); Weiss, *supra* note 1, at 367 nn.2&3.

"Ad hoc" arbitration is non-institutional arbitration, with all procedural matters indicated by the parties in their agreement to arbitrate. "Institutional" arbitration is arbitration conducted under the direction of a permanent and impartial agency, such as the ICC, the AAA, or the London Court of International Arbitration ("LCIA"). See Weiss, *supra* note 1, at 367 nn.2&3.

42. See International Chamber of Commerce Rules of Conciliation and Arbitration, 1 I.C.C.A. Y.B. Com. Arb. 157, 158-64 (1976), reprinted in 15 I.L.M. 395, 398 (1976) [hereinafter ICC Rules]; Commercial Arbitration Rules of the American Arbitration Association, Am. Arb. Assoc. Commercial Arb. Rules (as amended and effective Nov. 1, 1993) [hereinafter AAA Rules].

43. Report of the United Nations Commission on International Trade Law, 21st Sess., Supp. No. 17, at 34-50, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL Rules].

44. See *id.* at 35-36. Article 1 applies the UNCITRAL Rules to contracts that have referred to arbitration under the UNCITRAL Rules. See *id.* at 35. This article also gives the parties broad power to modify these Rules. Article 2 defines adequate notice, as well as how to calculate time periods. See *id.* Article 3 specifies the required information that must be included in a notice of arbitration from the claimant to the respondent. See *id.* at 36. Article 4 requires each party to specify the names and addresses of the persons representing and assisting them. See *id.*

45. See *id.* at 37-40. Article 5 allows the parties to agree on the number of arbitrators, with a default provision for three arbitrators, if the parties do not agree on the number of arbitrators within 15 days. See *id.* at 37. Article 6 specifies the process by which a sole arbitrator is chosen by the parties. If the parties do not agree, an appointing authority will choose the sole arbitrator. See *id.* at 37-38. Article 7 details the process by which three arbitrators are to be selected. Each party is to select one arbitrator. The two selected arbitrators then are to choose the third, presiding arbitrator. If, however, the parties or the two selected arbitrators do not agree on the third arbitrator, then the appointing authority will act to appoint the third arbitrator. See *id.* at 38. Article 8 informs the parties of the necessary information that must be sent to the appointing authority when the appointing authority is to select an arbitrator. See *id.* Article 9 imposes a duty on arbitrators, whether appointed or being considered for appointment, to disclose circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. See *id.* at 39. Article 10 gives a party the right to challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. See *id.* Article 11 requires that a challenge be brought within 15 days

classified as "Arbitral Proceedings," direct the arbitral proceedings, including the filing of claims, the use of evidence, the use of witnesses, and the hearing procedure.⁴⁶ Articles 31-41, classified as "The Award," de-

of the arbitrator's appointment, or within 15 days of the circumstances mentioned in articles 9 and 10. This article also requires notice of the challenge to be given to the other party, the arbitrator being challenged, and the other tribunal members. Lastly, the article states that a challenged arbitrator may resign without prejudice. *See id.* Article 12 states that the appointing authority is to rule on a challenge to an arbitrator. If the challenge is sustained, a substitute arbitrator is to be appointed by the parties or the appointing authority. *See id.* at 39-40. Article 13 states that articles 6-9 should control the replacement of an arbitrator in the event of death or resignation of that arbitrator. However, in the event that an arbitrator fails to act, or due to *de jure* or *de facto* impossibility of performance, the replacement of that arbitrator should be conducted in the same manner as a successfully challenged arbitrator. *See id.* at 40. Article 14 states that the hearings should be repeated if a sole or presiding arbitrator is replaced. The hearings will be repeated at the discretion of the tribunal if any other arbitrator is replaced. *See id.*

46. *See id.* at 40-45. Article 15 affords the tribunal flexibility in its administration the arbitration so long as the parties are treated with equality. This article also provides that a hearing will be conducted at the request of either party or at the tribunal's discretion. Lastly, article 15 requires that all documents submitted to the tribunal be submitted to the other party as well. *See id.* at 40. Article 16 provides that the parties may agree on the place of arbitration. If the parties have not agreed on the place of arbitration the tribunal will select the place of arbitration. The tribunal may also meet at any place to inspect goods, property or documents. *See id.* at 41. Article 17 states that the language(s) agreed upon by the parties will be used in the proceedings. *See id.* Article 18 defines the information that must be included in the statement of claim such as: (a) the names and addresses of the parties; (b) a statement of facts supporting the claim; (c) the points at issue; and (d) the relief or remedy sought. *See id.* at 41-42. Article 19 provides that the statement of defense must respond to items b, c and d of the statement of claim within the time period set by the tribunal. *See id.* at 42. Article 20 allows for a claim or defense to be amended so long as it does not delay or prejudice the other party. *See id.* Article 21 authorizes the arbitral tribunal to rule on objections to the tribunal's jurisdiction. The article further provides that objections to jurisdiction shall be raised no later than the statement of defense, or with respect to a counterclaim, in the reply to the counterclaim. *See id.* at 42-43. Article 22 states that the tribunal will determine whether further written statements will be required from the parties. *See id.* at 43. Article 23 provides that the periods of time set by the tribunal for the communication of written statements should not exceed 45 days, unless an extension is justified. Article 24 states that each party has the burden of proving its claim or defense. *See id.* Article 24 further provides that the tribunal may require a party to produce a summary of the evidence upon which it intends to rely in supporting its claim. Lastly, the article authorizes the tribunal to require a party to produce documents, exhibits or other evidence. *See id.* Article 25 states that the tribunal must notify the parties of the date, time and place of an oral hearing. The article also requires the parties to notify the tribunal and the other party of any witnesses that will testify and in what language they will testify. The article also provides that a record of the hearing will be kept at the request of both parties or at the tribunal's discretion. Furthermore, article 25 states that hearings are to be held *in camera* unless the parties agree otherwise. Lastly, the article authorizes the tribunal to determine the admissibility, relevance, materiality and weight of the evidence. *See id.* at 43-44. Article 26 authorizes the tribunal to award interim relief at the request of a party in order to protect the subject matter of the dispute. The article further states that judicially administered interim relief will not prejudice the arbitral proceeding. *See id.* at 44. Article 27 permits the tribunal to appoint expert witnesses on specific issues. The expert witness is first to report in writing. After the expert witness reports in writing, a party may request that the expert witness appear in person for interrogation. *See id.* at 44-45. Article 28 provides that if the claimant fails to submit its statement of claim within the

scribe the issuance of the arbitral award, other methods of terminating the proceedings, and the allocation of arbitral costs.⁴⁷

II. EXPERIENCE OF THE UNCITRAL ARBITRATION RULES

This Part discusses the Rules' strengths and weaknesses by examining the Tribunal's experience in applying the Rules.

