

REVISING THE UNCITRAL ARBITRATION RULES: SEEKING PROCEDURAL DUE PROCESS UNDER THE 2010 UNCITRAL RULES FOR ARBITRATION

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I. Introduction

A testament to their solid design, the United Nations Commission on International Trade Law's ("UNCITRAL") Arbitration Rules remained unchanged for thirty-four years.¹ From 1976 until 2010, these Rules served as the principle set of guidelines for ad hoc international commercial arbitrations.² In 2006, UNCITRAL instructed its working group on arbitration to begin the process of revising the Arbitration Rules to make them responsive to the needs and realities of international commercial arbitration in the modern world without altering the original structure, style, or spirit of the Rules.³ The revised Arbitration Rules were adopted on June 29, 2010, and apply to arbitration agreements entered into after August 15, 2010.⁴ This article evaluates the impact that the 2010 Rules for Arbitration have on protecting the procedural due process rights of arbitration participants by examining the treatment of party control and efforts to improve parties' perception of fairness in the final version of these revised Rules for Arbitration.

II. Background

In 2000, at Working Group II's 32nd session, UNCITRAL instructed the working group to begin exploring the possibilities of revising the UNCITRAL Rules for Arbitration.⁵ The working group undertook the revision process with the Commission's admonition to recognize the success of the 1976 Rules for Arbitration and their widespread use.⁶ The main objective of the revision was to modernize and address concerns about the text, while striving to maintain the flexibility, style, structure, and spirit of the text.⁷ Commentary from parties involved in the drafting process also demonstrated a concern for protecting the procedural due process rights of arbitration participants.⁸ In the final version of the 2010 UNCITRAL Arbitration Rules, changes made to Articles 2, 11, and 17 help ensure due process by modernizing the Rules and better facilitating party control of the arbitral proceedings.⁹

Article 2 allows parties to provide notice of arbitration to other parties through any means, not just physical delivery, so long as the means of delivery records the transmission.¹⁰

¹ See G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17, ¶ 56 (Dec. 1976) [hereinafter 1976 Rules Adoption] (approving and encouraging the adoption and use of the newly created UNCITRAL Arbitration Rules).

² See Report of the U.N. Comm'n on Int'l Trade Law On Its Forty-Third Session, U.N. GAOR, 65th Sess., Supp. No. 17, A/65/17 (2010) [hereinafter 2010 Rules Adoption] (approving and encouraging the adoption and use of the Revised UNCITRAL Arbitration Rules); see also Kyriaki Karadelis, *New UNCITRAL Rules at Last*, GLOBAL ARBITRATION REVIEW (July 12, 2010) <http://www.globalarbitrationreview.com/news/article/28575/> (discussing the official issuance of the revised UNCITRAL Arbitration Rules).

³ See U.N. Comm'n on Int'l Trade Law, Report of Working Group on Arbitration and Conciliation on the Work of its Forty-fifth Session, U.N. Doc. A/CN.9/614 ¶ 3 (Oct. 5, 2006) (agreeing with the UNCITRAL Commission's statement that the spirit and structure of the 1976 Rules required flexibility and hoping to capture that flexibility in the revision).

⁴ See Andrew Ness, *Updating the UNCITRAL Arbitration Rules*, KLUWER CONSTRUCTION BLOG (Aug. 30, 2010) <http://kluwerconstructionblog.com/2010/08/30/updating-the-uncitral-arbitration-rules/> [hereinafter KLUWER CONSTRUCTION BLOG] (explaining that the revision of the UNCITRAL Arbitration Rules is the first change to the Rules in thirty-four years); see also MICHELLE MIZUTANI & ATSUSHI YAMASHITA, *NEW UNCITRAL ARBITRATION RULES* (Clifford Chance, July 2010) http://www.cliffordchance.com/publicationviews/publications/2010/08/new_uncitral_arbitrationrulesjuly2010.html [hereinafter Clifford Chance Client Briefing] (noting, unless otherwise specified in an agreement, that the 2010 Rules for Arbitration will apply to all new arbitration agreements referencing the UNCITRAL Rules).

⁵ See U.N. Comm'n on Int'l Trade Law, Report of Working Group on Arbitration on the Work of its 32nd Session, U.N. Doc. A/CN.9/468, ¶ 107-108 (Apr. 10, 2000) (considering future work that could alter aspects of the 1976 Rules for Arbitration); Jonathan Sutcliffe & Anibal Martin Sabatar, *UNCITRAL Arbitration: New Rules on Transparency?*, in MEALY'S INTERNATIONAL ARBITRATION REPORT (May 2008) http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=3504&site_id=494&detail=yes (discussing the process of revising the UNCITRAL Rules for Arbitration).

⁶ See U.N. Comm'n on Int'l Trade Law, Rep. on its 39th Sess., June 19, 2006-July 7, 2006, U.N. Doc. A/61/17, ¶ 184; GAOR 61st Sess., Supp. No. 17 (2006) (observing that the UNCITRAL Rules for Arbitration had been successful and used by arbitration centers and in investor-state disputes).

⁷ U.N. Comm'n on Int'l Trade Law Working Group II, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/WG.II/WP.143, ¶ 1 (July 20, 2006) (recalling the Commission's desire for the rules to be improved during the revision process without drastically altering their proven framework).

⁸ See generally Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations, U.N. Doc. A/CN.9/704 (May 4, 2010) [hereinafter Commentary on the Draft Rules] (providing the commentary made by 15 countries and 9 nongovernmental organizations on proposed rule changes during the last stages of the revision process).

⁹ See Clifford Chance Client Briefing, *supra* note 4, at 1-2 (discussing the broad changes made in the 2010 Rules for Arbitration).

