

**THE SMALL, THE USEFUL AND THE IMPOSSIBLE:
THE EXPERIENCE OF UNCITRAL IN REVISING ITS RULES**

*The 16th Annual Lord Goff Lecture
9 December 2009*

by

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As I give this lecture, the climate change conference is underway in Copenhagen.² An essential characteristic of the challenge of climate change is change itself, and change is a central focus of my remarks tonight. At times it feels as though international arbitration is in a process of constant revision: one set of rules is changing, and another set of rules has just finished completion. Apart from rules, there are guidelines popping up everywhere, and we must keep track.

Change is not, in itself, a bad thing. It all depends on the perspective taken when examining that change. Does one focus on what is lost, or on what might be gained? Does one see the future as diminished or enhanced?

The change I will focus on is to the UNCITRAL Rules. In 2006, two coauthors and I published a commentary on the 1976 UNCITRAL Rules (“1976 Rules”) with Oxford University Press.³ A gentleman from the US State Department remarked to me: “*Well, you’re too late. I’ve got bad news, we’re going to start revising the rules.*” From his perspective, it was a bad thing that the rules were changing. From my perspective, it was a good thing—I had another book coming! So, these things are all relative.

I do think, though, that there’s something of concern for counsel and for arbitrators, who want some constancy. They wonder what we are trying to accomplish

¹ At the time of delivery of this lecture David D. Caron was C. William Maxeiner Distinguished Professor of Law, Berkeley Law, University of California at Berkeley. At the time of his unexpected death on 20 February 2018, he was a Judge of the Iran-United States Claims Tribunal, and a Judge *ad hoc* at the International Court of Justice. Caron had sadly not drafted a complete text of this lecture. When he delivered it on 10 December 2009 he spoke from notes and slides. He later approved a summary of his remarks for reporting purposes. These materials, along with a partial transcript of the recording, have formed the basis for this text. The views are all Caron’s, and the expression largely follows the conversational tone of the lecture. Any errors or inaccuracies are those of the editor (Cian Murphy, with thanks to Caron’s collaborator on the UNCITRAL Rules, Lee Caplan, for his comments).

² The 2009 United Nations Climate Change Conference (COP15) took place in Copenhagen, Denmark, 7 December 2009 – 18 December 2009.

³ David D. Caron, Matti Pellonpää, and Lee M. Caplan, *The UNCITRAL Rules (1st Edition): A Commentary* (2006). Caron and Caplan produced a 2nd Edition in 2013.

with all this revision. Does the state of the art really keep getting better? What is it that's happening?

In this lecture I will first provide an introduction to UNCITRAL itself, and to the 1976 Rules, and will then turn to the current effort to revise those rules. There are many changes in play, and I'm going to talk about the small, the useful and the impossible. I will address these in terms of three clusters of changes. The first cluster is catching the rules up; the second relates to different approaches to procedure; and the third cluster relates to administration, arbitrators, and trust.

I. UNCITRAL and Its Work on Arbitration

UNCITRAL, the United Nations Commission on International Trade Law, was created in 1966 by the United Nations General Assembly.⁴ The creation was in part as a component of the effort at that time to change the direction of the international economic order, to open it up to more actors. Its mandate was to include “... *preparing or promoting the adoption of new international conventions, model laws and uniform laws*”.⁵ Arbitration was only a small part of what it was thought UNCITRAL would address.

The membership of UNCITRAL is not the entire membership of the UN. At the time of drafting of the 1976 Rules, it was only 36 countries. Today it is 60 countries. The UNCITRAL members today who remember that earlier process say it was a much easier drafting process the first time around. Drafting with 60 countries is harder. The drafting is not a political process – it involves technical delegations who really know their stuff. So, it's not that efforts to revise the 1976 Rules are being politicized, but it's a harder task with a larger number of perspectives to bring together.

