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Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal**

The UNCITRAL Arbitration Rules have been with us only since December 15, 1976.¹ One would ordinarily expect to wait decades to test a new set of arbitration rules. Conservative businessmen and lawyers must be persuaded to write the new rules into their contracts. Even then, the rules will not be invoked unless the deal goes sour. In addition, the confidentiality of most arbitration proceedings means that only a small proportion of the decisions interpreting the new rules will come to light. Those of us who prefer to judge ideas in practice rather than in the abstract expected to grow gray waiting for a practical judgment to be passed on the UNCITRAL Rules.

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1. The United Nations Commission on International Trade Law (UNCITRAL) adopted its Arbitration Rules on April 28, 1976. On December 15, 1976, the General Assembly of the United Nations recommended application of the UNCITRAL Arbitration Rules to the settlement of disputes arising in the context of international commercial relations. G.A. Res. 31/98, [1977] VIII UNCITRAL Y.B. 7, reprinted in Sanders, *Introduction*, II Y.B. COM. ARB. xi (1977). As adopted, the Rules may be found in [1976] VII UNCITRAL Y.B. (part 1) 22, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL RULES]. The initial draft of the UNCITRAL Rules was prepared by the UNCITRAL Secretariat in consultation with Professor Pieter Sanders of the Netherlands in 1974. *Report of the Secretary-General: Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating*

But those expectations have been entirely overturned by events. Although only twelve years have passed since the adoption of the UNCITRAL Rules, we already have a vast and largely public store of practical experience with the Rules. This is because in January 1981 the governments of Iran and the United States agreed to submit billions of dollars in claims to an Iran-United States Claims Tribunal (the Tribunal)² and specified that the procedures of the Tribunal were to be governed in large part by the UNCITRAL Rules. The governments agreed that:

Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified

to *International Trade*, [1975] VI UNCITRAL Y.B. (part 2) 163, U.N. Doc. A/CN.9/97 (1974) [hereinafter *Report Preliminary Draft*]. The draft rules were placed for consideration before the eighth session of the UNCITRAL in Geneva on April 1, 1975. *Report of the UNCITRAL on the Work of Its Eighth Session*: Chapter V, Annex I [1975] VI UNCITRAL Y.B. (part 1) 9, 24, U.N. Doc. A/10017 (1975) [hereinafter *Report Discussion Preliminary Draft*]. The daily record of the eighth session meetings is published as *Examination of the Preliminary Draft "International Commercial Arbitration Rules,"* U.N. Doc. A/CN.9/SR.159-171 (1975) [hereinafter *Eighth Session Record*].

The UNCITRAL Secretariat and Professor Sanders then prepared a revised draft, taking into account the observations made in the course of the eighth session. *Report of the Secretary-General: Revised Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules)* [1976] VII UNCITRAL Y.B. (part 2) 157, U.N. Doc. A/CN.9/112 (1975); *Commentary on the Draft UNCITRAL Arbitration Rules*, *id.* at 166, U.N. Doc. A/CN.9/112/Add. 1 (1975) [hereinafter *Report Revised Draft*].

The UNCITRAL established a Committee of the Whole II to consider the revised draft and to report back to it. *Report of the Committee of the Whole II Relating to the UNCITRAL Arbitration Rules*, U.N. Doc. A/CN.9/9/CRP.1, reprinted in *Report of the UNCITRAL on the Work of Its Ninth Session*, [1976] VII UNCITRAL Y.B. (part 1) Annex II, U.N. Doc. A/31/17 (1976) [hereinafter *Committee of the Whole II Report*]; *Committee of the Whole II, Ninth Session, Summary Record*, U.N. Doc. A/CN.9/9/C.2/SR.1-19 (1976) [hereinafter *Committee of the Whole II Summary*]. The UNCITRAL considered the report of this Committee and approved the final text of the Rules in April 1976. *Report of the UNCITRAL on the Work of Its Ninth Session* [1976] VII UNCITRAL Y.B. (part 1) 9, 20, U.N. Doc. A/31/17 (1976); Sanders, *Commentary on UNCITRAL Arbitration Rules*, II Y.B. COM. ARB. 172 (1977) [hereinafter Sanders, *Commentary*].

2. The Iran-United States Claims Tribunal was established pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981 [hereinafter *Claims Settlement Declaration*]. The Claims Settlement Declaration is one of a number of agreements known as the Algiers Accords, which led to the release of fifty-two Americans held hostage in Iran from November 4, 1979 to January 19, 1981. Besides the Claims Settlement Declaration the Algiers Accords consist of: (i) the Declaration of the Government of the Democratic and Popular Republic of Algeria [hereinafter *General Declaration*]; (ii) the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria; and (iii) the Escrow Agreement and related technical agreements. Iran-United States: Settlement of the Hostage Crisis, Jan. 18, 1981, reprinted in 1 IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS 9 (1981) [hereinafter IRAN-U.S.-C.T.R.] and in IRANIAN ASSETS LITIGATION REPORTER [hereinafter IALR] 2,361-74 (Feb. 6, 1981); 20 I.L.M. 223 (1981).

by the Parties or by the Tribunal to ensure that this Agreement can be carried out.³

As the parties foresaw, the UNCITRAL Rules did require some modification. After all, the UNCITRAL Rules were written primarily for arbitration of a single case, while the Tribunal comprised several panels with responsibility for thousands of claims.⁴ Even though the UNCITRAL Rules were broadly written to find acceptance in countries with very different legal and economic systems,⁵ no one could expect to apply the UNCITRAL Rules in the Tribunal without some alterations.⁶

But the peculiarities of the Tribunal also offer great advantages to students of the UNCITRAL Rules. The requirement that the Rules be modified meant that practicing arbitrators who would have to live with the results scrutinized every line of the Rules. The Tribunal took nothing for

3. Claims Settlement Declaration, *supra* note 2, art. III(2).

4. Much has been written on the workings and composition of the Tribunal. See, e.g., Brower & Davis, *The Iran-United States Claims Tribunal After Seven Years: A Retrospective View from the Inside*, 43 ARBITRATION J., Dec. 1988, at 16. Carter, *The Iran-United States Claims Tribunal: Observations on the First Year*, 29 U.C.L.A. L. REV. 1076 (1982); Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues, and Lessons: View From Government's Perspective*, 1981 PRIVATE INVESTORS ABROAD 75; Holtzmann, *Some Lessons of the Iran-U.S. Claims Tribunal*, 1982 PRIVATE INVESTORS ABROAD 16-1; Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 VA. J. INT'L L. 259 (1984); Lauterpacht, *The Iran-United States Claims Tribunal—An Assessment*, 1983 PRIVATE INVESTORS ABROAD 213; Leahy, *Claims Tribunal for Iranian/American Disputes Requires Change in Litigating Style*, [10] 1 LITIGATION NEWS 3 (1984); Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984); Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1 (1983); Trooboff, *Implementation of the Iranian Settlement Agreements—Status, Issues and Lessons: View from the Private Sector's Perspective*, 1981 PRIVATE INVESTORS ABROAD 103.

5. See, e.g., G.A. Res. 31/98, *supra* note 1, preamble; Sanders, *Commentary, supra* note 1, at 173. The drafters of the UNCITRAL Rules took into account the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention of 1961 (European Convention on International Commercial Arbitration), the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of the States, the Council of Europe Convention Providing a Uniform Law on Arbitration of 1966 and the Moscow Convention of 1972 on the Settlement by Arbitration of Disputes Arising out of Economic, Scientific and Technical Cooperation. In addition, existing arbitration rules were taken into account. These included the Economic Commission for Europe Rules of 1966, the Economic Commission For Asia and the Far East Rules of 1966, the Uniform Rules of Procedure of 1974 for Arbitration in the Arbitration Courts of CMEA [Council for Mutual Economic Assistance] Countries, the International Chamber of Commerce Rules of 1975, the Rules of the American Arbitration Association (AAA), the International Arbitration Association (IAA) Rules, and the Rules of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce. See Sanders, *Commentary, supra* note 1, at 173; *Report Revised Draft, supra* note 1, at 158-59.

6. The Tribunal's Provisionally Adopted Rules were promulgated on March 10, 1982, 1 IRAN-U.S. C.T.R. 57, IALR 4, 291 (Feb. 19, 1982). Following a small number of very minor changes, the Final Tribunal Rules of Procedure were adopted on May 3, 1983, 2 IRAN-U.S. C.T.R. 405, IALR 6,306 (Apr. 1, 1983) [hereinafter TRIBUNAL RULES].

granted, and while the Tribunal's mandate was to make only those changes deemed necessary to conform the Rules to the Claims Settlement Declaration, in fact, many of the Tribunal's changes amounted to improvements or clarifications to the Rules that may have merit beyond the Tribunal's function.

Perhaps even more important to the development of an UNCITRAL jurisprudence is the contribution of the individual parties to the many claims before the Tribunal. Notwithstanding execution of the Algiers Accords,⁷ the two governments and their nationals remained adversaries. As both sides aggressively pursued their positions, the applicability and interpretation of the Rules often took on central importance. In this atmosphere, if a procedural question could be disputed, it was.

The result has been that in the seven years since its establishment the Tribunal has encountered and resolved procedural issues under the UNCITRAL Rules that might have taken decades to arise in the normal course of commercial arbitration. Moreover, because of the need to achieve uniformity in handling thousands of cases, all of the Tribunal's awards and decisions and many of its procedural orders have been published.

In short, the UNCITRAL Rules have been given an intense and highly public workout. How did they fare? Remarkably well, in our view. The basic test of the success of arbitral rules is whether they can establish a workable arbitral institution and then keep the proceedings on track until either the arbitrators issue an award or the parties agree on one. Under that test, the Rules are a success. The Tribunal as an institution has survived serious and unprecedented disruptions, and has produced over 400 final awards.⁸

This article evaluates how the UNCITRAL Rules governing the composition and establishment of the arbitral institution have been applied in the creation and operation of the Tribunal. Where the experience of the Tribunal reveals a need for change to the UNCITRAL Rules we suggest modifications or clarifications.

The UNCITRAL Rules governing the establishment of arbitration appear in Section I (articles 1–4), which contain certain introductory rules, and Section II (articles 5–14), which regulate the appointment of arbitrators and the composition of the arbitral tribunal. The present discussion focuses on those sections and generally follows the organization of the Rules. Beyond the scope of this discussion are those articles dealing with the conduct of the arbitral proceedings (articles 15–30) and the rendering of the award (articles 31–41).

7. See *supra* note 2.

8. See *More than 1000 Cases Have Been Finalized at the Tribunal*, 3 MEALY'S LITIGATION REP.—IRANIAN CLAIMS [MEALY'S] No. 19, at 7 (Nov. 7, 1988).

I. Introductory Rules

A. SCOPE OF APPLICATION (ARTICLE 1)

Article 1 of the UNCITRAL Rules⁹ provides that the Rules apply whenever the parties to a contract have agreed in writing that they will refer disputes in relation to that contract to arbitration under the Rules.¹⁰ Article 1 provides for modification of the Rules by written agreement of the parties to the arbitration or in the event of conflict between the Rules and applicable law.

The unusual nature of the Tribunal produced one minor modification to this rule, but this change does not teach any general lesson relating to the ordinary functioning of the UNCITRAL Rules. Article 1(1) was altered to state that modifications to the UNCITRAL Rules may be made only by the Full Tribunal or the two governments, and not by the arbitrating parties as provided in the UNCITRAL Rule.¹¹ The need for such a provision results from the nature of the Algiers Accords, the agreements that established the Tribunal.¹² This change does not suggest a need to reconsider the original provision of the UNCITRAL Rules allowing only the arbitrating parties, and not the arbitrators, to modify the arbitral

9. UNCITRAL Rules art. 1 states:

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.
2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

10. While none of the private parties to the individual claims filed at the Tribunal had contractually provided for UNCITRAL arbitration, Iran and the United States in the Algiers Accords did. According to article II of the Claims Settlement Declaration, the Claims Tribunal has jurisdiction over the following disputes:

1. . . . [C]laims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of [the Claims Settlement Declaration], whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, [excluding certain claims].
2. . . . [O]fficial claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.
3. . . . [A]ny dispute as to the interpretation or performance of any provision of [the General] Declaration. Claims Settlement Declaration, *supra* note 2, art. II.

11. See *supra* note 9 (text of the rule).

12. See *supra* note 2.

rules.¹³ The Tribunal also added a paragraph expressly providing that the Algiers Accords constituted an agreement in writing binding the two governments and their nationals to arbitration under the Rules.¹⁴

B. COMMENCEMENT OF THE ARBITRATION (ARTICLES 2-3)

Under article 3¹⁵ of the UNCITRAL Rules the arbitral proceedings begin on the day the respondent receives the claimant's notice of arbitration. Subsections (3) and (4) of article 3 specify the information to be included in the notice, and article 2 governs the method of service.¹⁶

13. This change reflects another consideration that recurs frequently in the Tribunal Rules, *i.e.*, differentiation between the governments and the arbitrating parties. Under the UNCITRAL Rules, many rights and duties are allocated to the parties, but at the Tribunal, the parties who agreed to arbitration and who appointed the arbitrators, *i.e.*, the two governments, often are not the parties appearing in a particular case. As a result it was necessary to specify in notes to many of the Tribunal Rules *which* parties were meant in each context. *See, e.g.* TRIBUNAL RULES, *supra* note 6, definitions section; *id.* art. 16 and its accompanying note. This set of modifications is an accommodation of the Tribunal's peculiar structure, with no implications for arbitrations outside the context of the Tribunal.

14. TRIBUNAL RULES, *supra* note 6, art. 1(3). Paragraph 2 of article 1 was maintained unchanged, and it has been the subject of no particular interest at the Tribunal.

15. UNCITRAL RULES arts. 3(3) and 3(4) provide:

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
3. The notice of arbitration shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names and addresses of the parties;
 - (c) A reference to the arbitration *clause* or separate arbitration agreement that is invoked;
 - (d) A reference to the contract out of or in relation to which the dispute arises;
 - (e) The general nature of the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;
 - (g) A proposal as to the number of arbitrators (*i.e.*, one or three), if the parties have not previously agreed thereon;
4. The notice of arbitration may also include:
 - (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6 paragraph 1;
 - (b) The notification of the appointment of an arbitrator referred to in article 7;
 - (c) The statement of claim referred to in article 18.

16. UNCITRAL RULES art. 2 governs service of the notice and all other documents, and also sets forth rules for calculating time periods:

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the

The Tribunal did away with the usual requirement of filing a separate notice of arbitration for two reasons. First, it was the governments of the United States and Iran, and not the arbitrating parties, that instituted the arbitration through the Tribunal's organic documents, the Algiers Accords. Second, separate requirements were called for at the Tribunal for filing claims and beginning proceedings in the thousands of separate cases to be adjudicated. The Tribunal, however, provided for the inclusion in the statement of claim of much of the information required in the notice of arbitration by the UNCITRAL Rules.¹⁷

A procedure similar to the Tribunal's was advocated during the drafting of the UNCITRAL Rules. Some delegates argued that combining the notice of arbitration and the statement of claim "would have the effect of speeding up the arbitral proceedings."¹⁸ UNCITRAL, however, rejected this proposal in favor of allowing a claimant to initiate arbitration by simply serving a notice of arbitration without the additional information concerning the merits of the case that is required in a statement of claim.¹⁹ Of course, a claimant may, if he wishes to expedite the arbitration, attach the separate statement of claim to his notice of arbitration.²⁰

The Tribunal's abandonment of the notice of arbitration in the Iran-United States arbitration should not be regarded as an implicit criticism of the UNCITRAL Rules, because that modification was due entirely to the Tribunal's unique nature. No notice of arbitration was required to alert Iranian or United States respondents that arbitration in the Tribunal

day it is so delivered.

2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

The Tribunal modified article 2, paragraph 1 to reflect the institutional nature of Tribunal arbitration, providing for service of all documents on the Tribunal Registry, which in turn supplies copies to the representatives of the two governments for forwarding to the individual arbitrating parties. This modification, which eliminates the possibility of haggles over notice or service of documents, makes sense in the Tribunal context, but does not suggest any modification of the UNCITRAL procedures for normal *ad hoc* arbitration.