¹⁰ See 2010 Rules Adoption, *supra* note 2, at 79 (permitting a broad range of methods for delivering notice, but requiring that notice provided via e-mail, facsimile, or other electronic means only be sent to a pre-determined designated address for it to be valid); see also Clifford Chance Client Briefing, *supra* note 4, at 1 (summarizing the new ability to serve proper notice through fax or e-mail in the revised version of Article 2 of the UNCITRAL Arbitration Rules).

This provision seeks to guarantee that notice is fairly received by ensuring that (1) notice does not go to an address that is no longer in use and (2) parties can include, in an arbitration clause, the exact address where they will be able to receive notice.¹¹ In addition, Article 2 now allows parties to provide notice via modern electronic communications such as fax and e-mail.¹² This part of the Article was an update from the 1976 version which only permitted notice via written, physically delivered notice.¹³

The revised version of Article 11 addresses arbitrator disclosures of potential conflicts of interest.¹⁴ Article 11 clarifies the disclosure requirements for potential arbitrators by indicating what content is needed in arbitrator disclosures.¹⁵ The changes ensure that all involved entities learn about potential arbitrator conflicts quickly and clearly so that challenges can be made in a timely manner.¹⁶

The new Article 17 alters the discretion allowed to the arbitral tribunal in the timing and number of hearings allowed during the arbitral process.¹⁷ Though the language in the 2010 version of Article 17 is changed only slightly from the language in the 1976 version, the minor changes have a major impact on the fairness of the rule.¹⁸ The new version's use of the words "appropriate" and "reasonable" instead of the former language of "any" and "full", is intended to increase the speed with which arbitrations are run under the UNCITRAL Rules.¹⁹ The arbitrators have more discretion when controlling the timing of the process under the newly created Article 17(2), which allows the arbitrators to create a timeline for the arbitration and allows the arbitrators to deviate from that timeline with virtually no necessary consideration of party preferences.²⁰

The revised version of Article 17 also creates the possibility to join third parties to the arbitral proceedings.²¹ Article 17(5) introduces a new ability for arbitrators to join third parties to existing arbitral proceedings.²² The Article allows only a party to the current arbitration to instigate the joinder process.²³ Article 17(5) also reserves the right to be heard regarding whether the joinder is proper for the third party as well as for the parties involved in the original arbitration.²⁴ This ensures party control in arbitrator selection for enjoined parties since they will have an opportunity to claim prejudice from any conflicts of interest revealed under Article 11.²⁵

III. Analysis

For the 2010 Rules to be as successful as their predecessors, they must ensure the perceived fairness, and therefore the enforceability, of awards handed down from arbitrations conducted pursuant to the UNCITRAL Rules. To do this, the Rules must protect the procedural due process rights of parties by ensuring opportunities to be heard and protecting party control of the process. The changes that were made to Articles 2, 11, and 17 have an impact on these concerns for due process, and they will ultimately succeed in promoting the enforcement of arbitral awards by protecting procedural due process.

A. Standards of Fairness and Enforceability

Two of the most important concerns underlying the protection of procedural due process when creating arbitration rules are that the rules give participants a sense that the proceedings

¹¹ See 2010 Rule Adoption, *supra* note 2, at 79 (adopting, in Article 2(3)(b), a provision that gives an expansive list of places where notice may be attempted, and, in Article 2(2), a provision that allows parties to designate an address for receipt of notice and other communications). *But see id.* at 79 (authorizing notice being deemed received upon delivery at the recipient's last known address after unsuccessful delivery is tried at all other viable locations for successful receipt).

¹² See 2010 Rules Adoption, *supra* note 2, at 79-80 (explaining the methods that are permissible to provide notice and the location where notice must be served).

¹³ See 1976 Rules Adoption, *supra* note 1, ¶ 57, art. 2 (allowing notice via courier and no other method).

¹⁴ See 2010 Rules Adoption, *supra* note 2, at 84 (stipulating when and to who arbitrators must make disclosures and incorporating a model statement of independence in the annex to the Arbitration Rules).

¹⁵ Compare 1976 Rules Adoption, *supra* note 1, ¶ 57, art. 9 (instructing potential arbitrators to disclose "any circumstances likely to give rise to justifiable doubts [about] his impartiality or independence" to any party that requests such disclosures, and to disclose those circumstances to all parties of an arbitration once on the arbitral panel), with 2010 Rules Adoption, *supra* note 2, at 84 (publishing, in Article 11, a model statement of independence, in the annex to the rules, for potential arbitrators to either confirm their complete lack of potential conflicts or to confirm their impartiality despite a list of potential relationships and circumstances involving either party, requiring arbitrators to disclose any new potential conflicts that arise during arbitral proceedings).

¹⁶ See U.N. Comm'n on Int'l Trade Law, Report of Working Group II (Arbitration and Conciliation) on the Work of its 49th Session, U.N. Doc. A/CN.9/665, ¶¶ 74, 78 (Sept. 30, 2008) (justifying the changes made to Article 9 of the 1976 Rules as necessary to ensure disclosures to all parties and fellow arbitrators, and finalizing new model statements of independence to clarify what arbitrators need to include in their disclosures).

¹⁷ See 2010 Rules Adoption, *supra* note 2, at 86 (giving the arbitral tribunal the ability, under Article 17(2), to establish a provisional timetable for the proceedings and to deviate from that timetable if needed, and allowing the arbitral tribunal to determine the stages of arbitration when it is appropriate for parties to have an opportunity to present their cases).

¹⁸ See *id.* at 86 (showing that Article 17(1) is identical to the 1976 Rules except for the change in two words to "may" and "reasonable").

¹⁹ Compare 1976 Rules Adoption *supra* note 1, ¶ 57, art. 15 ("... at any stage of the proceedings each party is given a full opportunity of presenting his case."), with 2010 Rules Adoption *supra* note 2, at 86 ("... at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.").