UNCITRAL operates through working groups. There are six of them. UNCITRAL's earlier work on arbitration was done as a whole, but as we'll see, since 2000 they've had a specific working group, Working Group II, dedicated to arbitration. In addition to the 1976 Rules on arbitration, UNCITRAL has adopted a range of other measures.⁶ One practice we see with UNCITRAL is that, unlike a private institution, when UNCITRAL starts revising its rules, it feels a little more bound by all the other documents it's created. The new rules are informed by, educated by, and limited by, all the other work UNCITRAL has done. This is particularly the case with the work done on the Model Law. The Model Law greatly

⁴ United Nations General Assembly Resolution 2205 (XXI) of 17 December 1966.

⁵ Resolution 2205, Article 8(c).

⁶ Caron's list was: 1980 UNCITRAL Conciliation Rules, 1985 UNCITRAL Model Law on International Commercial Arbitration, 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, 2002 UNCITRAL Model Law on International Commercial Conciliation, and the 2006 Amendments to the 1985 Model Law on International Commercial Arbitration.

influences what happens in the rules. A number of the arguments in the current process to revise the 1976 Rules ask about staying consistent with the Model Law – or not implying that the Model Law is incorrect. But I am getting ahead of myself.

The 1976 UNCITRAL Rules

Let's go back for just one moment—I don't know how many of you know Pieter Sanders? Pieter Sanders is still active today at, I think, 97 years old.⁷ He's in Rotterdam. And he prepared the discussion drafts of the 1976 Rules—something that wouldn't happen today. After negotiation, and modifications (some of which were extensive), the final rules were adopted by UNCITRAL on 28 April 1976 and, in a resolution of 15 December of that year, the UN General Assembly recommended their use.⁸

The motives of UNCITRAL are different than institutions or centers in thinking about rules. One of the main differences is that, unlike private centers and institutions, UNCITRAL is not thinking about how to get the rules used more. Centers and institutions are trying to offer a product that will generate cases, and in turn revenue, for those centers and institutions. That sometimes leads to revision in and of itself, because a center can say “*we have better rules than before*”. UNCITRAL is not driven in that way. There is a sense of status. UNCITRAL likes that their rules are employed. I certainly don't think they're out to make them and *not* have them used. But the original driver was a sense that the institutions in the early 1970s were not responsive to parts of the world other than Europe, and particularly not Asia or Africa. There was a sense in which the UN and UNCITRAL would have more legitimacy in developing a set of rules worldwide.

There was also a sense that the primarily European system was a costly one—that the institutions were too expensive. A basic structural idea in the UNCITRAL rules is that they are not administered. I think the best way to think about this is as if you're selling a home. Sometimes, when some people sell a home, they hire an agent to help them sell the home, and pay the agent. If a seller is really confident, they sell the home without an agent. A lot of money can be saved by doing that. Similarly, the idea for UNCITRAL was to design a set of rules that did not require an agent. Obviously some agent is needed, far in the background, and we'll see how that works out (for example in relation to the appointment of arbitrators). But that was the basic sense of what motivated this in the beginning—to develop this set of rules that could be used worldwide, more cheaply, and somehow be more open to the global community.

⁷ Professor Pieter Sanders passed away on 27 September 2012, a week after his 100th birthday.

⁸ UN General Assembly Resolution 31/98 of 15 December 1976.

The Growth and Significance of the UNCITRAL Rules

It took a little while for the UNCITRAL Rules to grow in use and significance. There was no use immediately after 1976. But, in time, three developments led to their increasing popularity. First, surprisingly, came the Algiers Accords.⁹ The Accords were agreed to resolve the Iranian hostage crisis in 1980.¹⁰ They established the Iran-US Claims Tribunal, an international arbitral tribunal to consider claims which arose out of the crisis and related matters. The Parties had to decide what rules they were going to use for the tribunal. They turned to the 1976 Rules. As a result, the Rules were taken down off the shelf, and applied in, 3,000 cases, all of which were public. The public nature of the process is important because the procedural orders were public. Those orders formed the basis for a lot of commentary on the 1976 Rules – for example the book that my co-authors and I did. As we all know, arbitration rules are rather bare bones, which afford arbitrators a lot of discretion. Public decisions and commentary allows for practice to be looked at – arbitrators could consider how to actually handle procedure in their cases by reference to how others had done so before them.¹¹