17. Tribunal regulations governing statements of claim first appeared in Administrative Directive No. 1 (July 4, 1981), reprinted in 46 Fed. Reg. 37,418 (July 20, 1981) and IALR 3,382 (July 17, 1981). These requirements were later incorporated into the TRIBUNAL RULES, *supra* note 6, art. 18 which deals with statements of claim.

18. *Committee of the Whole II Report*, *supra* note 1, at 165.

19. UNCITRAL RULES art. 3(3).

20. UNCITRAL RULES art. 3(4)(c).

was about to begin or to launch the process of choosing arbitrators and establishing a framework for the proceedings. By the time the first claims were filed, the arbitral structure was already in place. In this respect Tribunal arbitration comes closer to institutional arbitration than to the usual individual arbitration generally anticipated by the UNCITRAL Rules.²¹

C. PRESENTATION AND ASSISTANCE (ARTICLE 4)

Article 4 of the UNCITRAL Rules²² requires that the names and addresses of each party's representatives and assistants be communicated in writing to the other party. The purpose of this section of the UNCITRAL Rules was plainly stated in the official commentary on the draft rules: "The communication of the name of the counsel or agent is necessary so as to assure the other party that such counsel or agent possesses the requisite authority to act on behalf of the party whom he claims to represent."²³

Unfortunately, during the last UNCITRAL drafting session, this simple purpose became embroiled in a dispute, first over how to demonstrate that the representatives were authorized to act for the parties and second over the role of nonlawyers in arbitration.²⁴ The rule was revised to include the concept of a person who assists a party. This was added to allay a fear that referring only to representatives would "be viewed as excluding the possibility that a party be 'assisted' by a non-lawyer in the preparation or presentation of his case."²⁵

These concerns led to a flurry of last-minute redrafting. As finally promulgated, the rule contains broad language that can be read as requiring parties to list the names and addresses of everyone who assists in the preparation of the party's case. The UNCITRAL drafters could not have intended such an interpretation as it would lead to absurdities, requiring disclosure of the names and addresses of translators, economists, paralegals, secretaries, perhaps even travel agents. Discussion at the UNCITRAL suggests that the identity only of *legal* representatives or assistants was intended to be disclosed, the distinction being that a party's "representative" is a person, whether lawyer or not, with power to speak for

21. See e.g., AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES R.7(b) (Feb. 1, 1984) [hereinafter AAA RULES].

22. UNCITRAL RULES art. 4 states: "The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance."

23. *Report Revised Draft*, *supra* note 1, at 168.

24. *Committee of the Whole II Summary*, *supra* note 1, SR.2, at 8-10.

25. *Committee of Whole II Report*, *supra* note 1, at 165.

or bind the party, while an "assistant" is any legal adviser or legal consultant lacking such power.²⁶

The Tribunal's practice supports this interpretation. While it adopted the UNCITRAL Rule without change, it added an interpretive note specifying that a party's "representative shall be deemed to be authorized to act" for and bind the party for all purposes, while a party's assistants who are not its designated representatives may not bind the party or receive notices or documents on behalf of the party.²⁷ The Tribunal's interpretive note further specifies that neither a representative nor an assistant need be licensed to practice law.²⁸ References in article 4 to such matters as binding parties and receiving notices, as well as the Tribunal's note that nonlawyers are not to be excluded, makes clear the Tribunal's interpretation that the representatives and assistants referred to in article 4 are a party's legal advisers and not all other persons assisting those advisers in a case. In compliance with this requirement arbitrating parties before the Tribunal have disclosed only the names of their counsel or others providing equivalent assistance.

This is certainly the proper interpretation of the UNCITRAL Rule. An arbitrating party can have no legitimate interest in the identities (let alone the addresses) of all who assist his opponent. It might even be questioned whether an opposing party has any legitimate interest in the identity of a legal assistant who is not a representative of a party. The arbitrators, however, may need to know the identities of a party's entire legal counsel regardless of capacity, for purposes of evaluating potential conflicts of interest. Accordingly, the identities of legal representatives and assistants should be revealed to the arbitrators as soon as they are selected. Article 4 thus should be read as requiring the identification only of those persons whose acts and statements to the arbitrators are intended to be binding on the parties and its other legal advisers.²⁹

26. See, e.g., *Committee of the Whole II Summary*, *supra* note 1, SR.2, at 8-10, SR.15, at 4.

27. See TRIBUNAL RULES, *supra* note 6, art. 4, notes 2-3.

28. *Id.*

29. A revised article 4 expressing its apparent purpose more clearly could read as follows: The parties may employ such legal representatives and legal assistants as they choose. A party's legal representative shall be deemed to be authorized to act before the arbitral tribunal on behalf of the party for all purposes of the case, and the acts of the representative shall be binding on the party.

Persons employed by a party to give legal assistance are not deemed to be authorized to act for or to bind the party, or to receive notices for the party. The names and addresses of the party's legal representatives and of persons employed to give legal assistance, if any, must be communicated in writing to the other party and to the members of the arbitral tribunal specifying whether the appointment is made for purposes of representation or assistance. Neither a representative nor other assistant need be licensed to practice law.

II. Composition of the Arbitral Tribunal

Arbitration is worth as much—or as little—as the arbitrators themselves.³⁰ How arbitrators are chosen, replaced, and challenged are among the most important issues in any set of procedural rules. Some basic principles are obvious. Arbitration is the product of agreement. The parties should be encouraged to agree on the appointment and replacement of their own arbitrators if at all possible. If the parties cannot agree, the decision should be made by an independent authority on whom the parties have agreed.

But what if the parties have not agreed on such an independent authority? In institutionally administered arbitrations the institution itself serves that role. The solution adopted by UNCITRAL for noninstitutional arbitrations was the naming of a universal designating authority, the Secretary-General of the Permanent Court of Arbitration in The Hague. The role of the Secretary-General is to designate an “appointing authority” to choose the arbitrators if the parties cannot agree on one.³¹

Providing one authority to name yet another authority to name the arbitrators is obviously a somewhat cumbersome procedure. UNCITRAL adopted it only after lengthy consideration of the possibility of directly naming a single world-wide appointing authority to choose the arbitrators.³² In the end, however, the two-step process was accepted as the only practical way to guarantee that an able and authoritative person or institution would be available if the parties could not agree on appointment of their arbitrators.³³ The assurance that such an authority would intervene, the drafters hoped, would provide the incentive for the parties to agree, if not on their arbitrators, then at least on someone to appoint their arbitrators.

The establishment of the Tribunal promised to test every aspect of the rules governing the composition of arbitral panels. The strained relations between the two countries, the appointment of one Iranian and one United States national to each of three arbitral panels, the size of the docket, and the probable length of the proceedings all guaranteed numerous arguments over how arbitrators should be appointed, challenged, and replaced. This expectation has been fulfilled. Over the past seven years,

30. See Glossner, *Sociological Aspects of International Commercial Arbitration*, in *THE ART OF ARBITRATION, ESSAYS ON INTERNATIONAL ARBITRATION* 143–44 (1982); Eisemann, *The Partisan Arbitrator*, in *INTERNATIONAL SEMINAR ON COMMERCIAL ARBITRATION* 37 (1968).

31. UNCITRAL RULES arts. 6(2), 7(2)(b), (3); see *infra* notes 42 & 45 (text of rules).

32. *Eighth Session Record*, *supra* note 1, SR.163, at 134–39; *Committee of the Whole II Summary*, *supra* note 1, SR.3 at 6–10; SR.4 at 4–7.

33. *Committee of the Whole II Report*, *supra* note 1, at 168.

twenty-three arbitrators have served on the nine-member Tribunal and the resulting appointments, resignations, and challenges have greatly tested the Rules.³⁴

The UNCITRAL Rules have responded admirably. Almost no changes were required to adapt the rules governing composition of a Tribunal to the Claims Settlement Declaration. And the prospect of intervention by an appointing authority has indeed produced some degree of agreement between Iran and the United States. Of the nine "third country" arbitrators so far appointed to the Tribunal, only two had to be named by an appointing authority.³⁵ With that said, the intense focus on this part of the UNCITRAL Rules has exposed some ambiguities and omissions that prevent the Rules from working as smoothly as one might wish.

A. NUMBER OF ARBITRATORS (ARTICLE 5)

The UNCITRAL Rules give the parties only two choices, either one arbitrator or three. Article 5 provides that if the parties cannot agree "on the number of arbitrators (i.e., one or three)," the Arbitral Tribunal is automatically composed of three arbitrators.³⁶

A panel of three arbitrators is an accepted practice in international arbitration, and under the UNCITRAL Rules is the default composition that applies if the parties do not agree to only one arbitrator.³⁷ Single-arbitrator proceedings are also common and are usually less expensive. On the other hand, as the nine-member Iran-United States Claims Tribunal itself demonstrates, arbitral panels even larger than three do occur from time to time.³⁸ Indeed, arbitral panels of more than three members have

34. *See infra* Part III.

35. *See infra* note 76 and accompanying text.

36. UNCITRAL RULES art. 5 states:

If the parties have not previously agreed on the number of arbitrators (i.e., one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

37. *Id.* *See Sanders, Commentary, supra* note 1, at 184.

38. Presidential Order No. 1 (Oct. 19, 1981), 1 IRAN-U.S. C.T.R. 95, IALR 3,809 (Nov. 6, 1981). *See TRIBUNAL RULES, supra* note 6, art. 5. The Claims Settlement Declaration, *supra* note 2, art. III, provides that the Tribunal will consist of nine members or such larger multiple of three as Iran and the United States may agree. Even after the appointment of the nine members, the United States and Iran entertained the idea of appointing as many as 30 members. *See Full Arbitration Tribunal Will Hold First Session July 1*, IALR 3,119 (June 19, 1981).

The Tribunal has three Chambers. Each Chamber is composed of an arbitrator appointed by Iran, an arbitrator appointed by the United States and a presiding arbitrator appointed by the other party-appointed arbitrators or an appointing authority. The third arbitrators have, as a practical matter, always been nationals of third countries, and are thus commonly referred to as "third-country" arbitrators, although nothing in the Rules or the Algiers Accords requires their nationality to differ from the parties. Claims Settlement Declaration,

a distinguished history going back at least as far as the *Alabama Claims* arbitration.³⁹

Although article 5 of the UNCITRAL Rules specifically gives parties the option of only "one or three" arbitrators, in a special situation, such as a dispute between States like the one giving rise to the present Tribunal, the parties are free to modify the rule to provide for a different number of arbitrators if they so desire.⁴⁰ If a different number is chosen, however, corresponding changes may have to be made in other articles of the Rules on the appointment of members.⁴¹

B. APPOINTMENT OF ARBITRATORS (ARTICLES 6–8)

1. *Appointment by Agreement of the Parties*

In an ideal case, the parties will choose the arbitrators without resort to an appointing authority. The UNCITRAL Rules provide fairly straightforward procedures for such appointments.

Article 6(1) provides that when the Tribunal is composed of one arbitrator, either party may propose to the other (1) the names of one or more persons to serve as the sole arbitrator, and (2) the names of one or more institutions or persons to serve as appointing authority, if no appointing authority has yet been agreed upon.⁴² The parties have thirty days after

supra note 2, art. III(1). *See infra* note 163. Most cases are handled by the Chambers, but where a case pending before a Chamber raises an important issue, or when the resolution of an issue might result in inconsistent decisions or awards by the Tribunal, the Chamber may relinquish jurisdiction in favor of the plenary Tribunal. A Chamber must relinquish jurisdiction in favor of the Full Tribunal when a majority for a decision or an award cannot be found within the Chamber. Presidential Order No. 1, *supra* note 28; Presidential Order No. 8 (Mar. 24, 1982), 1 IRAN-U.S. C.T.R. 97. Only the Full Tribunal has jurisdiction over interpretive disputes in relation to the General Declaration and the Claims Settlement Declaration. *Id.*

39. The *Alabama Claims* arbitration took place in 1871–72 before a five-member tribunal; two members were appointed by the disputing countries, the United States and the United Kingdom, while the remainder were appointed by the heads of state of Italy, Switzerland, and Brazil. *See* J. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION 8 (1959). Similarly, the recent arbitration between Egypt and Israel over the international boundary at Taba had a five-member tribunal: one member from each party and three other arbitrators from Sweden, Switzerland, and France. *See Israel Ordered to Return Taba Strip to Egypt*, 3 MEALY'S No. 10, at 3 (Oct. 1988); Summary of the Award of the Egypt-Israel Arbitration Tribunal (Sept. 29, 1988), *reprinted in id.* § A.

40. UNCITRAL RULES art. 1(1) (permitting modification to any provision of the Rules by agreement of the parties).

41. *See* UNCITRAL RULES arts. 6–7, which deal only with one (art. 6) or three (art. 7) members. On the other hand, if, as at the Tribunal, a larger arbitral panel consists of multiples of three, no corresponding changes may be necessary, as the present Rules may adequately be applied, *mutatis mutandis*. *See* Claims Settlement Declaration, *supra* note 2, art. III(2).

42. UNCITRAL RULES art. 6 states:

1. If a sole arbitrator is to be appointed, either party may propose to the other:
 - (a) The names of one or more persons, one of whom would serve as the sole arbitrator;
 - and

the receipt of the proposal to reach agreement upon the sole arbitrator, or an appointing authority, or both. If they fail to agree on the sole arbitrator, article 6(2) provides that the appointing authority will make the choice.⁴³ If the parties also fail to agree on the appointing authority the Secretary-General of the Permanent Court of Arbitration in The Hague, as designating authority, will choose an appointing authority to name the arbitrator.⁴⁴

When the panel is composed of three arbitrators, article 7(1) provides that each party is to appoint one arbitrator.⁴⁵ Appointment of the first arbitrator starts the running of a thirty-day period during which the opposing party must also name an arbitrator. If that party fails to do so, the appointing authority will appoint the second arbitrator. However the two party-appointed arbitrators are chosen, they have thirty days after the appointment of the second arbitrator to agree on the choice of a third arbitrator, who also fills the position of presiding arbitrator. If they fail

(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

43. *Id.*

44. *Id.*

45. *Id.* art. 7 states:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
 - (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
 - (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.
3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

to agree, the appointing authority appoints the presiding arbitrator upon the request of either party.⁴⁶

The Tribunal's experience with these rules, which it adopted without modification, demonstrates the importance of the appointing authority in encouraging agreement. The first group of "third-country" arbitrators, for example, was chosen by agreement among the United States and the Iranian arbitrators, but only after the United States had asked for the designation of an appointing authority on the grounds that the talks were deadlocked.⁴⁷ That pattern has been repeated subsequently, including the most recent selection of two new chairmen for Chambers One and Three. After two months of discussion between the two governments had proved fruitless, the United States asked Chief Justice Moons to name the new arbitrators. The parties continued, nevertheless, to attempt agreement, and two months later, just before the deadline, by which date Chief Justice Moons had promised to make his selection, the parties reached agreement, selecting Professor Gaetano Arangio-Ruiz of Italy and Professor Bengt Broms of Finland.⁴⁸

2. *Appointment by the Appointing Authority*

The need for an appointing authority can arise at many points during the course of an arbitration. In a single-arbitrator proceeding it may occur as soon as the parties try to pick the arbitrator. In a three-arbitrator proceeding, it may occur if the respondent refuses to name the second arbitrator or if no agreement can be reached on the third. Or it may arise out of the appointing authority's additional function as judge of challenges to arbitrators.

An appointing authority was first designated for the Tribunal when Iran challenged Judge Nils Mangård, a former Swedish court of appeals judge serving as chairman of Chamber Three.⁴⁹ Within two weeks of the challenge, the Secretary-General of the Permanent Court of Arbitration named Chief Justice Ch. M.J.A. Moons of the Netherlands Supreme Court as appointing authority.⁵⁰ The designation of an individual as appointing authority seemed perfectly sensible in the context of the Tribunal, and

46. *Id.* art. 7(1), (3). On the procedure for naming the appointing authority in such a case, see *infra* text accompanying notes 99–101.