²⁰ Cf. 2010 Rules Adoption, *supra* note 2, at 86 ("... tribunal may, at any time, ... extend or abridge any period of time prescribed under these Rules or agreed by parties.").

²¹ See *id.* at 86 (allowing, in Article 17(5), parties to request the joining of third parties to arbitral proceedings as long as the third party is a party to the arbitration agreement, is given an opportunity to be heard, and the arbitral tribunal does not determine that joinder would result in prejudice to the third party).

²² See 2010 Rules Adoption, *supra* note 2, at 86 ("The arbitral tribunal may, at the request of any party, allow ... third persons to be joined in the arbitration").

²³ See *id.* at 86 (allowing parties to petition the arbitral tribunal for joining a third party, but not allowing the arbitral tribunal to join a third party sua sponte).

²⁴ See *id.* at 86 (asserting parties' right to due process in the joinder proceedings in Article 17(5)).

²⁵ Cf. Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations, U.N. Doc. A/CN.9/704/Add.1, 2 (May 4, 2010) (arguing that denying a third party the right to choose the arbitrators it is subject to "gives rise to suspicion of... an infringement on its rights.").

have been unbiased and that they have thus produced a fair and enforceable award.²⁶

i. The Perception of Fairness in Arbitral Proceedings

One of the most common concerns of parties using arbitration to settle disputes is the existence, or at least the appearance, of fairness.²⁷ Fairness is a relative term.²⁸ When there seems to be fairness, parties tend to be happier with the resulting award.²⁹ The concern for fairness is not in the sense of equity, rather it is about fairness in the sense of procedural evenhandedness.³⁰ International treaties, the UNIDROIT Principles of International Commercial Contracts, and the UNCITRAL Model Law, codify the private concern for procedural fairness by requiring that parties act in “good faith and fair dealing in international trade”³¹ and ensuring that “parties shall be treated with equality.”³²

There is a concern that promoting “fairness” in arbitral proceedings may encourage arbitrators to look to their own

internal feelings of equity,³³ but this fear focuses on the wrong definition of fair.³⁴ Rather than being satisfied with arbitration due to this subjective type of fairness, those who are satisfied using arbitration to settle commercial disputes focus on procedural fairness.³⁵ Satisfaction with the perceived procedural fairness of an award leads to a lower likelihood of challenge by the losing party.³⁶ Subjecting the proceedings to party control and allowing for due process creates the perception of fairness.

ii. Enforceability Under the New York Convention

The reason for using arbitration for conflict resolution is that arbitral awards are binding and enforceable.³⁷ For international arbitration, this finality and predictable enforceability of awards is especially important.³⁸ National courts are bound by treaty to support the finality of international arbitration outcomes, but they also reserve grounds for the judicial appeal of arbitral awards.³⁹

²⁶ See Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration, Expectations and Perceptions of Attorneys and Business People: A Force-Ranked Analysis*, 30 INT'L BUS. L. 203, 205 [hereinafter Expectations and Perceptions Analysis] (finding that an overwhelming majority of practitioners and business people involved in international arbitrations consider a just and fair outcome to be even more important than a favorable monetary award; also finding that award finality, the award not being overturned or not enforced, is the third most important aspect to the survey participants, coming in a small margin after cost, which is closely linked to finality of an award); see also Nana Japaridze, Note, *Fair Enough? Reconciling the Pursuit of Fairness and Justice With Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1434-35, 1437-38, 1443 (discussing arbitrators' duty to ensure the fairness of the proceedings and asserting that awards that are deemed to be fair are less likely to be challenged and, when they are challenged, are more likely to be upheld than procedurally unfair awards).

²⁷ See Expectations and Perceptions Analysis, *supra* note 26, at 207 (implying that those who use arbitration are more satisfied when they deem that the process has been fair, i.e. that the procedure was even and transparent for both sides not just that it resulted in a favorable outcome).

²⁸ See Stewart F. Hancock, Jr., Lecture, *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 Alb. L. Rev. 81, 86 (2004) (observing that fairness is almost always a matter of opinion and can only be truly defined in theory). *But see* BLACK'S LAW DICTIONARY 674 (9th ed. 2009) (providing a succinct, though broad, definition of fair as “1. [i]mpartial; just; equitable; disinterested. 2. [f]ree of bias or prejudice.”).

²⁹ See Expectations and Perceptions Analysis, *supra* note 26, at 212 (relating that the integrity of the arbitral process is extremely important to participants).

³⁰ *Id.* at 209 (distinguishing between fairness as a result of “substantive justice”, getting the right result, and fairness as a function of “procedural justice”, coming to the result in the right way)

³¹ See UNIDROIT Principles of International Commercial Contracts, art. 1.7 (2004), available at <http://www.unidroit.org/english/principles/contracts/main.htm> (establishing that adherence to the duties of good faith and fair dealing are fundamental ideas underlying the UNIDROIT principles of international commercial dealings).

³² See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 18, U.N. Doc. A/40/17, annex I, U.N. Sales No. E.95.V.18 (1985) [hereinafter MODEL LAW].

(expanding on the concern for the equal treatment of parties by asserting that “each party [also] shall be given a full opportunity of presenting his case.”)

³³ See Karyn S. Weinburg, Note, *Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT'L L. J. 227, 252-53 (1994) (arguing that legal systems could be undermined if arbitrators began to use their own sense of fairness to achieve justice through arbitration).

³⁴ Compare BLACK'S, *supra* note 28, at 674 (defining “fair”, in its first definition, as concerned with equity and being just), and Hancock, *supra* note 28, at 87-90 (discussing “fairness” as containing aspects of objective morality and a personal sense of right and wrong), with BLACK'S, *supra* note 28, at 674 (defining “fair”, in its second definition, as free of bias, which is an apt description of a fair proceeding), and Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L. J. 1289, 1303 (1998) (asserting that ADR processes may eliminate some formal trappings of litigation, but maintains the essential components of procedural fairness such as allowing equal opportunity to be heard and equal notice of either side's arguments).