Second, again unanticipated, arbitration centers and institutions starting appearing all over the world—for example here in Hong Kong in 1985. Some centers adopted the UNCITRAL Rules, or a modified version of them, and offered the center as the administrator. As a result, the UNCITRAL Rules were no longer unadministered, they became administered rules within particular centers.¹² Third, and again surprisingly, bilateral investment treaties (BITs), and the North American Free Trade Agreement (NAFTA), gave claimants the choice of either ICSID or UNCITRAL arbitration. This all led to growth in use and in significance.

A Footnote of Caution

Here, I include a significant footnote, of caution. There is, within the NGO community, strong pressure for ICSID to revise their rules, to make them more transparent, to allow for public amicus briefs, and so on. There have been mixed

⁹ Algiers Accords, 19 January 1981.

¹⁰ See, in general, D Caron and J Crook (eds), *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (2000).

¹¹ In addition to the Commentary by Caron and Caplan, n 3 above, see also S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992); J van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (1991).

¹² Caron's examples here were the Hong Kong International Arbitration Centre (HKIAC), International Centre for Dispute Resolution (ICDR), and the Kuala Lumpur Regional Centre for Arbitration (KLRC).

reactions – and some acceptance of these proposals. The consequence has been that claimants have begun to choose UNCITRAL more and more for investor-state arbitrations. And so the NGO community now pushes for the UNCITRAL Rules to follow ICSID down the path of transparency.

The reaction of UNCITRAL has been twofold. The first part has been to say “*we’re not going to talk about that now*”. Rather, once UNCITRAL is done with the Rules revision, the next topic for Working Group II will be to consider if there should be a variation on the rules for investor-state arbitration. That’s very good because, as those involved in commercial arbitration will know, the shift towards transparency doesn’t make sense in commercial arbitration.

The second part of the reaction relates to the question of which rules will be applicable if an instrument simply says “UNCITRAL Rules”. The revision group has considered that, and the common approach is that the applicable rules, unless the parties say otherwise, will be those in force at the time the agreement to arbitrate is formed. That’s the time where there is mutual intent about which rules should apply. There will therefore be a transition period where the applicable rules may be the old rules – the 1976 Rules. But then, and this will probably be very quick in the contractual world, we’ll move over to the new set of rules.

For investor-state arbitrations things may be different. A BIT is an agreement between two governments. The governments are making an open offer to investors to arbitrate. The offer is not concluded until the investor actually agrees. You might think, then, that we would again move quickly to the new set of rules. However, states are indicating that their position is that they offer the set of rules at the time the BIT is concluded. They are, in essence, saying they will offer the old UNCITRAL Rules, which do not address transparency. So we see that states are reluctant to open up the transparency side of the equation and the pressure to do so may have unanticipated consequences.

A Personal Footnote

A second footnote is that there’s a personal side to all of this for me. I was one of the first Legal Assistants to the American arbitrators at the Iran-US Claims Tribunal. I was not, as I hope is obvious, present for the drafting of the 1976 Rules. I’m more a sibling of that first set of UNCITRAL Rules—we both grew up together in the Iran-US Claims Tribunal. That Tribunal, at that time, was a very combative institution. In fact I would say that that early experience has continued to influence the mindset. It tested the rules very strongly – in particular in relation to arbitrator conduct – which was very difficult. We had arbitrators who would not show up at deliberations because of a sudden health problem. They would resign shortly before signature was to be

done on the award. Or they would allow several awards to build up and then resign. They would disclose the content of the award to the party that nominated them just prior to its release, inducing a settlement that would then obviously make the award moot. This gives you a sense of how the rules were tested.