A. *The Iran-United States Claims Tribunal*

From 1960 until 1978, the United States and Iran, under the leadership of the Shah, engaged in a healthy economic relationship.⁴⁸ By 1978,

time period set by the tribunal, the proceeding will be terminated. If, however, a respondent fails to submit its statement of defense within the time period set by the tribunal, the proceeding will continue. The article also states that the tribunal will continue the proceeding when any party fails to appear at a hearing. Lastly, the failure of a party to produce evidence permits the tribunal to make a decision on the evidence before it. *See id.* at 45. Article 29 authorizes the tribunal to declare the hearings closed. The article also authorizes the tribunal to reopen the hearings at its discretion. *See id.* Article 30 compels a party to promptly object to the other party's noncompliance of the UNCITRAL Rules or the objection will be waived. *See id.*

47. *See id.* at 46-50. Article 31 states that decisions of the tribunal should be made by a majority of the arbitrators. In cases where no majority is reached, the presiding arbitrator shall decide. *See id.* at 46. Article 32 entitles the tribunal to issue final, interim, interlocutory and partial awards. The award shall be in writing and shall state the reasons for the decision. Finally, the arbitrators are required to sign the award. *See id.* Article 33 gives effect to the choice of law clause agreed to by the parties for the arbitration. *See id.* at 46-47. Article 34 allows the parties to settle any time before the award is issued. Article 34 also states that the tribunal may terminate the proceedings any time before the award is issued when the continuation of the arbitral proceedings becomes unnecessary or impossible. *See id.* at 47. Article 35 allows the parties, within 30 days of the issuance of the award, to request that the tribunal interpret the award. *See id.* Article 36 allows the parties, within 30 days of the issuance of the award, to request that the tribunal correct computational, clerical, or typographical errors. *See id.* Article 37 states that the parties, within 30 days of the issuance of the award, may request that the tribunal issue an additional award as to claims presented in the arbitral proceedings but omitted from the award. *See id.* at 48. Article 38 defines the "costs" of the tribunal to be: the fees of each arbitrator including travel and other expenses, the costs of expert advice, the travel and other expenses of witnesses approved by the tribunal, the costs of legal representation and assistance of the successful party and the fees and expenses of the appointing authority. *See id.* Article 39 states that the fees shall be reasonable, taking into account the amount of the dispute, the complexity of the subject matter and the time spent by the arbitrators. Article 39 also states that the tribunal shall take into account the schedule of fees put forth by the appointing authority. If no schedule of fees has been issued, a party may request that the appointing authority furnish such a statement. *See id.* at 48-49. Article 40 states that the costs of the tribunal shall be born by the unsuccessful party, unless the tribunal determines that an apportionment of the costs is reasonable. Article 40 also states that the tribunal shall fix the costs of arbitration when the tribunal terminates the proceedings or makes an award on agreed terms pursuant to articles 38 and 39. Finally, no additional costs are to be assessed for an interpretation, correction or completion of the award pursuant to articles 35 to 37. *See id.* at 49. Article 41 authorizes the tribunal to request the parties to make a deposit for the costs of the arbitration. If the party does not make the deposit within 30 days, the tribunal may request the payment again. If not complied with, the tribunal may then suspend or terminate the proceedings. *See id.* at 49-50.

48. *See Brower & Davis, supra* note 5, at 18. Economically, American construction

almost 40,000 Americans were living and working in Iran.⁴⁹ Many Iranians, however, discontented with the Shah's economic and social reforms, revolted against the government.⁵⁰ As a result, virtually all Americans living in Iran immediately departed.⁵¹

In February, 1979, after the successful revolution, the new Islamic Republic of Iran was proclaimed under the leadership of Ayatollah Khomeini.⁵² This government immediately seized the remaining American assets and abrogated the existing American contracts.⁵³ In addition, on November 4, 1979, Iranian protestors entered the United States Embassy Compound and took 52 American hostages.⁵⁴ The Iranians demanded the return of the Shah and his assets in exchange for the American hostages.⁵⁵ The President of the United States, Jimmy Carter, responded to Iran's action by issuing an executive order freezing Iran's assets that were under U.S. control.⁵⁶

On January 20, 1981, 444 days later, both Iran and the United States adopted the Algiers Accords, two declarations issued by the Algerian government.⁵⁷ The Algiers Accords resolved the hostage crisis between Iran and the United States by arranging for the release of the United States' hostages in exchange for the release of Iran's assets held by the United States.⁵⁸

companies, architectures, accountants, agricultural experts, lawyers, computer specialists, and engineers participated in Iran's development program. Militarily, the Government of the United States and United States' defense contractors supplied Iran with modern weaponry. See Richard M. Mosk, *Lessons From The Hague-An Update on the Iran United States Claims Tribunal*, 14 Pepp. L. Rev. 819, 819 (1987).

49. See Charles N. Brower, *Lessons to be Drawn from the Iran-U.S. Claims Tribunal*, 9 J. Int'l. Arb., Mar. 1992, at 51, 54; Brower & Davis, *supra* note 5, at 18.

50. See Brower & Davis, *supra* note 5, at 18.

51. See *id.* at 19; Brower, *supra* note 49, at 54.

52. See Brower & Davis, *supra* note 5, at 18.

53. See *id.*

54. See *id.*; Pierre Bellet, *Forward*, 16 Law & Pol'y Int'l Bus. 667, 667 (1984).

55. See Brower & Davis, *supra* note 5, at 18.

56. See Exec. Order. No. 12,170, 44 Fed. Reg. 65,729 (1979). The freeze also included Iranian assets held in overseas branches of United States banks.

57. See Iran-United States: Settlement of the Hostage Crisis, Jan. 18, 1981 *reprinted in* 1 Iran-U.S. C.T.R. (1983) [hereinafter Algiers Accords]. The Algiers Accords contain 1) the Declaration of the Government of the Democratic and Popular Republic of Algeria, 2) the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 3) the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, and 4) the Escrow Agreement and related technical agreements. See *id.* at 3-25; see also Baker & Davis, *supra* note 1, at 82 n.2.