³⁵ See Expectations and Perceptions Analysis, *supra* note 26, at 211 (relaying that parties seemed to focus their sense of satisfaction more on the fairness of the process itself than on winning the arbitration).

³⁶ See *id.* at 207 (finding that parties are more willing to forgo the expense and time involved in re-litigating a matter when they feel that an award is fairly arrived at); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 443 (3d ed. 1999) (contending that most international arbitral awards are voluntarily complied with without having to resort to court enforcement mechanisms).

³⁷ See REDFERN & HUNTER, *supra* note 36, at 10 (asserting that the strict structural rules used to govern the conduct of arbitrations are needed to legitimize judicial enforcement of arbitral awards, and emphasizing the importance of ensuring that arbitral awards are binding on the parties to promote the continued use of arbitration).

³⁸ Cf. *Nat'l Bulk Carriers, Inc. v. Princess Mgmt. Co., Ltd.*, 597 F.2d 819, 825 (2d Cir. 1979) (holding that arbitration will lose its reason for existence if it is treated as the initiation of litigation rather than a binding process); REDFERN & HUNTER, *supra* note 36, at 443 (observing that many model arbitration clauses emphasize the parties' agreement to speedily comply with any award rendered by an arbitral tribunal).

³⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention] (charging all signatory states to enforce arbitral awards rendered in foreign nations); see also REDFERN & HUNTER, *supra* note 36, at 459-60 (stating that the New York Convention does not permit review of an arbitral award on the merits of the case and that the grounds articulated in Article V of the New York Convention is an exhaustive list of grounds under which a court may refuse award enforcement).

The grounds on which national courts refuse to enforce awards are generally narrowly interpreted.⁴⁰ If a court decides not to enforce an award, the consequences can be very expensive and damaging for the party seeking enforcement; this could damage the status of arbitration as an effective form of dispute resolution.⁴¹ To avoid this, rules used to govern international arbitrations must include provisions that protect against the non-enforcement of arbitral awards under the New York Convention and the UNCITRAL Model Law by guaranteeing procedural due process for the involved parties.⁴² These provisions should conform with the existing international law of arbitral enforcement by ensuring that involved parties are given proper notice of the proceedings, that parties control important aspects of the process, and that the process is handled without bias.⁴³

B. Measuring Fairness and Enforceability Against the 2010 UNCITRAL Arbitration Rules

The changes made to the UNCITRAL Arbitration Rules should be evaluated for their effect on ensuring procedural due process by examining the procedural fairness and the international enforceability of awards rendered. An arbitral award meets the standard of procedural fairness under the Model Law when the arbitration proceedings are subject to party control and support due process.⁴⁴ Under the New York Convention and the Model Law, the enforcement of arbitral awards may be refused for seven reasons;⁴⁵ three of these highlight the extent that the rules governing an arbitration affect the enforceability of a resulting award.⁴⁶ An arbitral award is

secure from non-enforcement when the rules used to run the arbitration provide clear guidelines for notice, ensure that the procedure is run according to party agreement, and comply with the requirements of public policy.

i. Article 2: Notice and Calculations of Periods of Time

The revision of Article 2 of the UNCITRAL Arbitration Rules expanded the options available to parties to provide notice of arbitration to opposing parties.⁴⁷ As a result, arbitration decisions made under the UNCITRAL Arbitration Rules will be considered to comply with the fairness and enforcement provisions of the New York Convention and the Model Rules.

The changes, in an effort to modernize the Rules, improve fairness by increasing the prospect of effective notice by making it easier for parties to provide notice of initiated arbitrations and by ensuring that notice is delivered to a designated address included in the arbitration agreement.⁴⁸ The improved procedural due process resulting from the changes to Article 2 decreases the likelihood that a party will challenge the award as unfair.

Article 2 increases party control by allowing a myriad of methods to provide notice and by allowing parties to designate an address for fast and efficient communication through modern technology.⁴⁹ Parties will also feel that their due process rights are protected since the many ways for notice to be sent increase the likelihood that notice of arbitral proceeding will reach the intended recipient. In addition, due process concerns will decrease because Article 2, in conjunction with other provisions, requires parties served with notice to provide a written response.⁵⁰ This new response provision creates a further method of ensuring that proper notice is issued under Article 2 since a properly served

⁴⁰ See REDFERN & HUNTER, *supra* note 36, at 460 (quoting Albert Jan van den Berg, a noted commentator on the New York Convention, “As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly.”); Susan Choi, Note, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. OF INT’L L. & POL. 175, 212 (1996) (expounding on the ways that national courts interpret grounds for the non-recognition of arbitral awards under the New York Convention).

⁴¹ See Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION — SIMILARITIES AND DIVERGENCES 131, 132 (Christina Knahr et al. eds., 2010) (discussing the impact of non-enforcement being the re-litigation or re-arbitration of the case, which is an expensive prospect).

⁴² Cf. Japaridze, *supra* note 26, at 1443 (arguing that the most common challenge to arbitral awards is through public policy arguments regarding due process and arbitrator partiality).

⁴³ See New York Convention, *supra* note 39, at art. V (stipulating that courts may refuse enforcement of award based on the lack of proper notice, Article V(1)(b), the divergence from party agreement, Article V(1)(d), and the violation of domestic public policy, Article V(2)(b)); MODEL LAW, *supra* note 32, at art. 36 (mirroring the award recognition requirements contained in the New York Convention); see also Sabatino, *supra* note 34, at 1303 (1998) (insisting that procedural fairness is maintained in non-litigation dispute resolution by using the same processes as litigation, just in a less formal way).

⁴⁴ Cf. MODEL LAW, *supra* note 32, at art. 18 (requiring equal treatment of parties during arbitration proceedings).