In one incident in particular, two Iranian arbitrators physically assaulted a Swedish arbitrator, which led to a challenge. The rules say that an arbitrator must, obviously, be independent and impartial. The question was whether getting angry and punching someone means that an arbitrator is not independent or not impartial. It's not clear. The 2006 ICSID Arbitration Rules say you must be of "*high moral character*".¹³ The question, in this example, is what is the correct response if an arbitrator says "*I'm sorry, I just got carried away – I couldn't help myself, and I won't do it again?*" So you see, at the Iran-US Claims Tribunal, all of a sudden, we had problems as to how the rules worked. Situations that the drafters hadn't anticipated became more apparent. With revisions, and new scenarios, we'll see some of that come back.

Learning from Existing Variations

Even as we enter this revision process the UNCITRAL Rules are being used in different ways. This contrasts with certain institutions – for example the ICC Rules from a certain period won't vary until the next revision. Centers already adopt the UNCITRAL Rules with adjustments. Indeed, the Iran-US Claims Tribunal did just that.¹⁴ The UNCITRAL Model Law has a default set of arbitration rules, the UNCITRAL Rules, which are themselves modified. Even though the Swiss Rules of International Arbitration are based on UNCITRAL they are significantly different.¹⁵ So there is already a lot of variations of the UNCITRAL Rules to inform the process of revision.

II. Revising the UNCITRAL Rules

I have spoken about the origins of UNCITRAL, the 1976 Rules, and their growth. Now we have the conversation about revision. How did we get to the point of change? Interestingly, it's Pieter Sanders who comes back into the story. In 2004—he's still very productive—he published an article encouraging revision.¹⁶ In 2006 a study document was published, commissioned by UNCITRAL, and written by Jan Paulsson and Georgios Patrochilos.¹⁷ Then the current effort of Working Group II began in the Fall of that year. Working Group II meets twice a year and they are now

¹³ 2006 ICSID Arbitration Rules, Rule 14(1) and 40(2).

¹⁴ Iran-US Claims Tribunal, Tribunal Rules of Procedure, 3 May 1983.

¹⁵ Swiss Rules of International Arbitration, 1 January 2004. At the time of publication the current Swiss Rules are those which took effect as of 1 June 2021.

¹⁶ Pieter Sanders 'Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?' (2004) 20 *Arbitration International* 243.

¹⁷ Jan Paulsson and Georgios Patrochilos *Revision of the UNCITRAL Arbitration Rules* (2006).

seven sessions on in the work.¹⁸ There's an expectation that the work will be done in the Spring.¹⁹ This is the revision process that the US State Department gentleman warned me of - and the reason for another book!

The Principles Guiding the Revision Effort

At the outset, Working Group II made some statements about what their guiding principles were going to be. This brings us back to the theme of how we think about revision and what it is that is to be accomplished. Remember, Working Group II is not an institution that is trying to appear modern simply to increase its caseload. That motivation isn't there. Rather, it has been a long time since the adoption of the 1976 Rules, and there is a need for an update.

And, to the Working Group's credit, there is recognition that people can have an insatiable desire to revise. If you give a lawyer a pen they will start adding sentences and adding complexity. The Working Group is trying to restrain themselves but they don't always succeed. Still, the intention to be restrained has been there, and there was recognition in the Working Group's report of its September 2006 session that:

*"...any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit and drafting style and should respect the flexibility of the text rather than make it more complex..."*²⁰

I will return to flexibility at the end of this lecture. Another principle which might be said to be important is consistency – for example with the 1985 UNCITRAL Model Law.²¹ However, the Working Group concluded that:

*"...harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the Model Law should not be automatic but rather considered only where appropriate."*²²

¹⁸ There has not always been a Working Group devoted to arbitration. At a UN Conference celebrating the 50th anniversary of the New York Conference, a possible work plan was laid out for UNCITRAL, in the area of arbitration. At the 1999 session of UNCITRAL, a work plan was adopted, and Working Group II was tasked with addressing it.

¹⁹ The 2010 Rules ultimately became effective on 15 August 2010 and were subsequently the subject of UN General Assembly resolution 65/22 on 6 December 2010.