47. Feldman, *supra* note 4, at 86. See generally *Full Arbitration Tribunal Will Hold First Session July 1*, IALR 3,118 (June 19, 1981); Selby & Stewart, *supra* note 4, at 213; 1983 IRAN-U.S. CLAIMS TRIBUNAL ANN. REP. 2.

48. *New Arbitrators Agreed Upon at 11th Hour*, 3 MEALY'S, Special Bull. (Nov. 11, 1988).

49. For further discussion of this challenge, see *infra* text accompanying notes 206–12.

50. See *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 509 (1982); *Iranian Quits Tribunal to Protest Mangård's Refusal to Resign*, IALR 4,234–35 (Feb. 19, 1982).

nothing in the UNCITRAL Rules prohibited such a designation. Indeed, the rules were written broadly to permit such a designation.⁵¹ Nonetheless, permitting individuals as opposed to institutions to serve in this capacity was a controversial point during the UNCITRAL drafting process,⁵² and the drafters of the UNCITRAL Rules expected that most appointing authorities would be institutions, not individuals.⁵³

The naming of Justice Moons as appointing authority is notable for the speed with which he was named, only two weeks after the challenge, and just five days after the United States requested the Secretary-General to name an appointing authority. Such expedition is by no means assured under the UNCITRAL Rules, which establish a complex and variable set of rules controlling when one party may end discussions with the other side and ask the Secretary-General to designate an appointing authority. Because the other rules on use of an appointing authority refer back to article 6, the rule for appointing a sole arbitrator, that is where we begin.

51. Article 6(1)(b) permits either party to nominate "one or more institutions or persons" as appointing authority. See also *Committee of the Whole II Report*, *supra* note 1, at 168.

52. Indeed, Chief Justice Moons's appointment gave rise to some confusion on this point. Upon his retirement in 1987 from the Netherlands Supreme Court, there was some question whether Chief Justice Moons would continue to be the Tribunal's appointing authority after his retirement or whether the responsibility would be transferred automatically to his successor as Chief Justice. Ultimately it was confirmed that the appointing authority was Chief Justice Moons personally and not the Netherlands Chief Justice.

53. The debate in the Committee of the Whole ran as follows:

30. *Mr. HOLTZMANN* (United States of America) said that in paragraph I(b) the words "or persons" had been put in brackets since the drafting group had been divided on whether it was better to specify that the appointing authority would be an institution rather than a person or to take a more flexible approach. Several members of the drafting group had considered that there were great advantages in providing that only institutions should be able to act as appointing authorities, for the sake of continuity and expertise; others had thought it preferable to provide for the possibility of a person acting as an appointing authority. Those who held the first view had pointed out that article I made a general provision for such modification as the parties might agree.

31. *Mr. ROEHRICH* (France) said his delegation felt that the Committee should leave open the possibility of persons acting as appointing authorities and should therefore remove the brackets in paragraph I(b).

32. *Mr. ST. JOHN* (Australia) supported that view. Although in many cases institutions might be best suited to be appointing authorities, the possibility of a person acting as an appointing authority should not be excluded.

33. *Mr. SZASZ* (Hungary) also considered that the brackets should be removed.

34. *The CHAIRMAN* said that there seemed to be a majority in favor of removing the brackets.

35. *Mr. STRAUS* (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) recalled that, when the Committee had discussed articles 33 and 34, some representatives had expressed reservations as to whether some of the tasks specified there could be carried out by persons.

Committee of the Whole II Summary, *supra* note 1, SR.15, at 4-5.

a. Appointment of a Sole Arbitrator

Article 6 provides that the process of naming a single arbitrator begins when one party proposes one or more names to the other.⁵⁴ At the same time, the party may propose to the other the name of an appointing authority, assuming none has been previously agreed upon.⁵⁵ The appointing authority plays the back-up role ordinarily played by the arbitral institution in cases arbitrated under their rules,⁵⁶ principally by choosing the arbitrator if the parties cannot agree. And, as discussed earlier, if the parties cannot even agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration chooses the authority.⁵⁷

Parties who deadlock on the choice of an arbitrator are given no extra time to choose an appointing authority. If no agreement is reached on an arbitrator within thirty days after the first party proposes names of possible arbitrators to the other, either party may ask the Secretary-General to name an appointing authority to choose the arbitrator.⁵⁸ Early drafts of the rules offered a separate period for discussion and possible agreement on an appointing authority.⁵⁹ But UNCITRAL ultimately merged the two periods into a single thirty-day period in order to simplify and accelerate the appointment process.

UNCITRAL did not intend, however, to abolish the opportunity for agreement on the choice of an appointing authority.⁶⁰ Instead, parties are expected to discuss both possible arbitrators and possible appointing authorities during the thirty-day agreement period. In fact, one expert on the UNCITRAL Rules contends that the thirty days do not begin to run until one party proposes *both* an arbitrator and an appointing authority.⁶¹

54. UNCITRAL RULES art. 6(1).

55. *Id.*

56. See, e.g., Gerald Aksen, *A Practical Guide to International Arbitration*, 1975 PRIVATE INVESTORS ABROAD 51, 62; see also, AAA RULES, *supra* note 21, R.12-14.

57. See *supra* text accompanying note 31.

58. UNCITRAL RULES art. 6(1).

59. *Report Preliminary Draft*, *supra* note 1, at 168; *Report Revised Draft*, *supra* note 1, at 161.

60. *Committee of the Whole II Report*, *supra* note 1, at 167.

61. Sanders, *supra* note 1, at 182. Whether Professor Sanders is right in this regard is open to question. While the text of article 6 favors his reading, it does not compel it. The *travaux préparatoires*, in contrast, seem to indicate that the proposal of either an arbitrator or an appointing authority starts the 30-day countdown. The Committee of the Whole reported to UNCITRAL that the final rules resulted from an agreement that this article should be restructured along the following lines:

- (a) Any party may propose to the other party the name of a person who would serve as the sole arbitrator *or* the name of an appointing authority which would make such an appointment;
- (b) Within 30 days from the receipt of the proposal by the other party the parties may agree either on the choice of the sole arbitrator or on the appointing authority;

b. Appointment of Three Arbitrators

The streamlined approach to designation of an appointing authority works less smoothly when three arbitrators must be named. Under article 7 the appointing authority may have to appoint both the second and the third arbitrators. If the second party fails to appoint an arbitrator within thirty days, the first party may immediately request the Secretary-General of the Permanent Court to designate an appointing authority, if no appointing authority has yet been agreed upon.⁶² The UNCITRAL Rules offer no opportunity for agreement on the appointing authority, and wisely so, for it would undoubtedly be a waste of time. A party who refuses to appoint his own arbitrator is unlikely to agree on a person or institution to appoint the arbitrator for him.

Once a second arbitrator is chosen, the two appointed arbitrators have thirty days to agree upon the choice of the presiding arbitrator.⁶³ If they fail, article 7 provides that "the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6."⁶⁴

Under article 6, the rule for appointing a sole arbitrator, the parties have a chance to agree on an appointing authority at the same time they are discussing possible arbitrators. But the parties to a three-member arbitration may have never discussed either possible arbitrators or possible appointing authorities before discovering that their arbitrators are deadlocked. How long must they discuss these choices before resorting to the Secretary-General? Thirty days is the only relevant time period

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- (c) If the parties fail to reach agreement within the prescribed 30 days, then resort will be had to the designating authority referred to in article 7, paragraph 4 of the Rules.

Committee of the Whole II Report, *supra* note 1, at 167-68 (emphasis added). The Chairman of the Committee of the Whole stated the same understanding at the meeting that provided the consensus:

29. The CHAIRMAN suggested that the question of the choice of institution could be dealt with in one paragraph which might state that, after notification of arbitration, either party might propose the name of the person who should act as arbitrator or an appointing authority, or both, and that if, after 30 days, no agreement was reached, the matter should be referred to the supreme international authority.

30. Mr. JENARD (Belgium) said that that solution was acceptable to his delegation.

31. The CHAIRMAN suggested that a small drafting group comprising the representatives of France, the Federal Republic of Germany and either the United Kingdom or the United States should be formed to draft an appropriate text.

32. It was so decided.

Committee of the Whole II Summary, *supra* note 1, SR.4, at 5 (emphasis added).

62. UNCITRAL RULES art. 7(2).

63. *Id.*

64. *Id.* art. 7(3).

stated in the Rules, but this period applies to agreement on both the arbitrator and the appointing authority.⁶⁵

The *travaux préparatoires* demonstrate that the drafters intended to give the parties no extra time to agree on an appointing authority.⁶⁶ Thus, the rules seem to require the parties to seek agreement on an appointing authority at the same time that the party-appointed arbitrators are seeking agreement on the presiding arbitrator. A problem arises if the parties do not know how the arbitrators' talks are proceeding before the thirty days have elapsed. Unless the parties know a deadlock is probable, they are unlikely to discuss seriously the choice of an appointing authority. Thus, while this provision of article 6 no doubt eliminates a potential for delay, it creates a need for each party's arbitrator to communicate to the parties the progress of discussions concerning the third arbitrator.⁶⁷ This is in fact the practice that has emerged from the Tribunal, where the party-appointed arbitrators have kept the agents of the United States and Iran informed of the progress of discussions concerning possible presiding arbitrators.

3. *Appointment Procedure Used by Appointing Authority*

a. Time Limits

Once an appointing authority is designated, article 6 permits either party to request the appointing authority to appoint the absent arbitrator.⁶⁸ Upon this request the appointing authority must act "as promptly as

65. *Id.* arts. 6(2), 7(3).

66. *See supra* note 59.

67. It also necessarily suggests that communications between the parties and the party-appointed arbitrators cannot be considered a breach of the arbitrators' duty of independence or an improper ex parte contact. Certainly party-appointed arbitrators have a duty to assemble all relevant information about potential presiding arbitrators, and the opinion of the parties on the matter should be considered both necessary and proper.

68. Article 8 of the UNCITRAL Rules requires the requesting party to provide the appointing authority with information about the arbitration, in order to "ensure that the appointing authority will have the information necessary to enable it to select an arbitrator qualified to deal with the dispute in question." *Report Revised Draft, supra* note 1, at 169.

Article 8 reads as follows:

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfill its function.
2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

UNCITRAL RULES art. 8.

possible.”⁶⁹ The UNCITRAL Rules explicitly provide that an appointing authority designated by the parties must appoint the sole arbitrator within sixty days of a party’s request.⁷⁰ In the case of a three-member panel, the appointing authority must appoint the second arbitrator within thirty days and, if required, the third arbitrator within sixty days.⁷¹ In each case, the failure of the appointing authority to meet the deadline permits either party to ask the Secretary-General to designate a new appointing authority.⁷²

The idea of placing a time clock on the appointing authority appeared late in the drafting process. On the second reading of the rules, a subcommittee draft was tabled that contained the thirty- and sixty-day periods.⁷³ The time limits were put in brackets because the subcommittee did not agree on the provision.⁷⁴ In a spirited discussion, the drafters emphasized that the deadline was “not a sanction against the appointing authority but a guide to parties so that they would know when to apply to the Secretary-General.”⁷⁵ The time limits were then adopted.

69. UNCITRAL RULES art. 6(2).

70. *Id.*

71. *Id.* arts. 6(2), 7(2)(b), 7(3).

72. *Id.* art. 6(2).

73. *Report of Drafting Group on Articles 7, 8 and 8bis*, U.N. Doc. A/CN.9/9/C.2/CRP.21 (1976), at 1–3.

74. *Id.*

75. The report of the debate in full is as follows:

36. *Mr. ROEHRICH* (France) and *Mr. PIRRUNG* (Federal Republic of Germany) said that the brackets in paragraph 2 should be removed; the time-limit was not a sanction against the appointing authority but a guide to parties so that they would know when to apply to the Secretary-General of the Permanent Court of Arbitration at The Hague.

37. *Mr. HOLTZMANN* (United States of America) said that his delegation strongly felt that it was unwise to set a time-limit. He knew of no arbitration rules, either institutional or *ad hoc*, which placed such a burden on the appointing authority without taking into account the circumstances of the case. Under the UNCITRAL arbitration rules the appointing authority could not fully control the time in which it could make an appointment; parties might, for example, delay in providing information requested from them, or there might be difficulty in finding arbitrators. The parties would then apply to the Secretary-General of the Permanent Court of Arbitration at The Hague, and the whole process would start all over again.

38. *Mr. SANDERS* (Special Consultant to the UNCITRAL secretariat) agreed with the United States representative and felt that the appointing authority should be left to carry out its task in a normal time.

39. *Mr. PIRRUNG* (Federal Republic of Germany), supported by *Mr. JENARD* (Belgium), said that there was a precedent for such a time-limit in the World Bank arbitration rules, which gave the President 30 days to appoint an arbitrator. The 60 day time-limit was a guide to parties as to when they should regard the appointment procedure as unsuccessful; a time-limit of 60 days had been specified because it had been thought that an appointing authority should be able to find an arbitrator within two months.

40. *Mr. MELIS* (Austria) favored a 30-day time-limit. Two months would represent an unnecessary delay.

In the process, however, the drafters committed a drafting oversight, failing to apply the time limit to an appointing authority designated by the Secretary-General to name a sole or presiding arbitrator. The time limit contained in article 6(2) applies by its terms only to an authority previously "agreed upon" and not to one designated by the Secretary-General. What happens in the event a "designated" appointing authority fails to act within sixty days? This is no hypothetical question. Chief Justice Moons, a designated appointing authority, was asked to name a successor for Judge Bellet on May 1, 1983. He ultimately appointed Judge Riphagen on July 13, 1983, more than 140 days after the United States' request.⁷⁶

Delays in naming arbitrators may be inevitable. Chief Justice Moons undoubtedly stayed his hand to encourage continued discussions among the United States and Iranian arbitrators. This action was quite proper; they had, after all, only managed to reach agreement on the first group of arbitrators several weeks after the United States asked that an appointing authority be designated.⁷⁷ But such reasons for delay will be common in arbitration, and in the Tribunal's case other factors were present that arguably promoted a speedier process of naming an arbitrator than might normally be expected. For example, the arbitrators, the parties' agents, the appointing authority, and the designating authority all had their offices within a few minutes walk of each other. This situation is unlikely to recur in future arbitrations.

The inevitability of delay may argue against imposing any deadlines on appointing authorities. But that is an argument for revising the rules. It does not mean that the Rules should be read narrowly to exempt "designated" appointing authorities from the deadlines. That would create more problems than it solves, for it would leave the parties in such cases with no right to revert to the Secretary-General, even when the appointing

41. *Mr. SZASZ* (Hungary) said that, if the appointing authority was a person, that individual could be delayed for one reason or another.

42. *Mr. HOLTZMANN* (United States of America) pointed out that, in the case of the World Bank, there was a panel of arbitrators to choose from and the disputes involved were confined to investment matters. The task of the President in appointing an arbitrator was therefore much easier.

43. *The CHAIRMAN* said that there appeared to be a majority in favor of removing the brackets.

Committee of the Whole II Summary, supra note 1, SR.15, at 5-6.