⁴⁵ See REDFERN & HUNTER, *supra* note 36, at 461-62 (explaining the seven grounds on which an arbitral award can be refused under the New York Convention); see also Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgements and Arbitral Awards*, 24 SYRACUSE J. INT’L L. & COM. 1, 33 (1997) (dividing these seven grounds for non-enforcement into those that may only be raised by a party and those that may only be raised by a court *ex officio*). See generally New York Convention, *supra* note 39, at art. V (listing the grounds upon which nations may refuse enforcement of foreign arbitral awards); MODEL LAW, *supra* note 32, at art. 36 (incorporating the grounds for non-enforcement found in the New York Convention).

⁴⁶ See New York Convention, *supra* note 39, at art. V (requiring the provision of proper notice to satisfy Article V(1)(b), the adherence to party agreement to meet Article V(1)(d), and the prevention of bias and inequity to quiet article V(2)(b)).

⁴⁷ Compare 1976 Rules Adoption, *supra* note 1, at ¶ 57, art. 2 (permitting notice and other official communication through physical delivery either to addressee himself or to his habitual residence, place of business, or mailing address), with 2010 Rules Adoption, *supra* note 2, at 79-80 (allowing notice and other official communication to be given through “... any means of communication that provides or allows for a record of its transmission.”).

⁴⁸ See 2010 Rules Adoption, *supra* note 2, at 79 (allowing notice to be delivered to several locations and by methods beyond just certified mail in Article 2(1) and encouraging the use of a designated address for receipt of notice in Article 2(2)).

⁴⁹ See *id.* at 79 (permitting delivery of notice to a designated address, business address, residence, or mailing address under Article 2(3)(b) and by any means that leaves a record of transmission, under Article 2(1), including e-mail and fax, in Article 2(2)).

⁵⁰ See *id.* at 81 (setting forth a requirement, in Article 3, that the respondent provide a written response to the notice of arbitration within 30 days of receiving, or being deemed to receive, notice).

party will provide proof, in the form of a written response, that the notice was received.⁵¹ The new Rules in Article 2 improve fairness for both parties, thereby conforming to the Model Law, because they ensure that all parties have an opportunity to be informed of all pending proceedings.⁵²

If a party believes that the enforcement of an award governed by the Rules is unenforceable under the New York Convention, Article 2 will defer to the enforcement of the award. First, Article 2 fulfills the requirements of Convention Article V(1)(b) by requiring that notice be given upon the initiation of an arbitral proceeding.⁵³ The Article's allowance for many methods of notice helps to ensure that a receiving party is informed of a pending arbitration. Second, Convention Article V(1)(d) is satisfied since the requirements under Article 2(2) allow parties the ability to designate an address for any communications to be sent.⁵⁴ Finally, Article 2 fulfills the requirements for public policy, Convention Article V(2)(b), because it ensures an unbiased procedure by working with the response provisions to ensure that not only is the notice delivered to the correct party, but also that the party has the opportunity to confirm receipt and provide an initial argument against the claims in the notice.⁵⁵

Where a party initiates arbitration proceedings because of a breach of contract, under the 1976 Rules, the initiating party would have to physically deliver notice to the respondent or to a reasonable location for the respondent to receive mail.⁵⁶ Under the 2010 Rules, a party in the same situation may deliver notice through any means of communication which records transmission; for example, certified mail, or by e-mail or fax to an address designated in the arbitration agreement.⁵⁷ Under the 1976 Rules a respondent might miss physical delivery of notice; the 2010 Rules better ensure that the respondent will know of the proceedings and be prepared to mount her defenses, thus protecting her right to procedural due process.

Because it ensures proper notice is received, gives parties control of notice methods, and protects parties' right to be heard, Article 2 conforms with existing international law on arbitration, thus making arbitration awards fair and more enforceable.

ii. Article 11: Disclosures by Arbitrators

Article 11 improves procedural due process by improving party control and perceived fairness through transparency. Party control is furthered by the provisions compelling potential arbiters to reveal any and all potential conflicts of interest with the parties to the arbitration.⁵⁸ This empowers the parties as they choose whether to make a case for the removal of a potential arbiter.⁵⁹ Because Article 11 improves the transparency of the arbiter appointment process, parties will be unlikely to seek the non-enforcement of an award when the Rule is followed.

Article 11 does not make an award susceptible to non-enforcement. First, Article V(1)(b) of the New York Convention does not apply since this Rule does not affect notice. Second, Article 11 directly satisfies Article V(1)(d) of the Convention when it increases the control that parties have over the arbitral process by forcing arbitrators to reveal all potential conflicts.⁶⁰ Finally, Article 11 does not raise public policy concerns about denying procedural due process since it actually ensures that parties will be able to object to the appointment of arbitrators based on a full set of information from the disclosures.⁶¹

The model statements added to Article 11 create a practical tool for arbitrators to provide a clear and organized list of potential conflicts with the parties' interests. Using the 1976 Rules, an arbitrator involved with one party would limit disclosures to what she felt was best, possibly even not disclosing a potentially improper relationship.⁶² Under the 2010 Rules any ambiguity in disclosure requirements would be resolved, and the relationship would be known to all parties because of the model disclosure statement, thereby increasing reliability in the process. Where an arbitrator makes a disclosure according to the model statement that reveals a previous relationship with one party's parent company, the impacted party will be able to quickly evaluate any concerns for fairness that relationship might raise and object accordingly under Article 12.⁶³ This added transparency and structured disclosure will make parties feel more secure about their choice of arbitrator and their decisions on objections under Article 12.

⁵¹ Cf. 2010 Rules Adoption, *supra* note 2, at 80 (asserting, in Article 4(1), that parties served with notice of an impending arbitration must file a response within 30 days).

⁵² Cf. MODEL LAW, *supra* note 32, art. 18 (stipulating that parties must be treated equally during arbitrations).