²⁰ Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006), UN Doc A/CN.9/614, paragraph 15.

²¹ UNCITRAL Model Law on International Commercial Arbitration (1985).

²² Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006), UN Doc A/CN.9/614, paragraph 21.

Principles in Operation – Interim Measures

The revision of the UNCITRAL Model Law in 2006 shows how revision principles can operate. That was Working Group II's work prior to the current process. In the 2006 amendment of the Model Law, the interim measures provision in Article 17 has gone from a being a short paragraph, to being several pages long. Essentially, in the 2006 draft, the whole logic of interim measures has been spelled out with a lot of detail, contrary to the principle of flexibility.

The justification for this increase in detail was said to be the particular nature of the goal of that provision. The goal is to make interim measures by a arbitral tribunal enforceable in a national court. A national court, it was said, would be reluctant to enforce the measures —indeed, many *are* reluctant to enforce them—unless they understood more about them. So there was said to be a need for more detail.

I think that's a little difficult, as a justification, because the same kind of argument could be made about enforcement of awards. That could be a slippery slope which, if adopted in this process, would lead to a lot more detail in the Rules. And, as you'll have seen, I have a preference against a lot of detail. I guess it depends on which side you're on. As counsel you want more control and therefore you think about detail in the rules. As arbitrator you prefer flexibility and discretion. But those objectives might not be as divergent as they seem – we'll see more as we go along.

We are, now, close to the end of the revision process – the new rules will be with us next year. What I want to do in the remainder of this lecture is examine some of the changes that we are likely to see as a result. The caution is that there are many revisions – and none of them are final yet.

III. The Revisions: Clusters of Change

I will talk about three clusters of change.

As I have said, a caveat at the outset is there are many changes, certainly more than I'm going to describe. It can be difficult to keep track. One of the best sets of commentaries I have found on the ongoing process is from the Asia Pacific Regional Arbitration Group, who sends observers. No one else is doing that sort of reporting. The UNCITRAL Secretariat produces a report at the end of each session. It is not as helpful a report as was done when they were drafting the 1976 Rules. Then, there was a transcription, of sorts, of what was said. It would tell you that, say, Howard Holtzmann from the US stood up and said this or Sergei Lebedev from Russia said that. You could really get a grasp on what they were arguing about. What the Secretariat publishes now is much more sanitized. You can get a sense of what is

going on but you have to read between the lines. And, again, I stress that anything could change.

Having said that, there are three clusters that I will address: catching the rules up, different approaches to procedure, and arbitrators, unadministered arbitration, and trust.

Catching the Rules Up

The first cluster of changes are about catching the rules up. My point here is that these are actually not real changes; they are getting the rules to catch up with the world that has changed. The rules are changing, but it's merely to catch up with what's out there.

For example, Article 1(1) of the 1976 Rules provides that the agreement to arbitrate must be in writing. Nothing is in writing anymore. My mail at the university has gone down dramatically; everything is email at this point. So what does it mean to say "in writing" in Article 1(1) of the 1976 Rules? We have to change that. Similarly, "*mailing address*", in Article 2(1) of the 1976 Rules is anachronistic. It is also necessary, in that Article, to think about what it means to have an "*address*," and what it means to "*deliver*". All that terminology requires changes to can catch up with the world.

A little bit more substantive, back in Article 1(1) is the language "*disputes in relation to the contract*". That needs to be changed, in part, to recognise the significance of BITs. The necessary language is not actually all that new. It's in the New York Convention, where Article II refers to "*differences.... in respect of a defined legal relationship*".²³ We can now speak of "*disputes in relation to a legal relationship*". There is scope for further definition, so long as we bear in mind the potential tension, between detail and flexibility.

What I find interesting about those examples, just from Article 1 and 2 of the 1976 Rules, is that the 2008 revisions to this Center's rules all updated those terms.²⁴ I've enjoyed revisiting the new rules that you have here because they anticipate so much of what is happening in the UNCITRAL revision process.