76. In 1984 Chief Justice Moons took 87 days (June 8 to September 3) to appoint President Lagergren's successor.

77. Indeed, no party indicated any dissatisfaction with the time consumed by Chief Justice Moons's efforts. There is no indication that anyone felt restrained by the lack of express authorization in the Rules from lodging a protest they otherwise wished to assert. Moreover, since both Judge Bellet and President Lagergren remained at the Tribunal until their successors were appointed, the delay and inconvenience to the parties the 60-day limit seeks to reduce was not an issue.

authority is utterly incapacitated or refuses to act.⁷⁸ The only reasonable reading of the UNCITRAL Rules is to treat the words "agreed upon" as a drafting error and apply the same standards to all appointing authorities, whether designated by the Secretary-General or agreed upon by the parties. This interpretation is consistent with article 7(2)(b), which speaks of the "appointing authority previously designated," whether by the parties or the Secretary-General, in applying the time limit imposed on the appointing authority for naming the second arbitrator.⁷⁹

As the Tribunal's experience shows, this interpretation does not mean that the appointing authority will be held to unreasonable deadlines. The Rules contain no penalty for exceeding the sixty-day limit unless one of the parties believes the delay is unjustified. Even then, the objecting party must ask the Secretary-General of the Permanent Court of Arbitration to name a new appointing authority.⁸⁰ The Secretary-General apparently has the discretion not to act immediately, as he is subject to no express deadline, and thus can respond flexibly if a party unjustifiably attempts to use the sixty-day deadline to oust an appointing authority.

b. The List Procedure

To appoint the second arbitrator of a three-member panel, the appointing authority simply uses its discretion.⁸¹ If the appointing authority must appoint the sole arbitrator or the presiding arbitrator, however, the UNCITRAL Rules encourage the use of a "list procedure."⁸² The procedure

78. This is not a hypothetical situation. In 1984, Chief Justice Moons recused himself from a challenge, apparently because the challenged arbitrator had insulted him during an earlier dispute. See *infra* text accompanying notes 66–68.

79. UNCITRAL RULES art. 7(2)(b).

80. *Id.* art. 6(2).

81. *Id.* art. 7(2)(b).

82. The list procedure is set forth in article 6(3):

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
 - (a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
 - (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
 - (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order or preference indicated by the parties;
 - (d) If for any reason the appointment cannot be made according to this

works like this: At the request of one of the parties the appointing authority gives both parties a list containing at least three names.⁸³ Within fifteen days after the receipt of the list each party must return the list to the appointing authority after deleting any names to which he objects and numbering the remaining names in order of preference.⁸⁴ Although the UNCITRAL Rules do not explicitly so state, it may be supposed that a party who does not return his list on time accepts all the names on the list.⁸⁵ The appointing authority then appoints the sole or presiding arbitrator from the list, taking into account the preferences of the parties.⁸⁶

The list procedure was borrowed from the rules of the American Arbitration Association,⁸⁷ and is similar to a procedure used by the Netherlands Arbitration Institute and the Inter-American Commercial Arbitration Commission.⁸⁸ Nevertheless, the idea was controversial from the commencement of the UNCITRAL drafting process,⁸⁹ and the provision was gradually diluted. The list procedure was mandatory in early drafts, but by the end of the drafting process the Rules provided that the procedure can be set aside if both parties agree or if "the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case."⁹⁰

Tribunal experience shows that this discretion is crucial to the functioning of the appointment process. In making his first appointment, Chief Justice Moons circulated a list.⁹¹ The United States and Iran between them managed to delete all of the names.⁹² Chief Justice Moons then turned to Judge Riphagen, whose name had not been listed.⁹³

procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

UNCITRAL RULES art. 6(3).

83. Even if it is the presiding arbitrator who is to be appointed, the list is given to the parties and not to the arbitrators. *Id.* arts. 6(3)(a), 7(3).

84. *Id.* art. 6(3)(b).

85. Article 6(3)(c) allows the appointing authority to appoint an arbitrator from "the lists returned to it." Thus, if a party has not returned its list, the appointing authority can rely only upon the list which was returned, and cannot consider any deletions sought by the party who did not return one. The American Arbitration Association's Commercial Arbitration Rules, from which the UNCITRAL list procedure was adapted, state this point clearly: "If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable." Rule 13, AAA RULES, *supra* note 21, R.13.

86. UNCITRAL RULES art. 6(3)(c).

87. *Report Preliminary Draft*, *supra* note 1, at 169; see AAA RULES, *supra* note 21, R.14.

88. *Report Revised Draft*, *supra* note 1, at 169.

89. *Report Discussion Preliminary Draft*, *supra* note 1, at 30.

90. UNCITRAL RULES art. 6(3).

91. *Tribunal Notes*, IALR 6,783 (July 1, 1983).

92. *Dutch International Law Expert Named to Replace Bellet*, IALR 6,849 (July 15, 1983).

93. *Id.*

The parties' action symbolizes an assumption that any arbitrator acceptable to one party is unacceptable to the other. As a result of these suspicions, United States and Iranian arbitrators soon become reluctant to propose any arbitrators formally for fear that any name proposed by one side would almost automatically be rejected by the other. Names on the Chief Justice's list were treated to equally strict scrutiny. Once a name had been rejected, whether the name was first proposed by the party-appointed arbitrators or by Chief Justice Moons, it became politically difficult to appoint that person to the Tribunal. Continued use of the list procedure could have quickly eliminated all of the most suitable candidates. Presumably it was for this reason that Chief Justice Moons announced in making his second appointment that use of the list procedure was not appropriate.⁹⁴

c. Length of Service of a Designated Appointing Authority

When Judge Bellet resigned from the Tribunal in 1983 and the arbitrators could not agree on his successor, the United States discovered to its surprise that Chief Justice Moons might not be the Tribunal's appointing authority, although the Chief Justice had been named the appointing authority in 1982 to decide Iran's challenge to Judge Mangård.⁹⁵ The UNCITRAL Rules are clear that when the parties agree on an appointing authority he continues to perform that function from then on. When the Secretary-General designates an appointing authority, however, the authority's role in later disputes may depend on when the authority was designated and what issue the authority was asked to decide.

Under article 6, if an arbitrator must be named and there is no "agreed upon" authority, either party has the right to request that the Secretary-General name an appointing authority.⁹⁶ Nothing in the language of article 6(2) requires the parties to pay any attention to the appointing authority who was previously designated by the Secretary-General. We have already noted that the words "agreed upon" in article 6(2) must be a mistake; the drafters simply overlooked the possibility that an appointing authority

94. The decline of the use of the list procedure continued in the most recent involvement of the appointing authority. In the appointment process for the successors to President Boeckstiegel and Judge Virally, Chief Justice Moons formally circulated a list with only two names and, rather than request that unacceptable names be stricken and the others listed in order of preference, merely invited comments from the parties. It was widely expected that neither of the proposed candidates would be acceptable to both parties, and in fact the party-appointed arbitrators and the appointing authority were at the same time actively considering other candidates. Judges Arangio-Ruiz and Broms, who were not on the list, were ultimately selected by agreement of the party-appointed arbitrators. *New Arbitrators Agreed Upon at 11th Hour*, 3 MEALY'S, Special Bull. (Nov. 11, 1988).

95. See *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 509 (1982).

96. UNCITRAL RULES art. 6(2).

might already be available who had not been "agreed upon." This error also draws into question the power of a designated appointing authority to continue in his role after making a single appointment.

It is just conceivable, however, that the drafters intended this odd result. As discussed in greater length below, article 12(1) provides that an appointing authority previously named (apparently for any purpose) is to decide any subsequent challenge,⁹⁷ and article 12(2) provides that the appointing authority who sustains a challenge is also to break any deadlock over the challenged arbitrator's successor.⁹⁸ For example, if after his designation Chief Justice Moons had heard and sustained the challenge to Judge Mangård, he would have been specifically authorized by article 12(2) to choose Judge Mangård's successor (assuming the parties' arbitrators reached an impasse). Under article 12(1)(b) he would also have been specifically authorized to rule on a later challenge to another arbitrator. In contrast, article 6(2) provides no authorization for him to choose the replacement for a resigning arbitrator such as Judge Bellet. Thus, the specificity of the provisions in article 12 may suggest that the silence of article 6 is deliberate.⁹⁹

More likely, however, the lack of specificity in article 6 arises out of the expectation that normally an appointing authority will be chosen to name an arbitrator before an authority is chosen to deal with a challenge and that it would be highly unusual for the appointing authority to name two presiding or sole arbitrators in a single arbitration. The Tribunal, with its multiple chambers and thousands of cases over several years, falls outside this expectation.

97. *Id.* art. 12(1)(b).

98. *Id.* art. 12(2).

99. The *travaux préparatoires* look in the same direction. The drafters of article 12 seem to have believed that a designated appointing authority must have its mandate renewed in order to act as the appointing authority in later stages of the arbitration. The following colloquy in the Committee of the Whole seems to have raised the issue quite directly:

27. Mr. PIRRUNG (Federal Republic of Germany) said that he did not think it necessary to include the exception made at the end of article 12, paragraph 2 (providing that the authority deciding a challenge shall name the successor).

28. The CHAIRMAN said that that phrase was designed to avoid recourse to the Secretary-General of the Permanent Court of Arbitration at The Hague.

29. Professor SANDERS (Special Consultant to the UNCITRAL secretariat) confirmed that the phrase had been included so as to avoid a lengthy procedure. Its inclusion was, moreover, explained in the commentary.

Committee of the Whole II Summary, supra note 1, SR. 5, at 4–5. The commentary mentioned by Professor Sanders states:

With the object of preventing delay in the course of the arbitral proceedings, this paragraph modifies the procedures applicable under article [6 or 7] by providing that, where such procedures would require the designation of an appointing authority for the appointment of an arbitrator, the appointing authority which decided on the challenge under paragraph 1 shall make the appointment.

Report Revised Draft, supra note 1, at 171.

Whether it was deliberate or not, the possibility of having to rename an appointing authority for each decision does not make much sense, and this ambiguity should be eliminated in any future revision of the Rules. For the time being, however, the Secretary-General of the Permanent Court of Arbitration has found a way to live with the problem. While the United States believed that Chief Justice Moons should be considered the appointing authority for all Tribunal issues, it cautiously asked the Secretary-General to designate (or redesignate) an appointing authority to name Judge Bellet's successor. The Secretary-General named Chief Justice Moons a second time and declared that Moons would be the appointing authority for all future purposes.¹⁰⁰ Because the Secretary-General has the power to designate the same appointing authority time after time, this "continuing" designation appears to be within his power as well, even though the rules do not expressly provide for such action.

Naming a permanent appointing authority does not seriously impair party autonomy or the opportunity for parties to agree on their appointing authority. Even after a continuing designation, the parties may still agree on another appointing authority, although only if both are dissatisfied.¹⁰¹ The knowledge that an appointing authority designated by the Secretary-General will continue to act in that capacity for all decisions may increase the parties' incentive to reach agreement on an appointing authority in the first instance. If the parties fail to agree then, chances are not bright that they will succeed later on. Consequently, it seems unnecessary to sacrifice the goal of swift arbitration in order to provide numerous opportunities for party agreement by repeatedly sending the parties back to the Secretary-General. The UNCITRAL provisions thus may profitably be revised to specify that the appointing authority designated will serve for all purposes.¹⁰²

4. *Recusal of the Appointing Authority*

Among the more curious questions raised by the Iran-United States arbitration is this: When should an appointing authority recuse himself, that is, refuse to act in a matter because his impartiality is questioned?

100. *Tribunal Notes*, IALR 6,448 (May 6, 1983).

101. Iran has complained about this consequence. See Letter from Judge Kashani to Chief Justice Moons dated July 17, 1984, IALR 9,362 (Sept. 28, 1984) [hereinafter *Kashani Letter*].

102. Because articles 11, 12, and 13 all incorporate the methods for choosing arbitrators set out in articles 6-9, the problem could perhaps best be solved by adding a new provision to the end of articles 6(2) and 7(2)(b):

In the absence of a statement by the Secretary-General or agreement by the parties to the contrary, the person or institution designated as the Appointing Authority by the Secretary-General will continue to act as such for all purposes during the arbitral proceedings.

The question is not academic; Chief Justice Moons in fact recused himself from a challenge to a Tribunal arbitrator.

The facts are these: After rejecting Iran's challenge to Judge Mangård, Chief Justice Moons was drawn into a brief but extraordinary correspondence with the apparent spokesman for the Iranian arbitrators, Judge Mahmoud Kashani.¹⁰³ In the course of the exchange, Judge Kashani questioned Chief Justice Moons's impartiality in strident and insulting terms: "[Y]ou have assured the interests of the United States of America to the greatest possible degree and [your actions] have resulted in the appointment of certain imposed arbitrators upon this international Tribunal."¹⁰⁴ Two months later, Judge Kashani was himself challenged for conduct inconsistent with his status as an arbitrator.¹⁰⁵ Chief Justice Moons was asked to rule on the challenge. He demurred, no doubt believing that Judge Kashani's earlier personal insults might give rise to concerns about the Chief Justice's impartiality.¹⁰⁶

The challenge never progressed beyond this point. The Iranian Government shortly replaced Judge Kashani, making the challenge moot.¹⁰⁷ Yet the Chief Justice's action raises hard questions under the Rules. Before discussing them it is worth noting, that for two reasons, these questions will more likely arise in ad hoc arbitrations than in administered arbitrations for two reasons. First, in virtually every administered arbitration the parties must acknowledge that they at one time accepted the impartiality of the institutional body. This prior acceptance makes the notion of recusal alien to the world of administered arbitration, and indeed arguably a violation of the principle of party autonomy. Second, an institution engaged in the administration of arbitrations can be expected to have a thick institutional skin, and to be capable of weathering an attack, even one as vituperative as Judge Kashani's, without raising doubts as to its continued impartiality. Certainly this reason supports the view expressed during UNCITRAL's *travaux préparatoires* that individuals should rarely act as appointing authorities.¹⁰⁸

But in ad hoc arbitration, the UNCITRAL Rules selection mechanism functions in such a manner that the parties may end up with an appointing authority they never agreed to, perhaps even an individual, who is far

103. *Kashani Letter*, *supra* note 101, at 9,362-73.

104. *Id.*

105. The challenge was based on his physical attack and threats on Judge Mangård. See *infra* text accompanying notes 142-47.

106. *U.S. Challenges Iranian Arbitrators, Appointing Authority Moons Steps Down*, IALR 9,271 (Sept. 28, 1984).

107. *Tehran Court Judge, Head of BILS Likely to Succeed Kashani, Shafeiei*, IALR 9,505 (Oct. 26, 1984).

108. *Committee of the Whole II Summary*, *supra* note 1, SR. 15, at 4-5.

more likely than an institution to have the sort of business or family ties that could raise questions of impartiality. There seems to be no doubt that an appointing authority may recuse itself. The Rules take note of the possibility that an appointing authority may not just "fail" to act but may actually "refuse [] to act."¹⁰⁹ In that event, the Secretary-General designates another appointing authority.¹¹⁰ The real question is when, if ever, an appointing authority *should* refuse to act.

The Rules offer no standards. This fact, combined with the practice of most administering authorities, suggests that recusals should be vanishingly rare. It is difficult to imagine circumstances warranting recusal by an appointed institution that the Secretary-General has deemed capable of acting impartially. Without attempting to pass judgment on the delicate issues involved in Chief Justice Moons's recusal, it seems that individuals acting as appointing authorities in normal commercial arbitration also should be extraordinarily reluctant to force the parties to seek the designation of another appointing authority. At the very least, making recusals a common practice would create the incentive to insult appointing authorities.

As a practical matter, the rules governing arbitrator recusal offer some guidance for recusal by the appointing authority, although the rules should be narrowly construed.¹¹¹ For example, where the parties have agreed on an appointing authority, he should recuse himself only if the circumstances giving rise to the issue were unknown to the affected party at the time of the designation. The narrow issue should be whether circumstances have arisen that raise justifiable doubts about the authority's impartiality or independence in the specific task of appointing or removing an arbitrator.

5. *Designation of the Appointing Authority*

The events described above reveal that the Secretary-General of the Permanent Court of Arbitration has played an important role in Tribunal matters. The Secretary-General was called upon to designate an appointing authority and then to redesignate the authority when questions arose about the continuing force of the first designation. Action was almost required a third time when Chief Justice Moons recused himself.

Perhaps because of these events, the role of the Secretary-General has been challenged by the Iranian arbitrators. Judge Kashani accused the Secretary-General of a conflict of interest between his duty to be impartial and independent and his connection to the Dutch Ministry of Foreign

109. UNCITRAL RULES arts. 6(2), 7(2)(b).

110. *Id.*

111. *Id.* arts. 10, 11; *see infra* text accompanying notes 154-61.