⁵³ Compare New York Convention, *supra* note 39, art. V(1)(b) (creating a ground for challenge if a party against whom the award is invoked did not receive proper notice), with 2010 Rules Adoption, *supra* note 2, at 79 (providing such a vast array of places and types of notice transmission that it is highly likely that at least one attempt will be received by the intended recipient).

⁵⁴ Compare New York Convention, *supra* note 39, at art. V(1)(d) (describing a ground for challenge if the procedure is not according to party agreement), with 2010 Rules Adoption, *supra* note 2, at 79 (giving parties the ability to decide the address to use for receiving notice in Article 2(2)).

⁵⁵ Compare New York Convention, *supra* note 39, at art. V(2)(b) (asserting a ground for challenge if the enforcement of the award would be contrary to public policy), with 2010 Rules Adoption, *supra* note 2, at 79 (assuring parties that they will receive notice under Article 2 so long as they designate an address for notice receipt and allowing recipient parties to reply to notice under Article 4).

⁵⁶ See 1976 Rules Adoption, *supra* note 1, at ¶ 57, art. 2 (requiring the physical delivery of notice either to the addressee or to an address where it would be reasonable to expect the addressee to receive mail).

⁵⁷ See 2010 Rules Adoption, *supra* note 2, at 79 (allowing a broad range of methods through which to deliver notice of arbitration to a respondent).

⁵⁸ See, e.g., *id.* at 84 (stipulating, in Article 11, that potential arbitrators disclose all information on relationships which could reasonably be seen as effecting their ability to be impartial or independent).

⁵⁹ See *id.* (permitting, under Article 12, parties to challenge arbitrators when "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality," thereby protecting party rights best when the party is fully informed of potential conflicts).

⁶⁰ Compare New York Convention, *supra* note 39, at art. V(1)(d) (describing a ground for challenge if the tribunal makeup is not according to party agreement), with 2010 Rules Adoption, *supra* note 2, at 84 (permitting parties to intelligently control the membership of the arbitral tribunal by compelling arbitrator disclosures).

⁶¹ See 2010 Rules Adoption, *supra* note 2, at 84 (providing full information on potential conflicts of interest with arbitrators for parties to consider while contemplating challenge under Article 12 so that the chance of biased proceedings is eliminated).

⁶² See 1976 Rules Adoption, *supra* note 1, at ¶ 57, art. 9 (requiring potential arbitrators to disclose potential conflicts but not including a model statement to guide the content and scope of those disclosures).

⁶³ See 2010 Rules Adoption, *supra* note 2, at 84-85 (allowing, under Article 12, parties to object to arbitrators based on the disclosures from Article 11).

Article 11 of the 2010 Arbitration Rules improves the overall fairness and enforceability of awards rendered under UNCITRAL arbitration. Parties will perceive that the Rules are fair because they provide clear knowledge of any potentially conflicting relationships with arbitrators and grant parties the power to make informed decisions controlling the arbitral tribunal's makeup.⁶⁴ By having clear grounds for disclosures that help protect procedural due process, the 2010 Rules limit a party's ability to challenge an award's enforceability under the New York Convention grounds of interference with public policy or invalid composition of the tribunal.⁶⁵

iii. Article 17: General Provisions

Article 17 of the 2010 UNCITRAL Rules for Arbitration contains general provisions concerning the conduct of the arbitral proceedings.⁶⁶ There are two important changes that impact procedural due process in this Article. First, alterations in the language of the Article give arbitrators more discretion for timing proceedings at the expense of party control.⁶⁷ Second, there is a new provision that expressly allows the joining of third parties to an ongoing arbitration.⁶⁸ As a result, arbitration decisions made under the UNCITRAL Arbitration Rules will be more vulnerable to challenge because parties will not perceive fairness in the proceedings and may attack the award under the New York Convention and the Model Law for violating their procedural due process rights.

a. Articles 17(1)-17(4): Expansion of Arbitrator Discretion

The changes made to Articles 17(1)-(3) jeopardize procedural due process by decreasing party control and therefore increase the likelihood that a party will challenge an award rendered under the UNCITRAL Arbitration Rules. Party control is impacted by the changes in wording in Articles 17(1) and 17(3). The wording gives arbitrators more discretion at the expense of parties controlling the assertion of their arguments at each stage of the arbitral proceedings.⁶⁹ These changes deprive parties of controlling when to make arguments during the

various stages of arbitration; instead parties are allowed to assert their positions only when the arbitrators allow.⁷⁰ Additionally, Article 17(2) leaves the timing of the proceedings primarily to the arbitrators.⁷¹ Although parties may voice their views on the timing, the ultimate timetable is created by the tribunal, not by party agreement.⁷² If parties feel that they are denied control or equal-treatment, they will likely challenge the enforcement of the tribunal's award.⁷³

If a party decides to challenge an award under the New York Convention, the changes in Article 17(1)-(3) will defer to enforcing the award. Convention Article V(1)(b) has little effect here since there is no focus on notice proceedings. Convention Article V(1)(d) will not be breached under Rule Articles 17(1)-(3) because party agreement is respected.⁷⁴ Though the Articles deny parties full control of the timing of proceedings and arguments, the parties should know the limitations of Article 17 before agreeing to abide by the UNCITRAL Arbitration Rules.

The strongest argument for the non-enforcement of an award under Rules Articles 17(1)-(3) is the public policy rationale of Convention Article V(2)(b).⁷⁵ The arbitrators' discretion in allowing arguments in Articles 17(1) and 17(3), along with the tribunal's ability to declare a timetable and adjust it at will in 17(2), allows a party to argue that the tribunal abused its broad discretion and thus unfairly deprived the party of its procedural due process rights. Courts will be unlikely to refuse the enforcement of an award unless the challenging party can show that the arbitral tribunal abused its discretion solely to that party's detriment or that the tribunal was actually biased.⁷⁶ Articles 17(1)-(3) do not make awards rendered under the UNCITRAL Arbitration Rules vulnerable to non-enforcement under the New York Convention because parties must show more than a perception of arbitrator bias and should be aware of the rules they agree to use.