58. See Brower & Davis, *supra* note 5, at 19; Mosk, *supra* note 48, at 820. U.S. \$7.955 billion of Iranian assets were released by the United States. U.S. \$3.667 billion were allocated to pay certain American bank loans. U.S. \$1.418 billion were placed into an escrow account pending resolution of the amount of interest due on the loans. U.S. \$1 billion were placed in a security account to insure payment of awards to United States claimants. The remainder of the money was returned to Iran. See Mark B. Feldman,

The Algiers Accords also established the Iran-United States Claims Tribunal.⁵⁹ Under the Accords, the Tribunal was to arbitrate disputes between Iran and the United States arising from the 1979 hostage crisis.⁶⁰ The Accords stated that the "arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)" were to guide the work of the Tribunal.⁶¹ The Rules were most likely chosen for their reputation to "bridge[] the arbitration systems of the common law and civil law countries."⁶² The Tribunal, presently near the completion of its task to arbitrate the claims between Iran and the United States,⁶³ exemplifies successful international arbitration and the use of the Rules.⁶⁴

B. *Successes of the UNCITRAL Arbitration Rules*

The Tribunal has demonstrated that the Rules are "comprehensive enough[,] . . . sufficiently flexible[,] . . . [and] detailed enough" to administer arbitral claims.⁶⁵ Most importantly, the Rules have guided a Tribunal, comprised of members from two adversary nations, to fulfill its task

Implementation of the Iranian Claims Settlement Agreement-Status, Issues and Lessons: A View from the Governments Perspective, Private Investors Abroad-Problems and Solutions in International Business in 1981, 75, 76-77 (1981).

59. The Iran-United States Claims Tribunal was created pursuant to the authority stated in the Claims Settlement Declaration of the Accords. See Algiers Accords, *supra* note 57, Claims Settlement Declaration, art. II, at 9.

60. See Brower & Davis, *supra* note 5, at 19. Iran and the United States chose the more advantageous method of international dispute resolution by providing, in the Algiers Accords, for arbitration versus litigation. Arbitration is advantageous to litigation because arbitration is generally less costly, faster, more confidential, easier to enforce, and easier to obtain jurisdiction over diverse parties. See Branson & Tupman, *supra* note 41, at 918; Daniel M. Kolkey, *International Arbitration in East-West Trade*, 12 Whittier L. Rev. 245, 245-48 (1991).

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has made an arbitral award easier to enforce than a court judgement. The New York Convention entered into force on June 7, 1959. The United States is a member to the New York Convention, however, Iran is not a member to the New York Convention. See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

Finally, arbitration is final and binding, with appeals allowed only under limited circumstances. An arbitration award may be challenged because of 1) the invalidity of the arbitral agreement, 2) a violation of due process during the arbitral proceedings, 3) the arbitrator exceeding his or her authority, 4) irregularity in the composition of the arbitral tribunal or the arbitral procedure, 5) a non-arbitrable dispute, and 6) the suspension of the award in the country where it was issued. See Kolkey, *supra*, at 246.

61. See Algiers Accords, *supra* note 57, Claims Settlement Declaration, Art. III, ¶ 2, at 10; see also Brower & Davis, *supra* note 5, at 19; Mosk, *supra* note 48, at 820.

62. Bellet, *supra* note 54, at 672; see Weiss, *supra* note 1, at 368 n.8, 371.

63. Since its creation in 1981, the Tribunal has resolved nearly 95% of the claims submitted to it by Iran and the United States. See Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 Va. J. Int'l L. 421, 421 (1992).

64. See Brower, *supra* note 63, at 422; Brower & Davis, *supra* note 5, at 26-30.

65. Howard M. Holtzmann, *Five Ways the American Arbitration Association Can Assist in Resolving Disputes in Trade with the Soviet Union*, at 5, (PLI Commercial Law and Practice Course Handbook Series, Legal and Practical Aspects of: Doing Business with the Soviet Union, 1988).

of providing a forum for claimants to recover their rightful property.⁶⁶

The Rules have successfully guided the Tribunal through several international crises.⁶⁷ For example, the Tribunal was forced to respond to the increased tension between Iran and Iraq; the United States bombing raid in Libya; reported Iranian involvement in the instability of Lebanon; the Iran arms scandal in the United States; and direct military confrontations between Iran and the United States in the Persian Gulf.⁶⁸ The Rules' insistence and preservation of impartiality among the arbitrators (Articles 9-12),⁶⁹ as well as its fairness provision (Article 15),⁷⁰ have kept the Tribunal operational despite the discord between Iran and the United States.⁷¹

The Tribunal also confronted internal conflict.⁷² On September 3, 1984, two Iranian arbitrators, Judge Kashani and Judge Shafeiei, physically attacked a third-country arbitrator, Judge Mangard of Sweden, at the Tribunal at The Hague.⁷³ The Iranian arbitrators were attempting to prevent Judge Mangard from continuing at the Tribunal due to Judge Mangard's alleged partiality.⁷⁴ The Tribunal's successful response under the Rules was to suspend the Tribunal's work until December, 1984,⁷⁵ and to replace the two Iranian arbitrators.⁷⁶ Therefore, specific provisions of the Rules have directed the Tribunal through both external and

66. See Brower & Davis, *supra* note 5, at 26. Up until mid-1992, every single American claimant had received full payment of their award. See Brower, *supra* note 63, at 422.

67. See Brower & Davis, *supra* note 5, at 26.

68. See *id.*

69. Article 9-12 provides for the challenge and replacement of arbitrators "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." UNCITRAL Rules, *supra* note 43, art. 10.

70. Article 15 requires the Tribunal to conduct its proceedings in such a manner that the "parties are treated with equality." UNCITRAL Rules, *supra* note 43, art. 15.

71. See *supra* note 68 and accompanying text. Although not required by the Rules, the Tribunal's practice of not having the third arbitrator be a national of either Iran or the United States has most likely aided the Tribunal's quest for independence. See Baker & Davis, *supra* note 1, at 91 n.38 (1989).