Affairs, which Judge Kashani derived from the structure of the Permanent Court of Arbitration:

The Dutch Foreign Minister or his deputy convenes and presides over the Court's Administrative Council; moreover, the Secretary-General, who has no duties of consequence, is in practice selected from among the diplomatic corps of the Dutch Foreign Ministry. In accordance with Article 9 of the Bylaws of the Administrative Council, the Secretary-General is directly responsible to the Dutch Foreign Minister.¹¹²

According to Judge Kashani, this structure meant that the Secretary-General necessarily serves the interests of the Netherlands and, by extension, the interests of the United States and its nationals because of the friendship between the United States and the Netherlands.¹¹³

Judge Kashani's charges have a superficial basis in fact but are not entirely accurate. The signatories of the two conventions creating the Court of Permanent Arbitration also created a Permanent Administrative Council for the Court.¹¹⁴ The Administrative Council is comprised of the signatories' diplomatic representatives to The Hague, and its President is indeed the Dutch Minister of Foreign Affairs.¹¹⁵ The Administrative Council meets once or twice a year to oversee the administrative affairs of the Permanent Court of Arbitration,¹¹⁶ which are carried out by a small International Bureau.¹¹⁷ Although the two conventions creating the Court are silent about the staffing of the International Bureau, the Administrative Council's internal rules, adopted in 1900, declare that the head of the International Bureau is the Court's Secretary-General.¹¹⁸ The Secretary-General is appointed and directed by the Administrative Council.¹¹⁹ He receives orders through the Council's President, who is, it is true, the Dutch Minister of Foreign Affairs.¹²⁰ The Secretary-General's responsibility plainly runs to the entire Council, however, not just to its President, and as an international civil servant (a concept well developed by the International Court of Justice and the U.N. Charter), his primary loyalties are to the international organization he serves, not to his own government.¹²¹

Contrary to Judge Kashani's suggestion, the Secretary-General is not always selected from the Dutch diplomatic corps, although it is true that

112. *Kashani Letter*, *supra* note 101, at 9,362; 9,365 n.3; 9,372.

113. *Id.* at 9,366-72.

114. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, art. 49, 54 L.N.T.S. 435, U.S.T.S. 536, 36 Stat. 2199. International Convention for the Pacific Settlement of International Disputes, July 29, 1899, art. 28, U.S.T.S. 392, 32 Stat. 1779.

115. *Id.*

116. *Id.*

117. *Id.*

118. Règlement d'Ordre du Conseil Administratif, Sept. 19, 1900, art. 8.

119. *Id.*

120. *Id.*

121. *Id.* art. 9.

all nine Secretaries-General have been Dutch nationals, and most have had a close previous connection to the Dutch Government. According to the current Secretary-General:

Of the nine Secretaries-General who have been appointed so far by the Administrative Council, three were former Secretaries-General of the Netherlands Ministry of Foreign Affairs, one has held the function of First Secretary of the Permanent Court, one was a former legal adviser of the Ministry of Foreign Affairs, two were former members of the Netherlands Parliament and the remaining two (including myself) were retired officials of the Netherlands Foreign Service.¹²²

Complete impartiality and independence are, of course, the standards of conduct for any Secretary-General, and past ties to the Dutch Government could not properly influence a Secretary-General in carrying out his duties as designating authority.

It is worth noting in this context that the discussions on the draft UNCITRAL Rules provoked some criticism of the Secretary-General as "authority of last resort." Some critics believed that the Permanent Court of Arbitration lacked sufficient experience in the practice of commercial arbitration and did not have a universal character.¹²³ Right up to the final draft, the UNCITRAL Rules gave the parties a choice between the Secretary-General and another body to be established under United Nations' auspices.¹²⁴ The Commission deleted this option because it expected infrequent recourse to the authority of last resort and consequently the creation of a special United Nations body was not necessary.¹²⁵ The Commission also considered that involvement by a United Nations body, like UNCITRAL itself, in individual disputes would not be appropriate.¹²⁶

Plainly there is a risk that unhappiness with the results of an arbitration will lead to unhappiness with the appointing authority and eventually to unhappiness with the designating authority. Judge Kashani's charges emphasize the delicacy and importance of the Secretary-General's role. The tradition of choosing a Secretary-General who has served in the Dutch Government suggests that the Secretary-General exercise particular care when designating appointing authorities in cases affecting the Netherlands.¹²⁷

122. Letter from J. Varekamp to S. A. Baker (Feb. 10, 1986).

123. *Report Discussion Preliminary Draft*, *supra* note 1, at 26.

124. *Report Revised Draft*, *supra* note 1, at 161.

125. *Committee of the Whole II Report*, *supra* note 1, at 168.

126. *Eighth Session Record*, *supra* note 1, SR.163, at 143-44.

127. Certainly the Secretary-General will wish to bear in mind the suggestion of article 6(4): "In making the appointment, the appointing authority . . . shall take into account . . . the advisability of appointing an arbitrator of a nationality other than the nationality of the parties." UNCITRAL RULES. By the same token, a Dutch national should rarely be designated appointing authority when only one arbitrating party is a Dutch national.

The Tribunal, however, does not even adjudicate cases affecting the Netherlands.¹²⁸ Moreover, Iran and the United States agreed to arbitrate in the Netherlands, so they could hardly be surprised at having a distinguished Dutch jurist as the appointing authority.

While it might at some point be appropriate to evaluate the role of the Secretary-General in designating appointing authorities, in light of experience, one thing is clear: Offering a choice of designating authorities would be a disaster. Parties seeking an edge over their opponent would pore over the past designations of each, hoping to find and exploit differences between the two. This opportunity would encourage generalizations and assumptions of bias that would eventually undercut the reputation of both bodies. Having two possible bodies would also encourage confusion and a "race to the courthouse" whenever an appointing authority became necessary. In the Tribunal, for example, it is easy to imagine both parties asking different authorities to rule on the Mangård challenge or the Bellet replacement.¹²⁹ Rules would then be necessary to decide which body should act in such circumstances. If an early request to one authority gives that party priority, parties seeking an advantage would rush to their preferred body as early as possible, without taking time to try to agree on an appointing authority. No more pointless source of arbitral delay and dispute can be imagined.

If any practical lesson is to be learned from past experience, it is that the prior designation by the parties of an appointing authority in the original arbitration agreement (as encouraged in the UNCITRAL Model Arbitration Clause) is a wise course of action. Agreement while relations are still amicable can prevent considerable bickering later.

III. Challenge and Replacement of Arbitrators

Articles 9 to 14 deal with the method by which arbitrators may be changed in the course of the arbitration. Articles 9 to 12 provide for and regulate challenges. Article 13 governs resignation, death, and removal for failure or inability to act. Article 14 provides rules for the repetition of hearings after the replacement of an arbitrator.

A. GROUNDS FOR A CHALLENGE (ARTICLES 9–10)

1. *Tribunal Experience*

In a Tribunal expected to last at least a decade and to decide several hundred cases, the rules for replacement of arbitrators were bound to be

128. The Netherlands might be affected by Tribunal decisions only in the limited and indirect sense that as a NATO Alliance partner some decisions concerning disputed sales of U.S. military equipment to Iran might bear some tenuous relationship to Dutch interests.

129. See *supra* text at note 76.

invoked fairly often. As discussed earlier, with twenty-three arbitrators having filled the nine seats, there has been a substantial turnover among the arbitrators. But the questions arising under articles 9 to 14 have been far more novel than anyone could have predicted.

On January 1, 1982, before the Tribunal had ever begun hearing claims, Iran challenged Judge Mangård, one of the three "third-country" arbitrators Iran's own arbitrators had agreed to six months earlier, alleging that he was not "neutral."¹³⁰ This challenge was not sustained, but thereafter the first group of arbitrators named by Iran carried on a vehement campaign against the Tribunal, whose awards they deplored. In 1983, for example, as the Tribunal began issuing some of its first contested awards, Judge Sani and Judge Shafeiei refused to sign the awards.¹³¹ Both Iranian arbitrators issued public explanations disclosing previously confidential details about the Tribunal's deliberations and claiming that they were not allowed full participation in the process. Judge Sani's claim that he was not present at the deliberations and that the other two judges in Chamber Three had acted without consulting him provoked the American arbitrator, Richard Mosk, to issue statements of his own pointing out that Judge Sani had chosen not to participate in deliberations. Between them, Judges Mosk and Sani provided a blow-by-blow account of the panel's deliberative process.¹³²

In May 1983, accusations surfaced of even more egregious breaches of the confidentiality of Tribunal deliberations. An Iranian arbitrator appar-

130. The facts relating to the challenge are disclosed in *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 111 (1982), which is the decision of the Full Tribunal finding that Iran's challenge had to be dealt with by an appointing authority pursuant to the UNCITRAL Rules, and in *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 509 (1982), which is the decision of the appointing authority rejecting the challenge.

131. See *Granite State Mach. Co. v. Iran*, Award No. 18-30-3, 1 IRAN-U.S. C.T.R. 452 (1983) (Opinion of Judge Jahangir Sani); *id.* at 449 (Concurring Opinion of Richard M. Mosk); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3, 1 IRAN-U.S. C.T.R. 415 (1983) (Mr. Jahangir Sani's Reasons for Not Signing); *id.* at 424 (Comments of Richard M. Mosk); *id.* at 428 (Mr. Jahangir Sani's Reply); *Rexnord, Inc. v. Iran*, Award No. 21-132-3, 2 IRAN-U.S. C.T.R. 14 (1983) (Mr. Jahangir Sani's Reasons for Not Signing); *id.* at 27 (Concurring Opinion of Richard M. Mosk); *Chas. T. Main Int'l, Inc. v. Mahab Consulting Eng'rs*, Award No. 70-185-3, 3 IRAN-U.S. C.T.R. 270, 276 (1983) (Explanation for Failure of Judge Sani to Sign Awards); *id.* at 124 (Dr. Shafeiei's Reasons for Not Signing Awards); *id.* at 145 (Comments of George H. Aldrich on J. Shafeiei's Reasons for Non-Signature of Awards in the following cases: *Nat'l Airmotive Corp. v. Iran*, Award No. 58-449-3, 3 IRAN-U.S. C.T.R. 91 (1983); *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, Award No. 59-220-2, 3 IRAN-U.S. C.T.R. 110 (1983); *Reynolds Metal Co. v. Iran*, Award No. 60-83-2, 3 IRAN-U.S. C.T.R. 119 (1983); *Gruen Assocs., Inc. v. Iran Hous. Co.*, Award No. 61-188-2, 3 IRAN-U.S. C.T.R. 97 (1983)), see also *Shafeiei Absence—Iran Protests Chamber 2 Actions to Dutch Court*, IALR 6,905 (Aug. 5, 1983); *Shafeiei Protests Chamber 2 Awards Made Without Him*, IALR 7,038 (Aug. 19, 1983); *Sani Resigns, Raising Questions Over Future Chamber Proceedings*, IALR 7,037-38 (Aug. 19, 1983).

132. See cases cited *supra* note 131; see generally *Iran, U.S. Arbitrators Dispute Awards Procedures*, IALR 6,452-54 (May 6, 1983).

ently revealed to an Iranian party the amount and reasoning of a draft award against the Iranian party. Not surprisingly, the Iranian party immediately entered into an "eleventh hour" settlement with the claimant.¹³³ At much the same time, another Iranian arbitrator apparently encouraged an Iranian party to submit evidence after the close of the hearings in order to satisfy questions raised during deliberations.¹³⁴

In July 1983, Judge Shafeiei left The Hague while several awards were pending in Chamber Two.¹³⁵ The Chairman of Chamber Two, Judge Bellet, was scheduled to retire on July 31, 1983, and the Tribunal's President had issued an order in June requiring Chamber Two to stay in session until that date.¹³⁶ Judge Shafeiei's absence could have crippled the Chamber. If the awards under consideration were not issued by July 31, there was every reason to believe that Judge Bellet would be unable to sign them, and hearings would presumably have to be repeated for the new presiding arbitrator.¹³⁷ The Chamber ultimately solved the problem by issuing four awards without Judge Shafeiei's signature.¹³⁸

Then, in August 1983, Judge Sani resigned from Chamber Three suddenly and without notice.¹³⁹ His resignation was communicated to the Tribunal by the Government of Iran. Delays in designating a successor could have caused months of inactivity in the Chamber. The Tribunal voted not to accept the resignation until Iran named a successor.¹⁴⁰ Iran finally did so, but several awards were issued in the interim without Judge Sani's signature.¹⁴¹ During this entire period the Iranian judges made no attempt in their dissenting opinions to disguise the contempt in which they held the other arbitrators and the Tribunal staff.

133. *ITT Indus. Inc. v. Iran*, Award No. 47-156-2, 2 IRAN-U.S. C.T.R. 348, 356-58 (1983); *see Rexnord, Inc. v. Iran*, Award No. 21-132-3, 2 IRAN-U.S. C.T.R. 14, 28 n.3 (1983) (comments of Judge Mosk implying that respondents initiated settlement upon Judge Sani's recommendations after the decision in the case was made but before it was published).

134. *Ultrasystems, Inc. v. Iran*, Award No. 27-84-3, 2 IRAN-U.S. C.T.R. 114, 121-23 (1983) (Mosk, J., concurring) (telexes were sent to Tribunal by Iranian bank just before final deliberations, admittedly at request of Iranian arbitrator). *See Tribunal Notes*, IALR 6,703 (June 17, 1983).

135. *Iran Protests Chamber 2 Actions to Dutch Court*, IALR 6,905 (Aug. 5, 1983).

136. Presidential Order No. 10 (June 15, 1983).

137. TRIBUNAL RULES, *supra* note 6, art. 14; *see infra* text at note 236.

138. *See Nat'l Airmotive Corp. v. Iran*, Award No. 58-449-3, 3 IRAN-U.S. C.T.R. 91 (1983); *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, Award No. 59-220-2, 3 IRAN-U.S. C.T.R. 110 (1983); *Reynolds Metal Co. v. Iran*, Award No. 60-83-2, 3 IRAN-U.S. C.T.R. 119 (1983); *Gruen Assocs., Inc. v. Iran Hous. Co.*, Award No. 61-188-2, 3 IRAN-U.S. C.T.R. 97 (1983). *See also* Comments of George H. Aldrich, *supra* note 131, 3 IRAN-U.S. C.T.R. at 146.

139. *Sani Resigns, Raising Questions Over Future of Chamber Proceedings*, IALR 7,037 (Aug. 19, 1983).

140. *Iran Appoints Successor to Replace Sani*, IALR 7,155 (Sept. 16, 1983).

141. *See Chamber 3 Hands Down Five Arbitral Awards Without Sani*, IALR 7,156 (Sept. 16, 1983); *see also* cases cited *supra* note 131.

One year later, in September 1984, came the most remarkable event of all. The agent of the United States gave an eyewitness account of an attack on Judge Mangård that has never been contested. It deserves extensive quotation:

The attack took place at approximately 9:30 a.m. Witnesses reported that Mr. Kashani and Mr. Shafeiei appeared to be waiting for Mr. Mangård as he descended the Tribunal stairs on his way to the scheduled meeting [at which Mr. Mangård was expected to be named acting President]. When he walked within their reach, they began to yell at him, grabbed him, and began to force him towards the Tribunal's main door. Mr. Mangård was shoved down the hall almost to the Tribunal's door. Mr. Kashani held Mr. Mangård at the throat by the necktie and was twisting the necktie and shaking his victim. The attackers were continuing to shove Mr. Mangård toward the door. The U.S. Agent joined others who were trying to release Mr. Kashani's grip from Mr. Mangård's neck. According to observers, Mr. Shafeiei was beating Mr. Mangård on the back with his fists.