When an arbitrator takes advantage of Article 17's increased discretion by abridging the original set time periods for evidence gathering or argument presentation or by denying requests for addition oral arguments, she decreases party control of the arbitration. However, this use of discretion will not invalidate

⁶⁴ See Sabatino, *supra* note 34, at 1303, 1316-17 (insisting that procedural fairness exists when due process is protected and when parties know that the arbitrators are upholding their duty of fairness).

⁶⁵ Cf. Choi *supra* note 40, at 212 (asserting that national courts tend to interpret due process exceptions to enforcement of arbitration awards narrowly, even during the time of the 1976 Arbitration Rules, thus justifying an inference that courts would be even more hesitant to consider due process challenges based on arbitrator disclosures made under the clear guidelines provided in the 2010 Arbitration Rules).

⁶⁶ See 2010 Rules Adoption, *supra* note 2, at 86 (defining Article 17 as "General Provisions").

⁶⁷ See *id.* (changing the language of the rules to diminish party control of the process's timing in Articles 17(1)-(3)).

⁶⁸ See *id.* (expanding the Rules to include joinder in Article 17(5)).

⁶⁹ See *id.* (permitting, in Article 17(2), the arbitral tribunal to change extend or abridge any time set in the initial schedule of proceedings, even if the schedule was set by the parties).

⁷⁰ See *id.* (giving arbitrators the power to determine whether to hold hearings on evidence or oral argument in Article 17(3)).

⁷¹ See *id.* (permitting the arbitral tribunal to establish and amend all time periods, both in the Rules and set by the parties).

⁷² See 2010 Rules Adoption, *supra* note 2, at 79 ("the... tribunal shall establish the ... timetable of the arbitration.")

⁷³ Cf. Expectations and Perceptions Analysis, *supra* note 26, at 205 (inferring that the parties who most often initiate court challenges to arbitral awards are those who are not satisfied with the fairness of the arbitration process).

⁷⁴ Compare New York Convention, *supra* note 39, at art. V(1)(d) (describing a ground for challenge if the procedure is not according to party agreement), with 2010 Rules Adoption, *supra* note 2, at 86 (allowing parties to express their views of timings changes and permitting parties).

⁷⁵ Compare New York Convention, *supra* note 39, at art. V(2)(b) (asserting a ground for challenge if the enforcement of the award would be contrary to public policy), with 2010 Rules Adoption, *supra* note 2, at 86 (increasing arbitrator discretion regarding the control of timing hearings during the arbitral proceedings).

⁷⁶ See Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 469-70 (1999) (arguing that courts view each ground for non-enforcement narrowly, even public policy which is the broadest seeming ground, in order to prevent reviewing for error in fact or law); see also Choi, *supra* note 40, at 211-12 (delineating that courts seldom refuse enforcement of awards unless there is flagrant abuse of arbitrator discretion).

the award so long as the parties are treated with equality, i.e. they both suffer the same restrictions on presentation of evidence or argument time, and have a chance to argue their case.⁷⁷

Even though Articles 17(1)-(3) fail to ensure perceptions of procedural fairness by decreasing party control and jeopardizing due process, arbitral awards rendered under the UNCITRAL Arbitration Rules will still be enforceable under the New York Convention and the Model law. The Article's balance of speed and full party control is not likely to compromise the Rules' usefulness in international arbitrations.

b. Article 17(5): Introduction of Joinder Provision

Article 17(5) successfully protects procedural due process by maintaining party control of joining third parties and protecting parties' right to have a fair hearing concerning joinder of any third party. A party's challenge to an award under Article 17(5) would likely be unsuccessful. Convention Article V(1)(b) applies to this Rule because parties subject to joinder must be given proper notice. The Rule does not allow the joining of a third party without allowing that party an opportunity to be heard regarding its joinder. Thus non-enforcement on the grounds of no notice would not succeed. Convention Article V(1)(d) will not provide an argument against enforcement because Article 17(5) maintains party control of the proceedings by allowing joinder to be initiated upon party request.⁷⁸

Non-enforcement under Convention Article V(2)(b) may be possible if a third party is not allowed to express an argument in the selection of the arbitral tribunal deciding the award. However, this vulnerability is diminished by the requirement that the tribunal deny joinder if it would result in prejudice to any of the parties, including the third party.⁷⁹ Article 17(5) does not create grounds for non-enforcement under the New York Convention because it ensures that third parties have notice of joinder proceedings, it establishes that parties control whether to initiate joinder proceedings, and it protects third parties from being subject to prejudiced arbitrators.

An example illustrates the impact of the change on an arbitration. In a situation where there are more than two parties bound by an arbitration agreement, such as a contract for a building project between an engineer, a material supplier, and a

builder, it is now possible for a dispute between two of the parties to expand to include the third.⁸⁰ In terms of the aforementioned building contract, if the builder and material supplier are in arbitration regarding the provision of improper materials and they discover that the engineer actually gave the supplier plans calling for the wrong materials, now the first two parties will be able to force the engineer into arbitration to address the relevant concerns.