72. See Brower & Davis, *supra* note 5, at 25-26; Stewart, *supra* note 6, at 679-80.

73. See Stewart, *supra* note 6, at 679.

74. See *id.*

75. See *Iran-United States Claims Tribunal Annual Report* (1984). The suspension of the Tribunal occurred pursuant to article 15 which grants the Tribunal broad authority to "conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality . . . and each party is given a full opportunity of presenting his case." See UNCITRAL Rules, *supra* note 43, art. 15.

Pursuant to the flexibility afforded the Tribunal by article 15, President Lagergren suspended the Tribunal's proceedings on September 19, 1984, by Presidential Order No. 29. President Lagergren terminated the suspension of the Tribunal's proceedings on December 6, 1984, by Presidential Order No. 33. During the suspension, a Special Chamber was established to hear requests by arbitrating parties for termination of proceedings in individual claims and for awards on agreed terms in settled cases. The Special Chamber issued awards of \$47 million during the suspension. See Stewart, *supra* note 72, at 680-81.

76. The United States, under articles 10 and 11 of the Rules, filed a formal challenge

internal conflict to uphold its ultimate goal of hearing cases and issuing awards.⁷⁷

C. *Weaknesses of and Proposed Solutions to the UNCITRAL Arbitration Rules*

The Tribunal also highlighted the inherent weaknesses of the Rules.⁷⁸ The deficiencies in the Rules, as well as potential solutions, are discussed below and address articles regarding: 1) preparing for the arbitration, 2) composition of the Tribunal, and 3) arbitral proceedings.

1. Preparing for the Arbitration

The deficient article provisions under this section discuss notice requirements, the statements of claim and defense, and time periods.

a. Article 4: Representation and Assistance

Article 4 of the Rules refers to a party's disclosure to its adversary party of its legal representatives and assistants.⁷⁹ Article 4 is deficient because it fails to distinguish between the authority of a legal representative and that of a legal assistant.⁸⁰ Without clarifying this distinction, a party may consider that an adversary's assistant possesses the authority to act on behalf of the adversary for whom the assistant is working.⁸¹ This situation allows for several assistants inadvertently to bind the party for whom they are working—a result which is undesirable for both parties.⁸²

to the two Iranian Judges who attacked Judge Mangard on September 19, 1984. See UNCITRAL Rules, *supra* note 43, arts. 9-12; Stewart, *supra* note 6, at 680-81.

On November 28, the Islamic Republic of Iran, under article 11(3), notified the Tribunal that it was replacing Judge Kashani and Judge Shafeiei with Seyed Moshen Mostafavi Tafreshi and Hamid Bahrami Ahmadi. See Stewart, *supra* note 6, at 680.

77. See Brower & Davis, *supra* note 5, at 26.

78. See Baker & Davis, *supra* note 1, at 84.

79. See UNCITRAL Rules, *supra* note 43, art. 4. Legal assistants includes all persons assisting in the case such as accountants, economic advisors, and damage consultants.

80. See Baker & Davis, *supra* note 1, at 88-89.

81. For example, suppose the claimant sent the respondent's "damage consultant" notice of the future presentation of an expert damage witness. The respondent's damage consultant may only be a legal assistant and therefore, is not authorized to receive documents on behalf of the respondent party.

82. The potential exists for a party to be bound in conflicting positions by its several assistants. See *id.* For example, suppose party X had one lawyer and one accountant representing his case. Without distinguishing who is a legal representative (having authority to bind party X) and who is a legal assistant (not having authority to bind party X), both would have the potential authority to bind party X in the eyes of the arbitral tribunal and party X's adversary, party Y. This is harmful to party X because the accountant may act to bind party X in a manner contrary to the position that party X and his lawyer wish to take. Furthermore, the potential exists for both the accountant and the lawyer to state conflicting positions to party Y and the tribunal. Therefore, an ambiguous situation exists when legal representatives are not distinguished from legal assistants.

To remove this deficiency, the contracting parties may provide that a legal representative is authorized to act for and bind the party, as well as to receive documents.⁸³ Furthermore, the parties may state that a legal assistant is not authorized to act in the same manner as the legal representative.⁸⁴

b. *Article 18: Statement of Claim*

Article 18, which describes the requirements concerning the statement of claim,⁸⁵ is deficient in two ways.⁸⁶ First, article 18 places an excessive burden on the claimant because it is most often interpreted to require the claimant to include the respondent party's "current" address versus the respondent party's "last known" address in the statement of claim.⁸⁷ This requirement is burdensome because factors such as lapse of time and hostile relations make ascertaining the "current" address extremely difficult.⁸⁸ To alleviate this deficiency, the contracting parties may provide that the claimant is required to include the respondent's "last known" address and not the respondent's "current" address in the statement of claim.⁸⁹

Second, article 18 is deficient because it requires that a claimant list all the "points of issue" in the statement of claim.⁹⁰ This requirement is problematic because it limits the claimant to the points of issue listed in

83. *See id.* The Tribunal's practice supports this view.

84. *See id.* It has also been suggested in the Tribunal's interpretive notes that neither the legal representative nor the legal assistant need be authorized to practice law. If the problem arose that the parties were unsure of the legal requirements of their representatives and assistants, article 4 should be clarified in accordance with the Tribunal's interpretation. *See* Final Tribunal Rules of Procedure, art. 4. nn.2&3, 2 Iran-U.S. C.T.R. 405, 412 (1983).

85. *See* UNCITRAL Rules, *supra* note 43, art. 18.

86. *See* Baker & Davis, *supra* note 40, at 281-82.

87. *See id.* at 281. The ICC Rules require "the full names, a description and the addresses of the parties." *See* ICC Rules, *supra* note 42, art. 3(1) & (2). The ICC Rules, similar to the UNCITRAL Rules, are subject to the interpretation that the respondent's current address, versus the respondent's last known address, is required. The AAA rules require the respondent's current address. The AAA Rules state "[t]he initiating party [is to] give the other party written notice of its intention to arbitrate, including in the notice a statement of the nature of the dispute, the amount involved, the hearing locale requested, and the remedy sought." *See* AAA Rules, *supra* note 42, § 6.

88. *See* Baker & Davis, *supra* note 40, at 281. For example, because of the hostility between Iran and the United States, the claimant may not be able to ascertain easily the respondent's "current" address.