Several others present, including several Iranian attorneys and staff members, also intervened to release Mr. Kashani's hold at Mr. Mangård's throat and to separate Mr. Mangård from his attackers. Several Iranians then physically restrained Messrs. Kashani and Shafeiei. The two continued to shout and make threatening gestures and to block Mr. Mangård's access to the main hall of the Tribunal building. For Mr. Mangård's personal safety, he was rushed into an adjacent small room occupied by the Tribunal's telephone operator. Messrs. Kashani and Shafeiei remained by the telephone room door, and several persons, including the Deputy Agent of the United States, stood between them and the door until the police arrived to assume the protection of Mr. Mangård.

When the police arrived, Mr. Kashani began shouting and made emphatic gestures in an attempt to prevent their entry. Mr. Kashani's Iranian colleagues again restrained him. The police then tried to escort Mr. Mangård out of the telephone room. When Mr. Mangård came out of the room into the view of Mr. Kashani and Mr. Shafeiei, they resumed shouting that Mr. Mangård could not enter the Tribunal and that they would not permit him to go anywhere but outside the building. Mr. Shafeiei again physically assaulted Mr. Mangård, flailing at him with fists as Tribunal staff members and the U.S. Deputy Agent stood between them attempting to deflect the blows.

In the face of this sustained attack, Mr. Mangård left the Tribunal building under police escort and stood outside for a time. The two attacking Iranian Arbitrators remained in the entry foyer. They shouted that they would not permit Mr. Mangård's safe reentry and intended to renew their physical assault upon him if he attempted to reenter the building.¹⁴²

Although Judge Mangård stated his wish to reenter the Tribunal building, President Lagergren would not permit his return, stating that he could not ensure his safety. Instead, he sent Judge Mangård home and allowed Mangård's two attackers to stay. From the Tribunal offices, Judge Kashani

142. Memorandum to Chief Justice Moons by John R. Crook (Sept. 17, 1984), IALR 9,344-45 (Sept. 28, 1984). See also *Iranian Arbitrators Attack Mangård*, IALR 9,170 (Sept. 5, 1984); *Hostilities Threaten Future of Tribunal on U.S.-Iran Claims*, Washington Post, Oct. 3, 1984, Sec. A, at 23; *Slow Pace for Iran Claims*, N.Y. Times, Nov. 14, 1984, Sec. D, at 1, col. 3.

issued continuing threats against Judge Mangård: "[I]f Mangård ever dares to enter the Tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs."¹⁴³

These threats had their intended effect. President Lagergren "postpone[d] all proceedings" until further notice,¹⁴⁴ leaving Mangård outside and Kashani and Shafeiei inside the Tribunal. Work was halted until December 1984.¹⁴⁵

In the end, the crisis was resolved not by the Tribunal but by the two nations. The United States challenged both Iranian judges,¹⁴⁶ and not long thereafter Iran withdrew them.¹⁴⁷ Iran eventually named two new arbitrators, and Judge Mangård returned to hear and decide several more cases. He stepped down from full-time duties in April 1985 at the age of seventy, but he continued to work on cases he had heard during his tenure, finally completing his Tribunal duties in July 1987.¹⁴⁸

Less dramatic circumstances have also tested the Rules' challenge procedures at the Tribunal. For example, Iran considered, but ultimately did not press, a challenge to the appointment of Judge Virally as Chairman of Chamber Three because of past relationships with claimants in Chamber Three.¹⁴⁹ Iran also considered challenges of American arbitrator Charles N. Brower.¹⁵⁰

143. Quoted from Memorandum to Chief Justice Moons, *supra* note 142, IALR 9,345. Kashani's written statements were less strident but equally unrepentant. In a memo to President Lagergren issued three days after the attack, the Iranian arbitrators seemed to justify the attack by suggesting that Judge Mangård had improperly allied himself with the United States: "So long as the jointly-appointed presiding arbitrators are devoid of independence and neutrality and fail to enjoy the consent of one of the two Parties, the other Party should not nurture the expectation that attaining its objectives will be unattended by apprehension and anxiety." *Id.* at 9,346.

144. Presidential Order No. 27 (Sept. 5, 1984), IALR 9,354 (Sept. 28, 1984); *see also* Presidential Order No. 28 (Sept. 13, 1984) (continuing the shutdown), and No. 29 (Sept. 19, 1984) (extending the shutdown and setting up a special chamber to deal with awards on agreed terms only), IALR 9,354 (Sept. 28, 1984).

145. In addition, the meeting at which Judge Mangård was to be named acting President of the Tribunal was never held and, needless to say, Judge Mangård was never appointed to that position.

146. *U.S. Challenges Iranian Arbitrators*, IALR 9,271, 9,343 (Sept. 28, 1984).

147. *Tehran Court Judge, Head of BILS Likely to Succeed Kashani, Shafeiei*, IALR 9,505 (Oct. 26, 1984).

148. *See Sedco, Inc. v. National Iranian Oil Co.*, Award No. 309-129-3, 15 IRAN-U.S. C.T.R. 23 (1987).

149. Upon his appointment Judge Virally disclosed that he had previously been retained as an independent legal expert in two separate arbitrations to write an opinion of legal issues for two U.S. oil companies affiliated with claimants, Mobil Oil Corporation and Aminoil, whose cases were pending in Chamber Three. Letter of Mr. Virally to President Boeckstiegel, April 22, 1985. President Boeckstiegel set a deadline for objection of June 28, 1985. Iran requested, but was not given, an extension to that date, and ultimately raised no challenge. *See* Letters of President Boeckstiegel to the Agents dated July 3, 1985, and July 12, 1985.

150. Upon Judge Brower's original appointment as substitute arbitrator, Iran raised the issue of his former law firm's relationship with several Tribunal claimants, but made no

In late 1988 Iran carried through with a second challenge to a third-country arbitrator. On September 13, 1988, Iran challenged Judge Robert Briner, Chairman of Chamber Two, alleging that it had just learned that Judge Briner had until recently been a director and member of the board of a subsidiary of the international investment banking firm Morgan Stanley & Co., employees of which had been important witnesses for the claimant in a case already heard by the Chamber, but not yet decided. Iran asserted that Judge Briner's professional connections with the subsidiary of the corporate employer of the witness in a case, as well as his failure to disclose that relationship to the parties, required his disqualification as to that particular case.¹⁵¹

Judge Briner denied any impropriety and refused to accept the challenge. Judge Briner stated his belief that there could be no conflict of interest or duty of disclosure because the subsidiary at issue was an inactive shell with no office or staff, because his position was largely titular and involved no contact with the entity or any of the individuals involved in the cases, because he took steps to resign his position as soon as he was aware of the problem, and because the rules govern relationships with parties, not witnesses.¹⁵² The United States did not agree to the challenge, and the matter was referred to the appointing authority, Chief Justice Moons, for decision.¹⁵³

The events at the Tribunal provide a remarkably complete background for discussion of the two standards set by the UNCITRAL Rules for the conduct of arbitrators, and the grounds for challenge. The Rules allow the challenge of an arbitrator on the basis of "justifiable doubts as to the arbitrator's impartiality or independence."¹⁵⁴ They also permit the challenge and replacement of an arbitrator who "fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions."¹⁵⁵ Both bases of challenge have been invoked in the Tribunal.

formal challenge. *Tribunal Notes*, IALR 6,448 (May 6, 1983). Later, after Judge Brower's appointment as Member of the Tribunal, in January 1987 he took a temporary 3-month leave of absence to serve as Deputy Special Counsellor to President Reagan. Iran again raised the possibility of a challenge to Judge Brower, purporting to reserve the right to do so, but ultimately raised no challenge. Letter from Mr. Eshragh to President Boeckstiegel dated January 23, 1987.

151. See Memorandum in Support of Challenge to Mr. Robert Briner at 1-3 (Sept. 28, 1988) reprinted in 3 MEALY'S No. 18, § G (Oct. 21, 1988).

152. See Letter of Judge Briner to Mr. Eshragh dated Sept. 7, 1988, reprinted in *id.* § G, at 64-65.

153. At the time this article went to press the matter was still under consideration by the appointing authority.

154. UNCITRAL RULES art. 10.

155. *Id.*, art. 13(2); see *infra* note 213.

2. *Impartiality and Independence*

Under Article 9 of the UNCITRAL Rules¹⁵⁶ a prospective arbitrator must inform those who approach him in connection with his possible appointment about any circumstances likely to give rise to justifiable doubts about his impartiality or independence.¹⁵⁷ Once appointed, the arbitrator must disclose these circumstances to the other party, if he has not already done so.¹⁵⁸ The purpose of such disclosure is to prevent the appointment of arbitrators who could later be successfully challenged, and to insure that any challenges occur early in the proceedings, thus producing a minimum of disruption.¹⁵⁹ The duty of disclosure is a continuing obligation; an arbitrator has to inform the parties if new circumstances arise that may bring into question his impartiality and independence.¹⁶⁰ Whether upon initial or subsequent disclosure, article 10 of the Rules permits a party to challenge an arbitrator if it discovers "justifiable doubts as to the arbitrator's impartiality."¹⁶¹

The Tribunal Rules modified the disclosure obligation under article 9 of the UNCITRAL Rules to reflect the multi-case nature of the Tribunal. The modified Rule requires any member of the Tribunal who obtains knowledge that a particular case before the Tribunal involves circumstances likely to raise doubts about his impartiality or independence with respect to that case, to notify the President of the Tribunal, rather than the parties. The President then decides whether the parties must be notified.¹⁶² This change modifies, for particular cases, the duty of an arbitrator to divulge to the parties any possible source of bias in that it

156. UNCITRAL RULES, *supra* note 1, art. 9 provides:

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

157. *Id.*; see *Report Preliminary Draft*, *supra* note 1, at 171.

158. UNCITRAL RULES art. 9.

159. *Report Revised Draft*, *supra* note 1, at 170.

160. *Report Preliminary Draft*, *supra* note 1, at 171-2.

161. UNCITRAL RULES art. 10 states:

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

162. Article 9 of the Tribunal Rules reads as follows:

When any member of the arbitral tribunal obtains knowledge that any particular case before the arbitral tribunal involves circumstances likely to give rise to justifiable doubts as to his impartiality or independence with respect to that case, he shall disclose such circumstances to the President and, if the President so determines, to the arbitrating parties in the case and, if appropriate, shall disqualify himself as to that case.

interposes the President of the Tribunal as a "check" on what information need be disclosed.

The understandable purpose behind the Tribunal's modification is to avoid unnecessary challenges based upon trivial circumstances unlikely to induce partiality, while still permitting disclosure to a disinterested and authoritative person. Nevertheless, the Tribunal's modification to the rule should be limited to the Tribunal's unique situation. If a fact gives rise to questions of partiality in an arbitrator's mind, it is best to disclose to the parties rather than rely on another person's confidential determination, which still could be challenged much later and have a devastating impact on the parties. Article 9 of the UNCITRAL Rules is adequate without the Tribunal's modification in nearly all normal commercial arbitrations.

Nevertheless, the above discussion still leaves unanswered the central question of what constitutes "impartiality and independence" under the UNCITRAL Rules. Impartiality and independence are defined only by indirection. For example, impartiality does not require that the arbitrator's nationality be different from the nationality of the parties. This is clear from article 6(4) of the UNCITRAL Rules, which imposes no limit on nationality for arbitrators appointed by the parties or presiding arbitrators appointed by the parties' arbitrators, and in the case of arbitrators appointed by an appointing authority merely instructs the appointing authority to "take into account . . . the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."¹⁶³

The *travaux préparatoires* of the Rules offer some additional clarification. The draft Rules contained a nonexclusive list of factors that could give rise to justifiable doubts, i.e., any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent.¹⁶⁴ The Commission widely agreed that any financial or personal interest in the outcome of the arbitration should be a ground for challenge.¹⁶⁵ There was debate, however, about whether to treat "commercial ties" and "family ties" as grounds for challenge.¹⁶⁶

In this respect it was suggested that the grounds for challenge be divided into "absolute" and "relative" grounds. The former category included

163. UNCITRAL RULES art. 6(4). In the drafts, the sole and presiding arbitrators were required to have a nationality different from the nationality of the parties. See *Report Preliminary Draft*, *supra* note 1, at 170; *Report Revised Draft*, *supra* note 1, at 161. This provision was deleted in favor of free choice by the parties by the Committee of the Whole II and replaced by the suggestion in article 6(4) limited to arbitrators appointed by the appointing authority. See *Committee of the Whole II Report*, *supra* note 1, at 166.

164. See *Report Preliminary Draft*, *supra* note 1, at 171; *Report Revised Draft*, *supra* note 1, at 162, 170.

165. *Report Discussion Preliminary Draft*, *supra* note 1, at 32.

166. *Id.*

only a *direct* personal or financial interest in the outcome of the arbitration, and certain specified ties, such as close family ties between an arbitrator and a party. Proof of these grounds would automatically result in the success of the challenge. The latter category included other grounds, such as remote family ties. For a challenge based on these grounds to succeed, the protesting party would have to prove not only that the suspect grounds existed, but that they gave rise to "justifiable doubts" about the impartiality or independence of the arbitrator.¹⁶⁷ In the end, the delegates apparently realized that the effort to define the grounds for challenge was unlikely to produce useful guidance for most cases. In addition, they recognized the risk of encouraging illegitimate challenges or too narrowly circumscribing the grounds for a proper challenge. It was finally decided to delete any list of circumstances from the text of the official UNCITRAL Rules.¹⁶⁸ Thus, the appointing authority has the responsibility to decide what constitutes lack of impartiality and independence in a particular case. While no authority should decide a close case without reviewing the factors discussed in UNCITRAL's deliberations, the factors provide only a starting point.

Tribunal experience suggests the wisdom of the Rules' silence on this point. The 1984 attack on Judge Mangård by two Iranian arbitrators was an obvious breach of arbitral decorum. It goes without saying that any arbitrator who tries to influence another arbitrator's official acts by means of violence should be removed at once. Yet such acts do not demonstrate direct commercial or family ties to one of the parties. Indeed, in its challenge of the two Iranian arbitrators, the United States was somewhat hard-pressed to characterize a physical attack by two arbitrators on a third as evidence of partiality or lack of independence.¹⁶⁹

The United States managed to bring the physical attack upon Judge Mangård within the reach of the Rules by arguing that a truly impartial arbitrator would have no reason to carry his disagreements with other arbitrators to the point of disrupting arbitral proceedings and breaching arbitral decorum.¹⁷⁰ The Iranian arbitrators' resort to violence was considered a sign that they were unduly biased in favor of the Iranian side. This reasoning is certainly sufficient to justify the challenge, but had the Rules contained a list of disqualifying factors, the absence of some specific reference to physical attacks on other arbitrators might well have made a challenge more difficult.

167. *Id.* at 32-33.

168. *Committee of the Whole II Report*, *supra* note 1, at 173.

169. See Memorandum to Chief Justice Moons, *supra* note 142, IALR 9,347-48.

170. *Id.* at 9,349-50.

Iran's challenge to Judge Briner similarly, although much less dramatically, confirms the advantage of a general rather than specific definition of impartiality and independence. That challenge was not based on commercial or family ties to any party, but rather on a past professional relationship between Judge Briner and an affiliate of a party's expert witness, which the draft rule would not have specifically included. Without venturing to suggest whether that particular challenge had merit, there can be no doubt that in some cases close family or financial ties to an important witness could be a legitimate concern if the nature of the relationship renders the arbitrator incapable of assessing the witness's credibility with objectivity.¹⁷¹

The challenge to Judge Briner raised a number of other issues. One is the distinction between circumstances that must be disclosed, and circumstances that justify disqualification upon challenge. Article 9 requires disclosure of "any circumstances *likely* to give rise to justifiable doubts" as to the arbitrator's impartiality or independence.¹⁷² But the mere "likelihood" of such doubts is not grounds for disqualification—otherwise every disclosure would require disqualification. Article 10 sets out the standard for disqualification: a challenge will be sustained "if circumstances *exist* that give rise to justifiable doubts as to the arbitrator's impartiality or independence."¹⁷³ Thus, an arbitrator is required to disclose information that he believes does not in fact raise justifiable doubts, if he knows that the information would *likely* raise such doubts. An arbitrator may know of extenuating circumstances mitigating the effect of a suspect relationship, for example, but if an objective observer would find it "likely"

171. The question of challenge based on an arbitrator's relationship with a witness is virtually absent in the literature. No national arbitration statutes or institutional arbitration rules include a relationship with a witness as a disqualifying factor, and no case in any jurisdiction has ever disqualified an arbitrator or set aside an award for that reason. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TULANE L. REV. 42, 52 (1982); Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 246 (1977); A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 170-74 (1986); W. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 35-49 (1984); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983); U.S. Wrestling Federation v. Wrestling Div. of AAU, Inc., 605 F.2d 313 (7th Cir. 1979); Peabody v. Rotan Mosle, Inc., 677 F. Supp. 1135 (M.D. Fla. 1987). However, proposed ethical standards for arbitration which have attempted to go beyond the decisions or the common practice have listed as a disqualifying factor a close relationship with a party's important witness. See Int'l Bar Association Guidelines for International Arbitrators, Art. 3.3, 26 I.L.M. 583 (1987); American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commerce Disputes, Canon II(A)(2), reprinted in 33 BUS. LAWYER 308, 311 (1977).

