MED-ARB ALERT!

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INTERNATIONAL ARBITRATION AND THE 2010 UNCITRAL ARBITRATION RULES

INTRODUCTION

International Arbitration

International arbitration is a mechanism, with an international element, for the final and binding resolution of disputes in contractual or other relationships by neutral and independent arbitrators in accordance with standards and procedures chosen directly or indirectly by the parties. This form of settlement is removed from the sphere of the national judiciary mainly because national court judges are considered ill-equipped to handle disputes arising out of international business transactions or between parties of different nationalities. The real or perceived likelihood of bias by national courts is another reason parties resort to arbitration.

International arbitration has a number of advantages over litigation including the flexibility of arbitral procedures, neutrality and independence of the tribunal and arbitral process, confidentiality of the process, and the finality and binding nature of the awards rendered by the tribunals. The process is sometimes less expensive than litigation. International arbitration is governed by rules chosen by the parties and arbitrators chosen by the parties often times possess skills relevant to the dispute being arbitrated. The decisions of the tribunals are internationally recognized and enforceable, thereby avoiding the problems usually involved in the enforcement of decisions of national courts. Arbitration is generally viewed as less adversarial than litigation and thereby tends to preserve long-term business relationships.

International arbitration can be conducted either *ad hoc* or through an established arbitration institution. Arbitration institutions have formal procedures and rules designed to assist parties. The chosen institution may administer the arbitration according to its own rules or according to the rules of other arbitration tribunals, if so requested by the parties. *Ad hoc* arbitration refers to a process whereby parties select the arbitration format and structure without using an arbitration institution. The *ad hoc* approach allows for greater specificity in the design of a mechanism for the particular contract. Parties may select *ad hoc* arbitration to reduce costs, to accelerate the process and/or to structure proceedings to suit their particular needs. When choosing *ad hoc* arbitration, parties must specify in the arbitration clause all aspects of the arbitration, including applicable law, rules under which the arbitration will be carried out, the number of arbitrators, the method for selecting the arbitrator(s), the language

in which the arbitration will be conducted and the place of arbitration. Parties may either develop their own rules or select established arbitration rules to govern the process. Parties may use the rules of an arbitration institution without submitting the dispute to that institution.

It is equally important to distinguish international investment arbitration from international commercial arbitration. The two forms of arbitration share a few similarities. Both involve claims brought by disputing parties before private tribunals appointed by the disputing parties. The proceedings are governed by rules that originate in private arbitrations and the remedy in both forms of dispute settlement is an award of damages.

There are however more differences than there are similarities. International commercial arbitration is a private form of adjudication authorized by the will of the disputing private parties. It emanates from the private act of the parties based on contract and consent is specific as it is limited to a particular dispute and to a particular commercial relationship. The parties involved are private commercial entities. The agreement to arbitrate is usually found in an arbitration clause contained in the contract between the parties and the consent to arbitrate can also be given after the dispute arises. National courts are involved in the international commercial arbitration process to the extent that they can compel a reluctant party to arbitrate where there exists a valid agreement to arbitrate. The courts are also used to compel the attendance of witnesses, to stay proceedings, to preserve evidence, to compel the production of documents, to enforce interim measures. Additionally, courts provide supportive powers such as extension of time, determination of questions of law, coercion of witnesses, assistance in taking evidence, discovery, granting injunctions and the challenge and enforcement of the awards of arbitration tribunals. Unlike international investment arbitration, the subject matter of the dispute in international commercial arbitration, in most cases, does not affect the interests of third parties or a state in its regulatory capacity.

International investment arbitration, on the other hand are proceedings brought by foreign investors against the State in which they invested to settle claims arising directly out of their investment pursuant to an international investment treaty. Such claims are based on alleged breaches by the State of its international law obligations towards foreign investors found in bilateral or multilateral investment treaties to which the Host State is party. Investment arbitration engages matters in the public domain, touches on government public policy and rule making, and affects the general public. It engages public interests to a greater extent than international commercial arbitration because it adjudicates the exercise of the regulatory powers of the State and these powers are deemed to be exercised in the public interest. Additionally, investment arbitration is a mechanism for the determination of the legitimacy of the acts of public authorities.

Laws Governing International Arbitration

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of international arbitral awards. The Convention obliges parties to ensure that international arbitral awards are recognized and generally capable of enforcement in their jurisdictions in the same way as domestic awards. A supplementary aim of the Convention is to require courts of parties to give full effect to international arbitration agreements by requiring their national courts to deny the parties access to court in contravention of their agreement to refer a matter to arbitration. As at date, 146 States have adopted the Convention.