In some respects they've done better than UNCITRAL. For example, I think UNCITRAL has failed in In relation to the "*place*" of arbitration, referred to in Article 16 of the 1976 Rules. There were suggestions to get rid of the word "*place*" because it is something of an insider's term. We imply from the word "*place*" that there is a legal system governing that arbitration. But that isn't clear to outsiders. There were suggestions that the term used should indicate more clearly that it is about more than

²³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

²⁴ Hong Kong International Arbitration Centre, 2008 HKIAC Administered Arbitration Rules ("2008 HKIAC Rules").

the physical place. The 2008 HKIAC Rules, in Article 15, uses the phrase “*the seat of arbitration*”. That has a more legal connotation and there was a failed attempt to insert that into the new UNCITRAL Rules. The failure was partly because the word “*place*” is used throughout the UNCITRAL Model Law and consistency was a consideration. Still, congratulations to the drafters of the 2008 HKIAC Rules, for being progressive.

Different Approaches to Procedure

Let me talk about the second cluster: different approaches to procedure. Obviously this is where many of the changes lie. Probably all of the rules will change at least a little bit. They will change in small ways. Many of the changes will be very useful.

Some of these changes are extremely difficult to bring about, because when there are efforts to change rules at UNCITRAL, we start to see different divides on how procedure is approached. One thing I really enjoy about the meeting of the Institute for Transnational Arbitration in Dallas is that we have people come in from around the world. When I was young, I used to watch speakers talk about decision-making and think that they had got it wrong, they hadn’t quite seen how things were done. Now I’ve come to appreciate that, although rules may converge globally, there are a number of circles of arbitration folk. If we’re a little too quick, we think we’re talking the same language, but actually we have different views, or the language can mean different things to us.

You could say there is an International Chamber of Commerce group, who have a slightly different view from the London Court of International Arbitration group, which is different again from the International Centre for Dispute Resolution group. And I’m not saying any of those views are wrong—in fact, I think they’re all right; they just have a different approach or perspective. Similarly, there are some national cultural differences. We see some differences in Asia, maybe more on the value of mediation than in other areas, which leads to some differences of view about decision-making as well.

How do these different views impact on the process of revision? Take the question of how the three arbitrators, in an arbitration, finally make their decision. The 1976 Rules, in Article 31, follow that of the American Arbitration Association, which is that you decide by a majority of the arbitrators. The theoretical concern is that the chair could be unable to form a majority. The chair could ask one arbitrator, for example the claimant-appointed arbitrator, who could say I agree on liability, but I don’t agree that damages should be low. And the chair could get the opposite response from the other party-appointed arbitrator. That could lead to deadlock.

Is this really a problem, though, in practice? The question reflects a fundamental problem in efforts to revise the rules. Whether or not there is any

problem relies on anecdotal evidence. We have no examples of a deadlock happening. But there is potentially a problem. And the potential problem creates an opening for the ICC approach, whereby if there is no majority, the chair should decide.²⁵ The current revision process, though, has had the guiding principle not to change the spirit of the 1976 Rules. So, without any evidence of a problem, we have stuck with the original version of the rule. This example, then, shows the challenge of revision when there is not more evidence from inside the arbitration process.

Another area in which procedure differs relates to the role of local law. For example, some jurisdictions prohibit parties or their employees from serving as witnesses in an arbitration. If arbitration rules on witnesses become too specific they may create a problem for enforcement in jurisdictions with strict rules of inclusion or exclusion. Some rules of evidence, for example the International Bar Association's, explicitly allow employees as witnesses.²⁶ However, to avoid local law playing a blocking role, arbitration rules need to stay vague, and allow arbitrators to accommodate variations.