89. *See id.*

90. *See* UNCITRAL Rules, *supra* note 43, art. 18; Baker & Davis, *supra* note 40, at 282. The ICC Rules require "a statement of the claimant's case, the relevant agreements, [and] such documentation or information as is necessary to establish the circumstances of the case." *See* ICC Rules, *supra* note 42, art. 3(1) & (2). The AAA Rules require the claimant to include in the complaint "a statement of the nature of the dispute, the amount involved . . . and the remedy sought." *See* AAA Rules, *supra* note 42, § 6. Neither the ICC Rules nor the AAA Rules require the claimant to list all points of issue in the statement of claim. *See generally* AAA Rules, *supra* note 42; ICC Rules, *supra* note 42.

its statement of claim.⁹¹ As a result, the Tribunal may unjustly prevent a claimant from making all of the necessary points for its arbitration.⁹² This outcome is particularly unjust because it is often extremely difficult to specify all of the points of issue at such an early stage in the arbitral proceedings.⁹³

Furthermore, this requirement may lead the claimant to list any and all possible points of issue in its statement of claim.⁹⁴ The claimant would list all possible points of issue in order to protect itself from losing any points for argument.⁹⁵ This result creates an ambiguous situation for the respondent who may not be able to decipher the substantive points at issue from the points listed merely for protective purposes.⁹⁶ To avoid this ambiguity, the contracting parties may provide that the claimant is required to include, in good faith, all claims known to the claimant at the time of filing the statement of claim.

c. Article 19: Statement of Defense

Article 19 requires the Tribunal to determine the filing deadline for the statement of defense.⁹⁷ Article 19 also authorizes the Tribunal to extend the respondent's filing deadline when justified by the circumstances.⁹⁸ Article 19 is deficient because it allows the Tribunal to extend the filing deadline for the statement of defense without defining what circumstances constitute a justifiable extension.⁹⁹ The Tribunal has often ran-

91. See Baker & Davis, *supra* note 40, at 282. Article 20 of the Rules authorizes the parties to amend their statement of claim. However, the tribunal may deny an amendment if it is "inappropriate" because of "delay in making [the amendment] or prejudice to the other party or any other circumstances." See UNCITRAL Rules, *supra* note 43, art. 20.

The ICC Rules and the AAA Rules also permit the claimant party to amend their complaint under certain circumstances. The ICC Rules allow for amendments "provided [they] fall within the Terms of Reference, a document defining . . . the issues to be determined and the parties' claims. See ICC Rules, *supra* note 42, art. 16. The AAA Rules allow a party to "make any new or different claim[]" "[b]efore the arbitrator is appointed (or thereafter with his consent)." See AAA Rules, *supra* note 42, § 8.

92. See Baker & Davis, *supra* note 40, at 282.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See UNCITRAL Rules, *supra* note 43, art. 19. The ICC Rules require the defendant to reply "[w]ithin thirty days from the receipt of the Request for Arbitration . . . or apply for an extension of time to file his defense and documents." See ICC Rules, *supra* note 42, art. 4(1). The AAA Rules require the defendant to file an "answering statement with the AAA within ten days of the mailing." See AAA Rules, *supra* note 42, § 8. The ICC Rules and the AAA Rules more clearly define the time period within which the statement of defense must be filed.

98. See *id.* The ICC Rules allow the "defendant" to apply to the Secretariat for a filing extension in "exceptional circumstances." See ICC Rules, *supra* note 42, art. 4(1). The AAA Rules provide that "if no answering statement is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answering statement shall not operate to delay the arbitration." See AAA Rules, *supra* note 42, § 6.

99. See Baker & Davis, *supra* note 40, at 283.

domly awarded extensions.¹⁰⁰ This arbitrary awarding of extensions proves to be an injustice to the claimant.¹⁰¹ Contracting parties may avoid this potential injustice created by article 19 by stating that a filing extension will be awarded to the respondent when the late filing is due to "extreme circumstances beyond the control of the respondent."

d. *Article 23: Periods of Time*

Article 23 sets a 45-day maximum time period for filing claims.¹⁰² Article 23 also allows the Tribunal to extend the 45-day maximum time period when a party is justified to receive an extension.¹⁰³ Article 23 is deficient because it fails to provide the Tribunal with guidelines as to what constitutes a justifiable extension of a deadline.¹⁰⁴ Without guidelines, the Tribunal may grant arbitrary extensions at the expense of the opposing party.¹⁰⁵ Thus, the parties may supplement the Rules by stating in their contract that a filing extension will be awarded where the late filing is due to "extreme circumstances beyond the control of the late-filing party."

2. Composition of the Tribunal

The deficient article provisions under this section address the appointment and challenge process of arbitrators.

a. *Article 6: Appointment of Arbitrators*

Article 6 describes the process by which a sole or presiding arbitrator is appointed.¹⁰⁶ In describing this process, the article distinguishes between an "agreed upon" appointing authority (one which the parties have chosen by agreement) and a "designated" appointing authority (one which the Secretary General of the Permanent Court of Arbitration has chosen).¹⁰⁷ Article 6 is deficient because it specifies a time limit within which the "agreed upon" appointing authority must name a sole or presiding arbitrator, but is silent regarding the time limit within which the "designated" appointing authority must name a sole or presiding arbitrator.¹⁰⁸

100. *See id.*

101. *See id.*

102. *See* UNCITRAL Rules, *supra* note 43, art. 23.

103. *See id.*

104. *See* Baker & Davis, *supra* note 40, at 296.

105. *See id.*

106. *See* UNCITRAL Rules, *supra* note 43, art. 6.

107. *See id.*

108. *See* Baker & Davis, *supra* note 1, at 100. The ICC Rules are more consistent than the UNCITRAL Rules because they do not specify a time limit within which either a "designated" or an "agreed upon" appointing authority must act. *See* ICC Rules, *supra* note 42, art. 2(3)&(4). The AAA Rules provide that the "AAA shall appoint a neutral arbitrator if the party arbitrators . . . fail to do so within ten days after the appointment of the last party." In other words, the AAA is also more consistent than the UNCITRAL

By not defining the time limit for the "designated" appointing authority, the Rules allow for the possibility that the parties have no recourse if the "designated" appointing authority is incapacitated or refuses to act.¹⁰⁹ To correct this deficiency, the contracting parties may impose the same time limit on a "designated" appointing authority as it does on an "agreed upon" appointing authority, in regard to the naming of a sole or presiding arbitrator.