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 2010 are a set of procedural rules covering all aspects of the arbitration process, which parties may agree to in part or in whole in order to resolve their international disputes. The rules were primarily developed for use in *ad hoc* arbitrations but have also been used in proceedings before institutional arbitrations.

Many countries' legislations on international arbitration are based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2006). The Law is aimed at assisting States reform and modernize their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It reflects worldwide consensus on key aspects of international arbitration practice as States in many regions and different legal or economic systems of the world have adopted this Law.

The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (known as the Washington Convention) provides conciliation and arbitration rules for disputes between its member states and foreign investors from other member states. The Convention also established the International Centre for the Settlement of Investment Dispute (ICSID) to oversee the application of the rules.

Update on existing Legislation: The effect of the new UNCITRAL Rules 2010

The Working Group of the United Nations Commission on International Trade Law (UNCITRAL) has completed the revisions to the UNCITRAL Arbitration Rules. The new 2010 UNCITRAL Arbitration Rules came into force on 15 August 2010, thirty-four years after the introduction of the UNCITRAL Arbitration Rules and are applicable to all arbitration agreements concluded after that date. UNCITRAL Arbitration Rules were primarily developed for use in *ad hoc* arbitrations but have been broadly accepted in both *ad hoc* and institutional arbitrations. They have also been used in investor-state and state-state arbitration.

The Rules have proven highly successful having been in use for over 30 years in their original form. Revisions to the Rules were however due given the evolution and

changes in arbitral practice since 1976. The 2010 Rules, while preserving much of the flexibility of the original rules, introduce a number of important modifications and improvements to the UNCITRAL Rules. The revisions are aimed at improving the efficiency of arbitration and do not alter the original structure of the text of the Rules, its spirit or drafting style. It is hoped that the Rules, as revised, will continue to contribute to the development of harmonious international economic relations. The modifications and improvements of the UNCITRAL Rules can be divided into four categories.

The Drafting Process

First, in line with technological advancements since 1976, the new Rules provide for changes in the drafting process of arbitration clauses. The UNCITRAL Rules no longer require an arbitration agreement to be in writing thereby eliminating uncertainty as to whether various media constitute writing and accommodating the more-recent acceptance of oral arbitration agreements in some jurisdictions[1]. Similarly, Article 1 does not require that the parties to an arbitration be "parties to a contract" as was stated in the 1976 Rules. This allows a dispute arising from any kind of legal relationship to be referred to arbitration under the UNCITRAL Rules. Importantly, the UNCITRAL Rules are now directly applicable to investor-state arbitration. Further, the prior requirement that communications be physically delivered to the addressee for receipt to have occurred has been removed[2]. Another important improvement to the 1976 Rules is the ability to have videoconferences at hearings, allowing witnesses to be physically absent from the hearing.

Powers of Appointing Authorities

The second category of changes is the expansion of the powers of appointing authorities under the UNCITRAL Rules. The UNCITRAL Rules designate the Permanent Court of Arbitration in The Hague (PCA) as appointing authority. The 1976 Rules merely permitted a party to request the designation of an appointing authority only after the breakdown of the appointment process becomes manifest. By contrast, the 2010 Rules permit a party to seek an appointing authority at any time. A party that anticipates that an appointing authority will ultimately prove necessary can request the designation of one even before an appointment needs to be made. The revised Rules also provide that in the event that both parties fail to agree on an appointing authority, the PCA will serve as the default appointing authority. Upon the request of a party, the appointing authority may, in exceptional circumstances, deprive a party of the right to appoint a substitute arbitrator and appoint the substitute arbitrator itself. The appointing authority may also, on the request of a party, supervise the arbitrators' fees and expenses.

While the new Rules increase the role of the institution to a certain extent, they preserve the parties freedom to determine the

[1] Art. 7 of the New Zealand Arbitration Act 1996 provides that an arbitration agreement may be made orally or in writing

[2] Any means of communication that provides or allows for a record of its transmission will suffice.

process to be followed, and allow outside entities to assist in proceedings only when necessary. The aim of these amendments is to reduce the ability of a party to create gridlocks and delay the proceedings for tactical reasons by challenging the appointment of an arbitrator or failing to nominate an arbitrator.

Procedural Issues

Thirdly, a number of revisions relate to procedural issues and aim at increasing efficiency. These revisions reflect international best practices developed by arbitrators using the UNCITRAL Rules over the past 30 years. For instance, the new UNCITRAL Rules provides for the establishment of a provisional timetable by the arbitral tribunal as soon as practicable after its constitution and after inviting the parties to express their views; the inclusion of the claimant's legal arguments and all documents and other evidence in the Statement of Claim; and the requirement that the appointment of experts by a tribunal be done after consultation with the parties.