172. UNCITRAL RULES art. 9 (emphasis added).

173. *Id.* art. 10 (emphasis added).

that the circumstances might raise justifiable doubts, it would appear that disclosure is necessary.

But what if the arbitrator fails to disclose? Is a breach of article 9 itself grounds for disqualification? In its challenge to Judge Briner, Iran argued that it was.¹⁷⁴ The UNCITRAL Rules do not attach any consequence to the failure to disclose, however, and so it must be concluded that a breach of article 9 is not itself sufficient grounds for disqualification. The decision whether to disclose is left to the arbitrator's good faith discretion, after all, and there is necessarily room for honest difference of opinion as to whether a particular relationship should have been disclosed. The appointing authority's opinion that a fact should have been disclosed should not by itself lead to disqualification.

Failure to disclose may thus be relevant, if it is a circumstance giving rise to doubts as to an arbitrator's impartiality under article 10. Whether nondisclosure raises such doubts would depend on whether the failure to disclose was inadvertent or intentional, whether the failure to disclose was the result of an honest exercise of discretion, whether the facts not disclosed obviously raised questions about impartiality and independence, and whether the nondisclosure is an aberration on the part of a conscientious arbitrator or appears to be part of a pattern of circumstances raising doubts as to impartiality. This balancing is for the appointing authority to perform in each particular case.

The disruption to the arbitration and expense to the parties are potentially much greater from a challenge late in the proceedings than from a challenge at the time an arbitrator is chosen or at the beginning of the arbitration. The UNCITRAL challenge Rules are therefore structured to ensure that any challenge is made before the arbitration begins if possible, or in any event at the earliest possible moment. A challenge may nevertheless justifiably arise late in the proceedings, however, if that is when the facts giving rise to the challenge occurred or were first discovered.

This possibility raises the question whether the stage at which the challenge arises can be relevant to the result of the challenge; that is, whether the appointing authority should properly be more willing to sustain a challenge early when the costs will be small, and more reluctant to do so later, when the costs may be substantial. The challenge to Judge Mangård, for example, was rejected as baseless, but had it been sustained, the costs to the parties and disruption of proceedings would have been minimal, since Judge Mangård had not yet heard any Tribunal cases or reviewed

174. Memorandum in Support of Challenge to Mr. Robert Briner, *supra* note 151, at 31–32. In support, Iran cited the IBA's Guidelines, art. 4.1: Failure to make disclosure creates an appearance of bias, and may itself be a ground for disqualification even though the nondisclosed facts or circumstances would not themselves justify disqualifications.

any evidence. By contrast, Judge Briner was challenged while the case in question was under final deliberations, after all evidence had been received, all arguments made, and the full two-week long hearing (the longest ever at the Tribunal) held. The disruption and expense of sustaining this challenge are obvious. Is that a permissible consideration? The Rules give no explicit answer, permitting challenge whenever circumstances giving rise to justifiable doubts as to impartiality exist. It must be the case, however, that the determination of whether such circumstances exist and whether the doubts are justifiable must be subject to greater scrutiny the later in the proceedings the challenge is made.¹⁷⁵

A prudent appointing authority may be tempted to sustain an early challenge simply to be on the safe side and avoid the potential for delay and disruption later, even though the same circumstances later on would not justify disqualification. But such an approach would muddle the standard for arbitrator impartiality—after all, if an arbitrator really is biased he should be disqualified no matter how late the challenge, and if he is impartial he should be allowed to serve, no matter how timely the challenge.¹⁷⁶ What can confidently be stated is that an appointing authority faced with a late challenge must take particular care to ensure that an allegation of arbitrator bias is fully justified by concrete and objective evidence before sustaining the challenge made after hearing the case is completed.¹⁷⁷

175. The General Counsel of the American Arbitration Association has noted that under AAA practice a challenge made at the outset of a proceeding may "excuse" an arbitrator if there is any reasonable "appearance that an award might not be fairly rendered." Hoellering, *The Experience of the American Arbitration Association in the Selection and Appointment of Arbitrators*, in 6TH JOINT ICC/ICSID/AAA COLLOQUIUM IN INTERNATIONAL ARBITRATION 6 (1988). On the other hand,

[g]iven the serious consequences resulting from the disqualification of an arbitrator after hearings have commenced, the approach employed by the AAA at this stage of the process is less liberal—an arbitrator will only be disqualified if the disclosed information reflects, or a party demonstrates, such an interest on the part of the arbitrator as would justify judicial vacatur of the arbitral award. In this regard, the courts have generally held that an arbitration award will not be set aside for allegations of arbitrator bias unless such bias is adequately proven.

Id.

176. Sustaining an early but unjustified challenge simply to avoid disruption also ignores the potential effect on the reputation of the arbitrator.

177. As a commentator on the ICC practice has stated:

I would say that the standards of what constitutes a lack of independence do not differ according to the point at which an allegation of a lack of independence is raised, but that at the stage of confirmation/appointment Court members are more ready to take into consideration not only the relative seriousness of the facts presented but also the desirability of commencing an arbitration on as solid a footing as possible and of forestalling possible challenges later in the arbitration when the consequences could be of far greater magnitude.

Bond, *The Selection of the Arbitrators: The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration*, in 6TH JOINT ICC/ICSID/AAA COLLOQUIUM ON INTERNATIONAL ARBITRATION (1988).

Tribunal practice may also shed some light on another compelling question: the meaning of impartiality and independence for party-appointed arbitrators. United States arbitration practice has two approaches to the neutrality of party-appointed arbitrators. In establishing an arbitration, parties can agree either that the party-appointed arbitrators will be neutral or that they will be considered party representatives.¹⁷⁸ In European practice, by contrast, no such option is available, and no distinction is made between the impartiality of party-appointed and "neutral" arbitrators.¹⁷⁹ This single standard of impartiality for all arbitrators is reflected in the UNCITRAL Rules and, at least in theory, at the Tribunal. For example, care is taken at the Tribunal to refer to the three non-party-appointed members as "third-country" rather than "neutral" arbitrators, since all nine arbitrators are required to be "neutral." Both Iranian and American party-appointed arbitrators have often recused themselves from cases to avoid the appearance of interest or impartiality¹⁸⁰ and certainly strict independence is the official stance of the arbitrators and their governments.

While the United States and Iranian arbitrators most often vote in favor of nationals of the party that appointed them, they have taken pains in their separate opinions to demonstrate that their positions are based on the law and evidence in the record. In countless cases the United States arbitrators have in fact voted to deny all or part of a claim of a United States national, just as Iranian judges have on occasion voted to award all or part of a United States national's claim.¹⁸¹ Despite occasional crit-

178. See Aksen, *supra* note 56, at 64; Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration*, 1 TRANSNAT'L LAW. 253, 256-59 (1988); see also AAA RULES, *supra* note 21, R.12-.14.

179. See de Vries, *International Commercial Arbitration: A Transnational View*, 1 J. INT'L ARB. 7, 13 (1984); Strauss, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709, 714 (1974); see also INT'L CHAMBER COM. ARB. R. art. 2(4).

180. See Presidential Order No. 19 (Jan. 12, 1984) and Presidential Order No. 21 (Jan. 19, 1984) (reassigning cases following recusals by Judges Shafeiei, Aldrich, and Brower); Presidential Order No. 57 (Oct. 9, 1987) (accepting Judge Noori's recusal from cases on which he had previously served as counsel to the Iranian party). Cynical U.S. claimants have remarked, however, that Iranian recusals seem to occur in cases Iran has an interest in delaying.

181. *E.g.*, Parguin Private Joint Stock Co. v. United States, Award No. 275-12783-3, 13 IRAN-U.S. C.T.R. 261 (1986) (U.S. arbitrator joining award of 3 million rials to Iranian claimant); Cosmos Eng'g, Inc. v. Ministry of Road & Transp., Award No. 271-334-2, 13 IRAN-U.S. C.T.R. 179 (1986) (Iranian arbitrator joining unanimous award of portion of U.S. national's claim); H.A. Spaulding, Inc. v. Ministry of Roads & Transp., Award No. 212-437-3, 10 IRAN-U.S. C.T.R. 22 (1986) (U.S. arbitrator joining unanimous award dismissing claim of U.S. national); Gould Mktg., Inc. v. Iran, Award No. 316-49/50-2, 6 IRAN-U.S. C.T.R. 131 (U.S. arbitrator joining \$2.6 million award to Iranian counterclaimant); Schering Corp. v. Iran, Award No. 122-38-3, 5 IRAN-U.S. C.T.R. 361 (1984) (Iranian arbitrator forming majority with chairman, over U.S. arbitrator's dissent, for \$400,000 award to U.S.

icism of party-appointed arbitrators for alleged bias,¹⁸² no party-appointed arbitrator has ever been challenged for partiality.

On the other hand, acceptance of something like a predisposition on the part of an arbitrator toward the appointing party is simply an acknowledgment of reality. Party-appointed arbitrators are more often in a position more readily to appreciate and to explain to the other arbitrators the legal theories, cultural assumptions, and general approach of the party that appointed them. This fact does not demonstrate bias towards one side or another; it is a natural and useful function of the three-member panel and the appointing process.¹⁸³

3. *Failure or Inability to Act*

Article 13 of the UNCITRAL Rules provides that the challenge procedure may also apply if an arbitrator fails to act or if it becomes de jure or de facto impossible for him to perform his functions.¹⁸⁴ A challengeable failure to act could arise if an arbitrator refuses to participate in the arbitral proceedings but also refuses to resign.¹⁸⁵ Because respondents are usually benefited by delay, the failure of the respondent's appointed arbitrator to participate in Tribunal deliberations without legitimate reason can also be challenged as evidence of lack of impartiality. Either party to the arbitration may then challenge such an arbitrator.¹⁸⁶ If the other party does not agree or the arbitrator does not withdraw, the appointing authority decides whether the arbitrator's nonparticipation constitutes a failure to act under the UNCITRAL Rules.¹⁸⁷ A prolonged refusal to participate should also lead to a successful challenge on the ground that the arbitrator has failed to act. Iranian arbitrators have on occasion refused to participate in Tribunal deliberations, but none has been challenged on

claimant); Iran v. United States, Award No. 33-A-4/A-15-2, 5 IRAN-U.S. C.T.R. 131 (1984) (unanimous decision restraining United States from selling items in U.S. Iranian embassy); Haji-Bagherpour v. United States, Award No. 23-428-2, 2 IRAN-U.S. C.T.R. 38 (1983) (Iranian arbitrator joining unanimous award dismissing claim of Iranian national).

182. Letter of Aug. 8, 1983 from Judge Shafeiei to Judge Lagergren, complaining that American arbitrators wished "to convert the Tribunal into a machine for churning out awards against Iran," appended to Dr. Shafeiei's reasons for not signing awards, *supra* note 131, 3 IRAN-U.S. C.T.R. at 129.

183. See Mosk, *supra* note 178, at 261-63; see also Comment of Mr. Holtzmann in *Eighth Session Record*, *supra* note 1, SR.162, at 132-33 (third-country arbitrator "learn[s] a great deal about the customs and traditions in the countries of the two parties, as a result of hearing the two other [party-appointed] arbitrators"); Comment of Prof. Sanders in *Committee of the Whole II Summary*, *supra* note 1, SR.3, at 2 (same).

184. UNCITRAL RULES art. 13(2); see *infra* note 213 (text of rule). This provision is discussed at greater length below.

185. See also *Franco-Tunisian Arbitration*, [1957] INT'L L. REP. 767, 769, quoted in M. WHITEMAN, 12 DIGEST OF INTERNATIONAL LAW 1072 (1972).

186. *Id.*

187. *Id.*

this ground. Rather, the Tribunal has dealt with an arbitrator's nonparticipation by proceeding to an award with only two arbitrators, thus preventing the action of an unwilling arbitrator from impeding progress on a case.¹⁸⁸

B. CHALLENGE PROCEDURE (ARTICLES 11–12)

1. *Method and Consequences*

In theory, a party may challenge any arbitrator. A party, however, may challenge his own party-appointed arbitrator only for reasons of which he first becomes aware after the appointment has been made.¹⁸⁹ Under article 11 of the UNCITRAL Rules¹⁹⁰ a challenging party must send written notice of the challenge to the challenged arbitrator, the other party, and the other members of the tribunal, stating the reasons for the challenge.¹⁹¹ The challenging party must make the challenge within fifteen days after it has received notice of the appointment¹⁹² or within fifteen days after the party first learns of the circumstances giving rise to justifiable doubts about the arbitrator's impartiality or independence.¹⁹³

188. *See, e.g.*, cases cited *supra* note 131.

189. UNCITRAL RULES art. 10(2). The claimants and respondents in cases before the Tribunal may challenge an arbitrator only on the basis of circumstances related to the particular case involved. The two governments may challenge an arbitrator upon general grounds which relate to several cases. *See* TRIBUNAL RULES, *supra* note 6, note 1 accompanying arts. 9–12.

190. UNCITRAL RULES art. 11 reads as follows:

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

191. *Id.* art. 11(2).

192. Under the Tribunal Rules the period of fifteen days starts to run for the claimant(s) and respondent(s) in a particular case after the challenging party has been given notice of the Chamber to which the case has been assigned. If the case is relinquished to the Full Tribunal, the period for challenging an arbitrator who is not a member of the relinquishing Chamber starts to run after the challenging party is given notice of the relinquishment. *See* TRIBUNAL RULES, *supra* note 6, note 2 to arts. 9–12.

193. UNCITRAL RULES art. 11(1)

The fifteen-day requirement has two obvious purposes—first, to prevent a party from “saving” a challenge until it gets an impression, perhaps late in the proceeding, of the ultimate outcome of the case and, second, to avoid late challenges calculated to cause disruption and expense.¹⁹⁴ The rule makes good sense, but raises two corollary issues which the Rules do not specifically address.

One is whether a party has duty to investigate an arbitrator’s background at the outset of the arbitration in order to uncover any accessible and public information that could serve as the basis of a challenge to the arbitrator. In other words, is it the challenging party’s actual subjective knowledge that governs, or is it instead an objective standard, requiring a challenge within fifteen days of when the party “knew or should have known” of the circumstance? Iran’s challenge of Judge Briner in September 1988 raised the question whether Iran had a duty to investigate Judge Briner’s activities and professional relationships upon his appointment. This issue was particularly significant in that challenge because Judge Briner’s professional relationship, on which the challenge was based, was published in an annual listing of all directorships of Swiss companies, so that Iran could have learned of that relationship long before the challenge was made.

A related issue arising from the fifteen-day rule is whether and how the challenging party must prove that it first obtained knowledge of the circumstance within fifteen days of bringing the challenge. Given the public nature of the relationship that led to the Briner challenge, questions arose in that case about whether Iran had actual knowledge of the relationship more than fifteen days before it brought the challenge.