IV. Recommendations

A. UNCITRAL Should Update its Guidelines for the Use of the 2010 UNCITRAL Rules for Arbitration

There are many arbitral institutions that act as administrators for arbitrations governed by the UNCITRAL Arbitration Rules.⁸¹ This has been the case since early in the Rule's life and drove UNCITRAL to issue guidelines to help these institutions correctly administer arbitrations using the Arbitration Rules in a consistent and fair way.⁸² With the revisions recently made to the Rules, there is again a need for UNCITRAL to publish a set of guidelines for arbitration administrators to ensure that fairness and due process are preserved under the rules and the awards can be secure against challenge.⁸³ In addition, guidelines to instruct arbitrators in the application of the rules would be useful for protecting the parties' right to procedural due process. This is particularly the case with arbitrator discretion under Article 17, where guidelines should encourage arbitrators to briefly explain, and possibly record, their reasoning for altering timelines and whether to permit hearings on various issues.⁸⁴

B. UNCITRAL Should Create Guidelines for Parties Using the Revised Arbitration Rules

Some of the concerns about the revision of the rules included the suspicion that the application of some of the rules would not be clear to parties participating in UNCITRAL Arbitration Rules based proceedings.⁸⁵ This concern speaks to the possibility that parties may not know of threats to procedural due process under Article 17, which could impact their perception of the

⁷⁷ See 2010 Rules Adoption, *supra* note 2, at 86 (setting a fair proceeding as the base line requirement around which an arbitrator may actually exercise her authority).

⁷⁸ See *id.* (restricting arbitrators from unilaterally initiating joinder proceedings in Article 17(5)).

⁷⁹ See *id.* (prompting the arbitral tribunal to deny joinder if, after all parties have an opportunity to be heard, it determines that there is a chance that prejudice would result).

⁸⁰ See *id.* (allowing parties to an arbitration to join a third party "in the arbitration as a party provided such person is a party to the arbitration agreement...").

⁸¹ See Recommendations to Assist Arbitral Institutions and Other Interested Bodies With Regard to Arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission, in Report of the U.N. Comm'n on Int'l Trade Law, 14th sess, July 26-Aug. 6, 1982, U.N. Doc. A/37/17; GAOR, 37th Sess., Supp. No. 17 (1982), reprinted in [1982] 3 U.N. Comm'n on Int'l Trade L. Y.B. 420, U.N. Doc. A/CN.9/SER.A/1982 [hereinafter Guidelines for Arbitral Institutions] (recognizing that many arbitral institutions had begun administering arbitrations under the UNCITRAL Arbitration Rules); see also PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 21 (3rd ed. 2004) (stating that many arbitral institutions, such as the AAA/ICDR and the LCIA, offer to preside over arbitrations run according to the UNCITRAL Arbitration Rules).

⁸² See Guidelines for Arbitral Institutions, *supra* note 81 (stating that UNCITRAL determined that arbitral institutions needed some guidance in how to use the UNCITRAL Arbitration Rules efficiently and effectively).

⁸³ Cf. Expectations and Perceptions Analysis, *supra* note 26, at 207 (asserting the importance of arbitral awards being awarded the "right way", meaning through procedurally fair methods, in creating the perception of fairness in arbitral outcomes).

⁸⁴ See 2010 Rules Adoption, *supra* note 2, at 86 (giving arbitrators broad discretion in determining the timing of arbitration proceedings and the amount of evidentiary hearings).

⁸⁵ See, e.g., Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Compilation of Comments by Governments and International Organizations, U.N. Doc. A/CN.9/704/Add.1, 2 (May 4, 2010) (expressing China's concerns that what became the final rule in Article 34 leaves ambiguity about whether parties waive their right to appeal the award and requesting that the article be redrafted to clarify that parties could challenge awards granted by arbitral tribunals).

fairness of the Rules. To remedy such concerns, UNCITRAL should publish a short set of guidelines to clarify the changes made to the Rules⁸⁶ and the new rights that parties have under the Rules.⁸⁷ This type of guideline should also clarify what qualifies as and how to establish a ‘designated address’ for the purposes of Article 2.⁸⁸ By creating guidelines including this type of information, UNCITRAL can ensure that its Rules are more transparent, more understandable to parties using them in arbitration, and ultimately perceived to be fair, thus encouraging more use of arbitration to settle international disputes.⁸⁹

V. Conclusion

Starting in earnest in 2006, UNCITRAL’s “Working Group II” faced the unenviable task of revising a set of rules that had been successfully in use for thirty-four years.⁹⁰ The revised Rules balance the interests that the many interested parties, both states and international organizations, expressed with the needs

of private parties actually using the Rules. By modernizing and increasing the transparency of the Rules for arbitration, UNCITRAL has kept the majority of what made the 1976 Rules stable and broadly used, while allowing parties to control costs, speed, and fairness of arbitral proceedings more than ever. There are risks that the changes could allow an increase in speed for the proceedings in a way that would jeopardize the procedural due process rights of participants. Other changes could instead slow down proceedings by creating more opportunities for litigation-like tactics. Overall, these risks are minor compared to ensuring party rights to a fair hearing and even playing field for parties involved in international commercial disputes.

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⁸⁶ *E.g.*, 2010 Rules Adoption, *supra* note 2, at 86 (altering the amount of discretion allowed to arbitrators in the timing and allowance of hearings compared to the 1976 Rules).

⁸⁷ *See, e.g., id.* at 84 (allowing parties to review more detailed arbitrator disclosures in Article 11).

⁸⁸ *See* 2010 Rules Adoption, *supra* note 2, at 79 (establishing the permissible use of electronic communications for notice so long as it is sent to a “designated address” in Article 2).

⁸⁹ *Cf.* U.N. Comm’n on Int’l Trade Law, Rep. on its 9th Sess., Apr. 12, 1976-May 7, 1976, U.N. GAOR, 31st Sess., Supp. No. 17 U.N. Doc. A/31/17, ¶ 56 (1976) (describing the purpose of the UNCITRAL Arbitration Rules as to encourage the use of arbitration since it is an efficient way to solve international commercial disputes and it can help foster the growth of international trade relations).

⁹⁰ *See* Clifford Chance Client Briefing, *supra* note 4 (describing the stability of the 1976 Rules and the changes that were ultimately made to them).