This is also related to the question of complexity. I'm very happy to note that UNCITRAL has been pretty good at avoiding complexity, understanding the practicality of arbitration, and the costs of decisions. So, in relation to the applicable law, Article 33 of the 1976 Rules provides that the parties shall designate the applicable law. If the parties fail to designate the law then "*the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*". As a result, there can be a costly exercise to decide the applicable conflict of laws rules, an exercise which really may not be worth the candle. With the new rules, Working Group II will put trust in the arbitrators, at least on this question. If the arbitrators want to use a conflict of laws rules they can do that. If they do not they can just decide on the applicable law. It goes back to discretion.

Finally, in respect of procedural differences, we have a problem that has bedeviled all the institutions as multiparty arbitration increases: how to deal with a third party. There is one set of Rules, the London Court of International Arbitration ("LCIA"), which deals with this. It's in Article 22.1(h) of the 1998 LCIA Rules which provides that, unless the Parties agree otherwise in writing, the Arbitral Tribunal will have the power

"... to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have

²⁵ At the time of publication of this lecture, the most recent version of the ICC Arbitration Rules is the 2021 Rules, Article 32(1) of which provides: "*When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone*".

²⁶ Article 4, IBA Rules of the Taking of Evidence in International Commercial Arbitration (1999 at the time of delivery; 2020 at the time of publication).

*consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration...*²⁷

The LCIA example drove a long discussion about whether there should be such a rule included by UNCITRAL. The drafters tried to find what the practice has been. Again, we see a desire to have the process informed by practice, but evidence may only be anecdotal. The LCIA pointed out that there's only been one instance of that happening. And so, at the moment, it appears unlikely that there will be anything about joinder in the new rules.²⁷

Administration and Trust in the Arbitrators

The final cluster of changes, where there has been a lot of controversy, relates to administration of arbitrations, including a potentially greater role for the Permanent Court of Arbitration (PCA). Here is where the question of trust in the arbitrators really comes to the fore.

As I said earlier, the UNCITRAL Rules are meant to work without an institution to administer them. Nevertheless, In the current revision process there is the potential for there to be a much greater role for an institution. Let me start with the appointment of arbitrators. Even with unadministered rules, it is necessary to have a body with the task of appointing arbitrators, or deciding on challenges to them. In the 1976 Rules, the body to do that is the PCA.²⁸ The PCA was chosen because it had absolutely nothing to do, and (in 1976) had had almost nothing to do, ever since World War I. It had been created by the first Hague Peace Conference in 1899. World War I ended that series of conferences and, after the war, work on the pacific settlement of disputes led to the creation of the Permanent Court of International Justice (PCIJ). The PCIJ, and its successor the International Court of Justice, eclipsed their older sister, the PCA.²⁹

However, since its designation by UNCITRAL in the 1976 Rules, the PCA is now a very busy institution. But the role in relation to UNCITRAL arbitrations remains limited. The 1976 Rules, in Article 6, say the PCA shall designate the appointing authority. The PCA is not, itself, the appointing authority – it merely designates. There has been a move in negotiations over revision of the rules to make the PCA the appointing authority in all UNCITRAL arbitrations – globally. The

²⁷ Ultimately, Article 17(5) of the 2010 UNCITRAL Rules did include the power to join a third party, at the request of any party to the arbitration, so long as certain criteria are met.

²⁸ 1976 Rules, Article 6(1).

²⁹ David D. Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94(4) *American Journal of International Law* 4, p.24.

various arbitral institutions and centers have, as you can imagine, responded rather robustly.

I think that the idea to develop the PCA role in this way will not succeed and that it will correctly not succeed. Some rules can be global. Nevertheless, the institutions and centers have made a very good argument. They are the ones who know counsel, and who know local conditions, around the world. It's far too complex and diverse a world for one institution to try to administer such a set of appointments or challenges. This is where we can say that some proposed revisions are neither small nor useful – they are impossible. It may be, though, that the PCA becomes the principal appointing authority in investment arbitration using the UNCITRAL Rules. That would make some sense. It would be a much smaller set of cases and would involve a set of specialized people.