Furthermore, article 6 differentiates between the length of service for an "agreed upon" appointing authority and that of a "designated" appointing authority.¹¹⁰ Article 6 states that the length of service for an "agreed upon" appointing authority is continuous.¹¹¹ However, the article is silent regarding the length of service for a "designated" appointing authority.¹¹² To overcome this omission, the contracting parties may specify that, as with an "agreed upon" appointing authority, the length of service for a "designated" appointing authority is continuous.¹¹³

b. *Article 11: Challenge of Arbitrators*

Article 11 describes the process of challenging an arbitrator.¹¹⁴ The article states that a party may only bring a challenge within fifteen days of an arbitrator's appointment or of knowledge of circumstances that give rise to justifiable doubts as to an arbitrator's impartiality or independence.¹¹⁵ Article 11's imposition of the fifteen-day time limit, however, raises several unanswered questions.¹¹⁶

Rules because it provides a ten day limit within which all types of party arbitrators—designated and agreed upon—are to act. See AAA Rules, *supra* note 42, § 15.

109. See Baker & Davis, *supra* note 1, at 100-01. UNCITRAL's failure to include a time limit for the "designated" appointing authority in the Rules, article 6(2), has been referred to as a "drafting oversight." The drafters either intended to include the word "designated" along with "appointe" in article 6(2), or intended not to specify either "agreed upon" or "designated" in article 6(2). *Id.* at 100-02.

110. See UNCITRAL Rules, *supra* note 43, art. 6.

111. See *id.*

112. See *id.*

113. See Baker & Davis, *supra* note 1, at 103-05.

114. See UNCITRAL Rules, *supra* note 43, art. 11.

115. See *id.* The *travaux préparatoires* of the UNCITRAL Rules discuss circumstances that give rise to justifiable doubts as to an arbitrator's impartiality. The *travaux* state that any financial or personal interest in the outcome of the arbitration or any family or commercial tie with a party could give rise to justifiable doubts. The *travaux* continue by classifying the grounds for bringing a challenge into either "absolute" or "relative" grounds. Absolute grounds include "direct" personal or financial interests or "close" family ties between an arbitrator and a party. The existence of such grounds would result in the automatic success of the challenge. Relative grounds, on the other hand, include circumstances such as remote family ties. To sustain a challenge on relative grounds, the challenging party would not only have to prove the existence of such circumstances, but that the circumstances in fact created justifiable doubts. See *Report of the Secretary-General: Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade*, [1975] VI UNCITRAL Y.B. (part 2) 163, U.N. Doc. A/CN.9/97 (1974).

116. See Baker & Davis, *supra* note 1, at 125.

Similar to the UNCITRAL Rules' imposition of the 15-day time limit, the ICC Rules

The first issue raised by the fifteen-day time period is whether a duty exists on a party to investigate an arbitrator within fifteen days of the arbitrator's appointment.¹¹⁷ A second issue raised is whether the fifteen-day time period begins to run when the party "knows" of circumstances giving rise to justifiable doubts as to an arbitrator's impartiality or independence (subjective standard), or when the party "should know" of such circumstances (objective standard).¹¹⁸ Third, the imposition of a fifteen-day time period raises the question of how a party may prove the beginning of the fifteen-day period.¹¹⁹ In other words, how does a party prove that it raised the challenge within the requisite fifteen days from when it first learned of circumstances giving rise to justifiable doubts as to an arbitrator's impartiality or independence?¹²⁰ Is the party's statement alone enough to meet the fifteen-day requirement?¹²¹ This situation arises in cases where a challenge is directed towards an arbitrator who is already sitting at the tribunal.¹²²

To address the first issue raised by article 11, the contracting parties may state that a duty exists on the parties to conduct a reasonable investigation of an arbitrator that is being appointed. A duty to reasonably investigate would avoid the unnecessary expense and delay incurred when parties challenge the chosen arbitrator late in the proceedings versus within fifteen days of the arbitrator's appointment.¹²³

To address the second issue raised by the imposition of the fifteen-day time period, the contracting parties may apply an objective standard to the challenger's knowledge of circumstances that give rise to justifiable doubts as to an arbitrator's impartiality. The rationale for applying an objective versus a subjective standard is to force parties to bring a challenge at the earliest possible point in the proceeding.¹²⁴ Forcing a party to bring a challenge earlier in the proceeding avoids the unnecessary expense and delay that is caused by bringing a later challenge.¹²⁵

Regarding the third issue, the parties may specify in the contract that the challenger may prove the beginning of the fifteen-day period by its statement alone. The rationale for permitting this is to avoid imposing a

require a challenge to be submitted "within 30 days from receipt by that party of the notification of the appointment . . . of the arbitrator . . . or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based." See ICC Rules, *supra* note 42, art. 8. The AAA Rules do not impose a time limit for the challenge of arbitrators. See AAA Rules, *supra* note 42, §§ 12, 19.

117. See Baker & Davis, *supra* note 1, at 125.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.*

restrictive burden on the challenge process.¹²⁶

3. Arbitral Proceedings

The deficient articles in the "arbitral proceedings" section address discovery, non-expert and expert witnesses, and interim measures of protection.

a. Article 24: Discovery

Article 24 addresses the discovery process.¹²⁷ The article states that the tribunal may require a party to produce documents, exhibits and other evidence.¹²⁸ Article 24 is deficient because it does not specify the scope of the discovery process.¹²⁹ In other words, the article does not state whether the discovery process will be limited, as in civil-law jurisdictions, or broad-ranging, as in common-law jurisdictions.¹³⁰

To overcome this deficiency, the contracting parties may stipulate the school of discovery they wish to follow: limited discovery or broad-ranging discovery. The parties should also add to their contract that if they fail to agree on a particular school of discovery, the appointing authority will choose the school of discovery at the request of either party.

b. Article 25: Witnesses

Article 25 describes the procedure for presenting witnesses other than experts.¹³¹ Article 25 does not refer to rebuttal witnesses.¹³² Therefore, the article is unclear as to whether a party may use rebuttal witnesses and, if the party may, under what guidelines.¹³³

The contracting parties may provide that rebuttal witnesses are permitted.¹³⁴ Furthermore, the parties may state that the party introducing a rebuttal witness is to identify that witness to the opposing party as far

126. *See id.*

127. *See* UNCITRAL Rules, *supra* note 43, art. 24.