Article 4 of the 2010 Rules now requires the respondent to submit a brief response within 30 days of receipt of the notice of arbitration. This time limit corresponds to the time for a respondent to appoint an arbitrator or to respond to a proposal for the appointment of a sole arbitrator, thereby ensuring that a respondent is formally afforded the opportunity to present its initial view of the matter before any appointing authority may be called upon to act in the constitution of the e tribunal. In contrast, under the 1976 Rules, a respondent was not called upon to act until the submission of the statement of defense, well after the constitution of the tribunal. This left the claimant unsure of the respondent's position. There is also no penalty for the failure to submit such a response under the new Rules. It is expected that this change should prove a useful procedural innovation in the early portion of an arbitration.

General Amendments

Finally, the fourth category of changes under the new UNCITRAL Rules comprises several general amendments to areas including the appointment of arbitrators in a multi-party arbitration, interim measures and the arbitrator's fees and costs. The 1976 Rules had no provisions for appointing a three-member arbitration tribunal in a multi-party arbitration. Article 10 of the 2010 revision, however, provides that where there are multiple parties as either claimant or respondent, they shall jointly appoint a single arbitrator to the three-member tribunal. This however does not apply if the parties have agreed to use a different number of arbitrators rather than one or three. In the event that the parties are unable to constitute an arbitral tribunal, the appointing authority, if requested by the parties, shall constitute the arbitral tribunal (Art 10(3)). The rationale for using a third-party appointing authority is to avoid the situation where any one party obtains an unjustified advantage by gaining the right to appoint an arbitrator in a multi-party dispute where the others are unable to agree.

Article 17 (5) of the 2010 Rules now provide explicitly for the joinder of third parties, subject to the condition that such third parties are also parties to the underlying arbitration agreement and that the joinder does not prejudice a party. This is in contrast to the 1976 Rules which made no provision for inclusion of additional parties and required the agreement of all parties before inclusions may be made by the tribunal. Under the revised Rules, a tribunal now has express power to bring additional parties into the arbitral process. This provision addresses the difficulty of joining additional parties to a single proceeding.

The 1976 Rules do not set out the types of interim measures that may be granted, the standard for considering a request for such measures, or any limitations to a tribunal's flexibility. Article 26 of the 2010 Rules in contrast addresses the scope of permissible measures and the standard that a party seeking such measures must meet. This revision draws heavily on the 2006 revision of the UNCITRAL Model Law on Commercial Arbitration (Article 17) and largely corresponds to the comprehensive provision on interim measures contained therein. Furthermore, it gives the tribunal the authority to award interim measures to achieve purposes, including but not limited to the maintenance or restoration of the *status quo* between the parties; prevention of actions that would cause imminent harm or prejudice; preservation of assets to satisfy a subsequent award (i.e. "Mareva injunction"); and preservation of evidence.

The new UNCITRAL Rules now provide the parties with an opportunity to review the arbitrators' fees and expenses. Under the 1976 Rules, the parties had no right to review the tribunal's calculation of its fees and expenses. A further expansion can be seen in the new provision for supervision by the appointing authority of arbitrators' fees, an area where more than any other, the autonomous supervision of the arbitration by the parties and the tribunal has led to abuse.

CONCLUSION

The 2010 UNCITRAL Rules is definitely a step in the right direction and constitute an effective revision that preserves the successful core of the 1976 Rules, introduces important improvements, and avoids the introduction of new flaws into the Rules.

It should be noted as a matter of practical importance that the Rules state that the new version is presumed to apply only to arbitration agreements referring to the UNCITRAL Rules that were concluded after 15 August 2010 hence, the effects of the new rules may take some time to receive sufficient industry scrutiny. However, as the new rules incorporate international best practices in the arbitration arena and nominate the PCA as its default appointing authority; this will no doubt harmonize the evolution of international arbitration jurisprudence.

Mediation & Arbitration Department

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Led by Kehinde Aina, a Regional Consultant with the World Bank Group, and founder of The Lagos Multi-Door Courthous, MEAD has cognate experience in Mediation, Arbitration and other ADR Systems Design; and unparalleled expertise in Commercial and Investment Arbitration.

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Mediation & Arbitration Department
Aina Blankson LP
5/7 Ademola Street
South-West Ikoyi
Lagos

Tel: +234 1 8980882-3
Fax: +234 12710566
www.ainablankson.com

For further information please contact any of the contributors:

Kehinde Aina
k.aina@ainablankson.com

Obianuju Ezejiofor-Obasi
o.ezejiofor@ainablankson.com

Eghosa Courage Isibor
c.isibor@ainablankson.com

Olabanji Adenusi
o.adenusi@ainablankson.com