So that – appointment of arbitrators – is one way in which some administration is necessary. We have also found, in some other areas, that it is difficult for UNCITRAL Rules to be unadministered. Four examples are: multiparty situations, approving fees, fees for post award proceedings, and questions of the number of arbitrators. The upshot is that, if there is no administering institution, it's necessary to rely on, and to trust, the arbitrators even more. There is some unease at that. For example, in relation to approving fees, it is likely that arbitrators will not be able to set their own fees, which is the current situation under UNCITRAL.³⁰ This has led to some rather strong complaints about fees being set after appointment and after establishment of the tribunal. Under the proposed revisions, there will be a process whereby a party can appeal the setting of the fee to the appointing authority, which can make necessary adjustments. That will be an interesting development to see.

The sort of frustration which has led to those revisions are also reflected in the discussion about fees for post-award proceedings. Those proceedings can arise in a few ways – asking for a correction of an award, or for an interpretation of an award, for example. Should the arbitrator be able to ask for fees for those few hours of work? This question has been the subject of a long discussion in the revision process. There is a sense that there is a conflict of interest for the arbitrators: on the one hand between production of a final award; and on the other hand the potential for further fees. Some make the point that if there needs to be post-award proceedings then it is the arbitrators that are at fault. They consider that, but for the arbitrators' failure to complete the work correctly, there would be no need for post-award proceedings. It's

³⁰ 1976 Rules, Article 39, addresses fees.

an interesting discussion, although it may seem a smaller matter in comparison with a challenge to the fee structure itself. It will likely not go through.³¹

Next, in relation to the number of arbitrators, there was a proposal to do something like you have here at the HKIAC, to have a way to drop back to one arbitrator instead of three. There was a proposal for the PCA to do that. However, if that was to come to pass, it would be a fundamental change of structure. The revisions would, again, be sliding into what is impossible under the current structure of UNCITRAL as being a set of unadministered rules.

Finally, there are questions in relation to disclosure, resignation, replacement and liability of arbitrators. There is a question as to whether or not a tribunal can render an award with only two of the three arbitrators. We may see answers to some of these questions. Again, it comes back to what is appropriate discretion for the arbitrators, where there is no institution, and what the level of trust is. Under the current structure the changes may well stick to what is small, and useful.

IV. Closing Comments

I have a few closing comments. I want to return to this word “*flexibility*”. What does it mean for rules to be flexible? We always say, as counsel, that arbitration is desirable because it’s flexible. I question that. Arbitration is totally flexible at the moment you’re drafting your contract. You can design any type of arbitration you want—almost.

But, actually, once you sign the contract, and it’s concluded, and the dispute arises, what you have in the contract is actually quite hard to alter. It was flexible at the time of drafting but now it’s no longer flexible – unless the proposed change is so meaningless that both sides can agree to the change. The task for counsel, which is a hard one, is to design an arbitration specific to the dispute that will arise. But, unfortunately, counsel don’t know in advance what dispute will arise. That’s a hard problem to get around.

There do seem to be some ways to get around the problem, though, and to maintain some flexibility. One is to have a variation in the arbitration that turns on some factual trigger. Here, again, the 2008 HKIAC Rules are really exemplary. Article 38 of those Rules provides for an expedited procedure which turns on the amount in dispute. This makes a lot of sense as a way to approach the question.

³¹ The 2010 Rules did, ultimately, include the following in Article 40(3) on costs: “...*In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.*”

But what if there is no factual trigger? Then it becomes necessary to give discretion, to someone, to adapt the rules to the particular dispute. The rules have to be a little open-ended so that they can then be adapted to the particular dispute. Who is the discretion to be given to? It will have to be given to either an institution or the arbitrators. For me, arguments for flexibility in the rules are really about authorization of that discretion, so that the rules can be adapted to the particular dispute, as the parties want in any given scenario. So flexibility comes back to discretion, and trust in decision-making.

In general, the next steps for the revision process will come in February, and I think we will be pleased. I've been very pleased with how cautious the Working Group has been with their pen. It's a very tempting thing, to rewrite rules, and I think we'll be happy in the end.