128. *See id.*

129. *See* Baker & Davis, *supra* note 40, at 310-12.

130. Discovery in civil law jurisdiction is generally limited. *See id.* However, discovery in common law jurisdictions is generally broad. For example, Federal Rules of Civil Procedure allow for discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1) (emphasis added).

The ICC Rules and the AAA rules also fail to specify whether discovery will be broad ranging or limited. The ICC Rules require "such documentation or information necessary to establish clearly the circumstances of the case." *See* ICC Rules, *supra* note 42, art. 3(2)(c). The AAA Rules refer only to "the exchange of documentary evidence." *See* AAA Rules, *supra* note 42, § 3 (Supp. Proc. for Int'l Comm. Arb).

131. *See* UNCITRAL Rules, *supra* note 43, art. 25. Expert witnesses are discussed under article 27 of the Rules. *See infra* notes 142-51 and accompanying text.

132. *See* Baker & Davis, *supra* note 40, at 324.

133. *See id.* at 323-24.

134. *See id.*

in advance of the hearing as is reasonably possible.¹³⁵ Finally, the parties may add that rebuttal witness are precluded from presenting direct testimony.¹³⁶

c. *Article 26: Interim Measures of Protection*

Article 26 authorizes the tribunal to award interim measures of protection such as ordering the sale of perishable goods or the protection of certain evidence.¹³⁷ The article is unclear regarding the extent of the tribunal's authority to issue such orders.¹³⁸ For example, the article contains conflicting language that both grants and limits the tribunal's authority to issue interim measures of protection.¹³⁹

To remove the ambiguity created by article 26, the contracting parties may state that the scope of the tribunal's authority to issue interim measures of protection is broad.¹⁴⁰ The reason for affording the tribunal such broad authority is to maintain the flexibility and jurisdictional powers that prior articles have granted the tribunal.¹⁴¹ To achieve this result with absolute clarity, the parties may add that the interim measures of protection stated in article 26 are merely examples and are not intended to be an exclusive list.

d. *Article 27: Experts*

Article 27 discusses the use of expert witnesses.¹⁴² Article 27 is deficient because it refers to expert witnesses appointed by the tribunal, but is silent regarding expert witnesses presented by the parties.¹⁴³ Article

135. *See id.* at 323.

136. *See id.* at 324.

137. *See* UNCITRAL Rules, *supra* note 43, art. 26. The tribunal may award interim measures to protect the subject matter of the dispute from harm or destruction. For example, the tribunal may order the deposit of goods with a third party or the sale of perishable goods. *See id.*

The ICC Rules, contrary to the UNCITRAL Rules and the AAA Rules, provide that "the parties . . . [must] apply to any competent judicial authority for interim measures." *See* ICC Rules, *supra* note 42, art. 8(5). The AAA Rules state that "[t]he arbitrator may issue orders necessary to safeguard the property in dispute without prejudice to the rights of the parties." The AAA Rules, similar to the UNCITRAL Rules, authorize the arbitrators to act in this area, but fail to specify the scope of the arbitrator's authority. *See* AAA Rules, *supra* note 42, § 34.

138. *See* Baker & Davis, *supra* note 40, at 331.

139. The broad language of the article provides that "the arbitral tribunal may take any interim measures it deems necessary." The narrow language of the article limits the tribunal's authority by providing a specific list of interim measures, "such as ordering [the goods] deposit with a third person or the sale of perishable goods." *See* UNCITRAL Rules, *supra* note 43, art. 26.

140. *See* Baker & Davis, *supra* note 40, at 331.

141. *See id.* at 337. For example, article 15 authorizes the tribunal to conduct the proceeding "in such a manner as it considers appropriate," so long as the parties are treated with "equality." *See* UNCITRAL Rules, *supra* note 43, art. 15.

142. *See* UNCITRAL Rules, *supra* note 43, art. 27.

143. *See* Baker & Davis, *supra* note 40, at 326.

The ICC Rules are also silent regarding expert witness presented by the parties, but

27's silence is subject to two interpretations.¹⁴⁴ On the one hand, the silence may be interpreted as precluding the parties from presenting their own expert witnesses.¹⁴⁵ On the other hand, the silence may be interpreted as an implied authorization for the parties to present their own expert witnesses.¹⁴⁶ As a result, the claimant may attempt to present its own expert witness under one interpretation of article 27, and the respondent may validly object to the claimants use of an expert witness under another interpretation of article 27.

To clarify this discrepancy, the contracting parties may provide that the introduction of expert witnesses by the parties is permitted.¹⁴⁷ First, expressly stating that the parties may introduce their own expert witnesses removes the potential for misapplication of the Rules by the arbitrators or parties.¹⁴⁸ Second, allowing the parties to present their own expert witnesses affords the parties flexibility in presenting their case.¹⁴⁹ The theme of flexibility is inherent in the UNCITRAL Rules under articles 1 and 15.¹⁵⁰ Thus, allowing the parties to present their own expert witnesses keeps in line with the theme of flexibility.¹⁵¹

III. CONTRACTUAL PROVISION FOR AN ARBITRATION CONTRACT

Contracting parties intending to resolve all disputes through binding arbitration under the Rules must provide for such action in the contract.¹⁵² In addition, the parties must also stipulate the place where the

provide that "[t]he arbitrator may appoint one or more experts." See ICC Rules, *supra* note 42, art. 14(2). The AAA Rules do not contain a provision discussing expert witnesses. See Susan W. Tiefenbrun, *A Comparison of International Arbitral Rules*, 15 B.C. Int'l & Comp. L. Rev. 38 (1992).

144. See Baker & Davis, *supra* note 40, at 328.

145. See *id.*

146. See *id.* This view is supported by the language in article 15(2) stating that a party may present evidence in a hearing, "including expert witnesses." UNCITRAL Rules, *supra* note 43, art. 15.

147. See Baker & Davis, *supra* note 40, at 329.

148. See *id.* at 328.

149. See *id.* at 328-29.

150. See *id.* at 271; UNCITRAL Rules, *supra* note 43, art. 1. For example, article 15 allows the tribunal to conduct the proceeding as it considers appropriate and article 1 allows the parties to modify any Rule that they so desire. See UNCITRAL Rules, *supra* note 43, arts. 1 & 15.

151. See UNCITRAL Rules, *supra* note 43, art. 1; Baker & Davis, *supra* note 40, at 271.

152. An example of an arbitration contract providing for the use of the Rules is the standard Enterprise Purchase Agreement of the Fund of National Property of the Czech Republic, version 1.7.93. The Arbitration clause states:

12.2 *Governing Law and Dispute Resolution.* This Agreement and the rights of the parties hereunder shall be construed and interpreted in accordance with [Czech Republic] laws but without reference to conflict of law principles. The parties hereto shall endeavor to reach an amicable settlement of any disputes that may arise under this Agreement. However, if they are unable to resolve any dispute by amicable settlement, such dispute shall be settled by binding arbitration under the UNCITRAL Arbitration Rules (the "Rules") by three (3) arbitrators appointed in accordance with the Rules. The President of the Vi-

dispute will be arbitrated,¹⁵³ the language in which the arbitral proceedings will be conducted,¹⁵⁴ the number of arbitrators in the tribunal,¹⁵⁵ and the person who is to act as the "appointing authority."¹⁵⁶

The following proposed contractual provision is based on the Tribunal's experience and will clarify the ambiguities inherent in the Rules.

Preparing for the Arbitration

- (1) A legal representative is authorized to act for and bind the party¹⁵⁷ and to receive documents on behalf of the party.¹⁵⁸ A legal assistant does not possess these powers held by a legal representative.¹⁵⁹
- (2) The claimant is required to include the last known address versus the current address of the respondent party in the statement of claim.¹⁶⁰ Furthermore, the claimant is required to include only those points of issue known, by reasonable investigation, to the claimant at the time of filing the statement of claim.¹⁶¹
- (3) The filing deadlines for submitting the statement of defense¹⁶² and the statement of claim¹⁶³ may only be extended due to extreme circumstances beyond the control of the untimely party.¹⁶⁴

Composition of the Tribunal

- (4) The 60-day limit within which an "agreed upon" appointing authority must name a sole or presiding arbitrator also applies to a

enna Bundeskammer der gewerblichen Wirtschaft shall act as the "appointing authority" under the Rules. Each of Investor, Purchaser and the Fund hereby irrevocably waives the right to submit such disputes, or to appeal, to any court. The seat of the arbitration tribunal shall be in Prague. The language of the arbitration shall be English. This submission and agreement to arbitrate shall be specifically enforceable. Any award rendered by an arbitration tribunal shall be final and binding on the parties hereto and judgement upon the award may be entered in any court having jurisdiction thereof.

Enterprise Purchase Agreement of the Fund of National Property of the Czech Republic, cl. 12.2, version 1.7.93 (on file with *Fordham Law Review*).

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. This provision addresses the ambiguity in article 4 of the Rules created by the fact that the article does not distinguish between the authority of a legal representative and that of a legal assistant. *See supra* notes 79-84 and accompanying text.

158. *See id.*

159. *See id.*

160. This provision removes the potentially excessive burden on the claimant by the Rule's requirement that the claimant include the respondent party's "current" address. *See supra* notes 85-96 and accompanying text.

161. This provision alleviates the potential legal injustice by the Rule's requirement that the claimant list all points of issue in the statement of claim. *See id.*

162. This provision removes the tribunal's ability to award extensions randomly. *See supra* notes 97-101 and accompanying text.

163. As with article 19 (statement of defense), this provision removes the tribunal's ability to award extensions randomly regarding the filing of the statement of claim, as well as the statement of defense. *See supra* notes 102-05 and accompanying text.

164. *See id.*

“designated” appointing authority.¹⁶⁵ Furthermore, a “designated” appointing authority’s length of service is continuous, similar to that of an “agreed upon” appointing authority.¹⁶⁶

- (5) The parties are under a duty to conduct a reasonable investigation of arbitrators, either newly appointed or under consideration for appointment, to determine whether circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality.¹⁶⁷ The fifteen-day time period begins to run when a party either knows of, or should know of, circumstances that give rise to justifiable doubts as to an arbitrator’s impartiality (objective standard).¹⁶⁸ A challenging party may prove the beginning of the fifteen-day period by its statement alone.¹⁶⁹

Arbitral Proceedings

- (6) The parties may stipulate whether discovery will be limited or broad ranging.¹⁷⁰ If the parties fail to decide whether discovery will be limited or broad-ranging, the appointing authority will determine the method of discovery that will be followed by the tribunal.¹⁷¹
- (7) Parties may use rebuttal witnesses upon reasonable notice to both the opposing party and the tribunal.¹⁷² Parties may also introduce expert witnesses.¹⁷³
- (8) The tribunal possesses broad authority to issue interim measures of protection¹⁷⁴ and thus, is not limited to the examples of interim measures stated in article 26(1).¹⁷⁵

IV. CONCLUSION

Arbitration, particularly in the international sphere, offers a quick and relatively inexpensive means to dispute resolution. The United Nations has established the UNCITRAL Arbitration Rules as an option available

165. This provision addresses the Rule’s silence regarding a time limit within which the designated appointing authority is to appoint a sole or presiding arbitrator, or the length of time that the designated appointing authority is to serve the tribunal. *See supra* notes 106-13 and accompanying text.

166. *See id.*

167. This provision addresses the three unanswered questions raised by the Rule’s imposition of a 15-day limit for challenging an arbitrator. *See supra* notes 114-26 and accompanying text.

168. *See id.*

169. *See id.*

170. This provision addresses the Rule’s silence as to whether discovery will be limited or broad-ranging. *See supra* notes 127-30 and accompanying text.

171. *See id.*

172. This provision removes the Rule’s ambiguity regarding a party’s authority to use rebuttal witnesses. *See supra* notes 131-36 and accompanying text.

173. This provision addresses the Rule’s silence regarding whether a party may introduce expert witnesses. *See supra* notes 142-51 and accompanying text.

174. This provision addresses the conflicting language describing the tribunal’s authority to issue interim measures of protection. *See supra* notes 137-41 and accompanying text.

175. *See id.*

to contracting parties from different States. UNCITRAL offers a viable alternative to the arbitration rules of the ICC and the AAA. The Iran-United States Claims Tribunal, however, has demonstrated that some problems exist with the UNCITRAL Rules. The best means to avoid the weaknesses in the Rules is to add a contractual provision that clarifies its inherent ambiguities. By doing so, a party is ensured a fair and cost-efficient method of international dispute resolution.