The Rules provide no explicit guidance as to these issues. Read literally, article 11 does not impose any duty of investigation upon appointment, and the fifteen-day period starts when the party actually first knows of the circumstances—there is no concept of constructive knowledge or “should have known” objectivity. On the other hand, the more notorious or publicly available the information, the higher would be the expectation that a party would reasonably have been aware of it. This would in turn increase the challenging party’s burden to prove that it in fact did not have actual knowledge until the challenge was made. The purposes of the rule suggest as well that the later in the proceedings a challenge is made,

194. See *Committee of the Whole II Summary*, *supra* note 1, SR.3, at 4. At one point the UNCITRAL delegates considered expanding the time-limit to 30 days, but retained the shorter period, to “avoid the possibility of a party awaiting the completion of the arbitration procedure before making the challenge.” *Id.*; *Committee of the Whole II Report*, *supra* note 1, at 173.

the more convincing must be the challenger's proof that it first gained knowledge of the circumstances with the fifteen-day period. At the very least, a party should be expected to disclose fully the circumstances leading to its belated challenge. The mere declaration that it had "just learned" of the basis for the challenge should not be enough.

A related question is whether the fifteen-day time limit is jurisdictional, or whether it can be waived by the appointing authority.¹⁹⁵ The rule as written seems to leave no room for extensions or waiver of the fifteen-day period by the appointing authority. The *travaux* described the effect of the rule as a loss of the right to challenge, which "takes place automatically when no challenge is made within the 15 days."¹⁹⁶ In applying the corresponding Tribunal rule, President Boeckstiegel refused a request by Iran for a two-month extension of time within which to bring a possible challenge to Judge Virally as to a particular case, stating that in view of the fifteen-day time limit there was "no room for extensions."¹⁹⁷ This would appear to support a view of the time limit as absolute and nonextendable, except that President Boeckstiegel had already permitted the parties much more than fifteen days. Judge Virally's disclosure statement containing the professional relationships in question was made available to the Iranian agent no later than May 22, 1985, but President Boeckstiegel stated that he would accept comments or objections until June 28, 1985.¹⁹⁸ Because no challenge was ultimately made, the issue whether the fifteen-day limit is jurisdictional and nonextendable was never specifically addressed, but President Boeckstiegel's action suggests that he at least believed the fifteen-day limit could be extended in proper circumstances.

The consequences of a challenge are stated in articles 11(3) and 12.¹⁹⁹ The arbitrator will be replaced if either the other party agrees to the

195. The other party clearly can waive the time limit, since by agreement of the parties any provision of the rules can be modified. See article 1(1) (modification by agreement) and article 30 (waiver of the rules).

196. *Report Preliminary Draft*, *supra* note 1, at 171; *Report Revised Draft*, *supra* note 1, at 170.

197. Letter of Mr. Eshragh to President Boeckstiegel, in Case No. 74, filed June 25, 1985; letter of President Boeckstiegel to Mr. Eshragh in Case 74 (*et al.*), filed July 12, 1985.

198. Letter of President Boeckstiegel to Agents of Iran and the United States in Case No. 74, filed May 22, 1985.

199. Under UNCITRAL RULES art. 12:

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
 - (a) When the initial appointment was made by an appointing authority, by that authority;
 - (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
 - (c) In all other cases, by the appointing authority to be designated in accor-

challenge or the arbitrator himself withdraws from his office. Article 11(3) specifies that neither action implies acceptance of the validity of the grounds. In either case the procedure provided for the appointment of the challenged arbitrator will be used "in full" for the appointment of the new arbitrator, even if during the process of appointing the challenged arbitrator a party failed to exercise his rights to appoint or to participate in the appointment.²⁰⁰

The provisions of article 6 governing arbitrator appointment are thus incorporated into the challenge procedures. But as noted above, article 6 contains certain ambiguities that may be relevant here as well. For example, suppose that the challenged arbitrator was the sole arbitrator appointed by an appointing authority which itself was designated by the Secretary-General of the Permanent Court. In finding a replacement the parties must first try to reach an agreement on the choice of a new arbitrator and an appointing authority within thirty days. If they fail on both counts, either party may request the Secretary-General of the Permanent Court to designate an appointing authority, which will appoint the new sole arbitrator. The rule does not seem to permit the parties to make a request immediately to the appointing authority previously designated by the Secretary-General, although presumably a "continuing designation" would eliminate the need for the parties to request a second designation.²⁰¹

If the other party does not accept the challenge and the challenged arbitrator does not withdraw from his office, article 12 specifies that the decision on the challenge will be made by an appointing authority.²⁰² If an appointing authority is already in place, whether agreed upon or designated by the Secretary-General of the Permanent Court, that authority will make the decision.²⁰³ If no appointing authority has yet been designated, an appointing authority must be designated "in accordance with the procedure for designating an appointing authority as provided for in

dance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

200. *Id.* art. 11(3).

201. *See supra* text accompanying notes 63–65.

202. UNCITRAL RULES art. 12(1).

203. UNCITRAL RULES art. 12(1)(a), (b). During the discussions of the UNCITRAL Commission, there was some resistance against having the appointing authority who appointed the challenged arbitrator make the decision on his challenge. *See Report Discussion Preliminary Draft, supra* note 1, at 62.

Article 6.”²⁰⁴ If the appointing authority sustains the challenge, the new arbitrator is to be appointed following the same procedure applicable to the appointment of the challenged arbitrator, except that, when that procedure calls for selection by an appointing authority, the appointment will be made by the appointing authority that decided the challenge.²⁰⁵

2. Challenge of Judge Mangård

On January 1, 1982, even before the Tribunal began hearing cases, Iran demanded that Judge Mangård be removed from the Tribunal because he allegedly made derogatory remarks about the judicial system in Iran.²⁰⁶ Judge Mangård did not withdraw, and the United States did not agree to the challenge.²⁰⁷ At the United States’ request, the Secretary-General of the Permanent Court designated Chief Justice Moons as appointing authority to decide the challenge.²⁰⁸ In his opinion released on March 5, 1982, Chief Justice Moons decided several important issues.

Iran contended that the Secretary-General was not empowered to designate an appointing authority until the parties attempted and failed to reach an agreement on the selection of an appointing authority.²⁰⁹ Chief Justice Moons rejected this argument. According to the Chief Justice, the clear intention of article 12 is to ensure a speedy decision on the challenge. In light of this concern, it must be assumed that article 12(1)(c) allows designation of an appointing authority as quickly and simply as possible, just as in article 12(1)(a) and (b). Therefore, the provision in article 12(1)(c) to the effect that the designation of an appointing authority must be “in accordance with the procedure for designating an appointing authority as provided for in Article 6,” must be interpreted to allow either party to request the Secretary-General to designate an appointing authority without first seeking agreement from the other party. According to Chief Justice Moons the *travaux préparatoires* of the UNCITRAL Rules support

204. UNCITRAL RULES art. 12(1)(c).

205. *Id.* art. 12(1)(a). The changes proposed above at note 65 in relation to articles 6 and 7 of the UNCITRAL Rules would allow some streamlining of article 12. If no appointing authority has yet been designated, either party may immediately request the Secretary-General of the Permanent Court of Arbitration to designate an appointing authority. In our proposed articles 6 and 7 it would be stated that the appointing authority serves for all purposes. It would not be necessary to mention further in article 12(2) that the appointment will be made by the appointing authority “who decided on the challenge.” Overall, our proposal would tip the balance between the goals of party agreement and speedy arbitration even more in the direction of the latter.

206. *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 509, 515 (1982).

207. *Id.* at 509.

208. *Id.*; see 1983 IRAN-U.S. CLAIMS TRIBUNAL ANN. REP. 4 & n.2.

209. *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. 509, 513–14 (1982).

this interpretation because article 6 allows no opportunity to seek agreement on the choice of an appointing authority.²¹⁰

Chief Justice Moons's interpretation of the language of the rule and of the *travaux* may be questioned, but the end result is certainly proper. Contrary to Chief Justice Moons' suggestion, the UNCITRAL Commission did not delete the opportunity for an agreement on an appointing authority under article 6, but merged both periods given for agreement on an arbitrator and an appointing authority to one time period of thirty days. The UNCITRAL Rules could, however, probably be modified to reflect Chief Justice Moons's interpretation. The parties have the opportunity to negotiate on an appointing authority when writing the arbitration clause or at the start of the arbitration. If they fail to choose an appointing authority then, they should not be required to try again in the event of a challenge. The parties are unlikely to agree on an appointing authority in the tense atmosphere of a challenge if they were unable to agree at the start of the arbitration. Of course, the parties would still have the option of agreeing, if they wish, and their choice of an appointing authority would prevail over an appointing authority designated by the Secretary-General.

Chief Justice Moons ultimately ruled that Iran's challenge was inadmissible. According to the Chief Justice Moons, objections to a duly appointed arbitrator are admissible only if: (a) the party intends to use the legal remedy of a challenge as provided in the UNCITRAL Rules; and (b) the regulations set forth in article 11 of the Rules have been observed.²¹¹ The Chief Justice determined that Iran had satisfied neither requirement because its submission did not clearly state the circumstances or actual events that allegedly gave rise to disqualification. Iran had not sufficiently stated a "reason for the challenge" as required by article 11.²¹²

C. REPLACEMENT OF AN ARBITRATOR (ARTICLE 13)

Article 13 of the UNCITRAL Rules²¹³ deals with four situations involving the replacement of an arbitrator in addition to replacement after

210. *Id.* at 514.

211. *Re Judge N. Mangård*, 1 IRAN-U.S. C.T.R. at 517.

212. *Id.*

213. UNCITRAL RULES art. 13 provides that:

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.
2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

challenge. The first two scenarios involve the death or resignation of an arbitrator during the course of arbitral proceedings. The other two are the failure to act and the de jure or de facto impossibility of performing the function of arbitrator. Under article 13, a new arbitrator will be appointed or chosen in accordance with the procedure applicable for the appointment or choice of the arbitrator being replaced.

1. *Resignation*

Twelve arbitrators have resigned from the Iran-United States Claims Tribunal.²¹⁴ In early 1982 Iranian arbitrator Enayat resigned to protest Judge Mangård's refusal to resign.²¹⁵ In 1983 Judge Bellet and Judge Sani resigned, and in 1984 Judge Mosk and President Lagergren stepped down.²¹⁶ Judges Riphagen and Mangård left the Tribunal in early 1985; Judges Mostafavi and Bahrami in 1987.²¹⁷ Judge Brower left in March 1988; and Judges Virally and Boeckstiegel resigned effective December 1988.²¹⁸

Concerns have been raised about how to avoid disrupting the arbitral proceedings when an arbitrator resigns. This concern is emphasized by the Government of Iran's announcement of Judge Sani's resignation. The United States protested sharply when Judge Sani resigned by tendering his resignation to his government and then departing.²¹⁹ In essence, the United States argued that a party-appointed arbitrator cannot arrange his resignation with the party that appointed him, especially when his departure would incapacitate the Full Tribunal a few days before a scheduled meeting.²²⁰ At a Full Tribunal meeting on September 5, 1983, the Tribunal agreed, deciding that a party-appointed arbitrator must present his res-

214. Two others, Judges Shafeiei and Kashani, were withdrawn by their government after they were challenged.

215. *Iranian Quits Tribunal to Protest Mangård's Refusal to Resign*, IALR 4,234. (Feb. 19, 1982).

216. *Dutch International Law Expert Named to Replace Bellet*, IALR 6,849 (July 15, 1983); *Sani Resigns, Raising Questions Over Future of Chamber Proceedings*, IALR 7,037 (Aug. 19, 1983); *Mosk to Be Replaced by Brower in January*, IALR 7,602 (Dec. 16, 1983); *Lagergren Tells Tribunal He Will Stay on Until Next September*, IALR 8,372 (May 11, 1984).

217. *Riphagen Resigns for Health Reasons, Will Not Hear Any More Cases*, IALR 9,847 (Dec. 28, 1984); *Mangård Resigns, Citing Approach of 70th Birthday*, IALR 9,919 (Jan. 11, 1985); *Tribunal Notes: Mostafavi Resignation Accepted by Full Tribunal*, 2 MEALY'S 305 (Apr. 17, 1987); *Bahrami Resignation Accepted, Replacement Named*, 2 MEALY'S 1,594-95 (Dec. 18, 1987).

218. *Richard Allison Will Replace Charles Brower*, 2 MEALY'S 1,421 (Nov. 20, 1987); *Boeckstiegel and Virally Resignations Accepted by Tribunal*, 3 MEALY'S No. 11, at 3 (July 8, 1988).

219. *Letter of Agent of the United States, John R. Crook, to Judge Lagergren of Aug. 16, 1983*, IALR 7,105 (Sept. 2, 1983) [hereinafter *Letter*].

220. *Id.* at 7,105-07.

ignation to the Tribunal itself, not to the government that appointed him.²²¹ Moreover, the Tribunal decided that it would not accept Judge Sani's resignation until his replacement was available to take up his duties.²²² This scenario was repeated in 1987 when Judge Mostafavi resigned and left The Hague although Iran had not named a replacement, but the two governments were able to agree to the temporary seating of an ad hoc arbitrator to hear most of the cases scheduled until a permanent replacement was named.²²³

The potential disruption caused by resignation was again highlighted when Judge Lagergren announced his resignation effective October 1, 1984. Iran initially resisted discussions leading to a replacement, arguing that the time period for naming a replacement could begin to run only after his actual resignation.²²⁴ Chief Justice Moons correctly rejected this interpretation, which had it been allowed, would have disrupted the work of Chamber One, possibly for several months. Such an interpretation of the UNCITRAL Rules is unacceptable in the context of the Tribunal, which has been charged with adjudicating thousands of individual claims over several years. Even in the case of an arbitration panel set up to hear a single case, an unforeseen resignation can stall the arbitral process and cost the parties valuable time and money. The Tribunal's interpretation of how and when a resignation takes effect under article 13 is compelling on policy grounds and should be applied by other arbitrators using the rules.²²⁵

Another method the Tribunal adopted to minimize disruption is its amendment to article 13, which provides that a resigning arbitrator will continue to deliberate and sign the award in any case for which he was present at the hearing on the merits.²²⁶ Application of this provision, known as the "Mosk rule" (for Judge Mosk, the first judge to whom it was applied), in effect means that an arbitrator's resignation is for future cases, not for those cases already heard. The American and "third-

221. *Iran Appoints Arbitrator to Replace Sani*, IALR 7,155 (Sept. 16, 1983).

222. *Sherman & Stewart*, *supra* note 4, at 14. This argument raises the interesting issues of whether the Tribunal can refuse such a resignation and, if so, for how long?

223. *See* Presidential Orders 52 and 54 (Apr. 3 and 14, 1987).

224. *Moons Gives Arbitrators Until September 1 to Decide on Lagergren Successor*, IALR 8,744-45 (July 13, 1984).

225. While an eventual effort to revise the UNCITRAL Rules may wish to consider imposing more explicit notice of resignation requirements as well as deadlines for the replacement of a resigning arbitrator, the Rule as interpreted by the Tribunal adequately protects the integrity of the arbitral process upon an arbitrator's resignation. *See Uiterwyk Corp. v. Iran*, Award No. 375-381-1, para. 30, 19 IRAN-U.S. C.T.R. ____ (1988), 3 MEALY'S No. 14, § A, at 8-9 (July 22, 1988).

226. TRIBUNAL RULES, *supra* note 6, art. 13(5).

country" arbitrators have generally fulfilled their responsibilities under this rule, while Iranian arbitrators sometimes have not.²²⁷

The "Mosk rule" provides a common sense rule of thumb for a resigning arbitrator in a multi-case arbitration. Although the Tribunal cannot realistically force an arbitrator who wishes to resign to continue deliberations in cases that may take many months or years to resolve, existence of an obligation to continue should discourage tactical resignations by a party-appointed arbitrator. This rule provides the tribunal with an explicit basis on which to complete its deliberations on a case without such an arbitrator if it so chooses.²²⁸ In a normal, single-case arbitration, the "Mosk rule" would not be appropriate, however, since it would in effect prohibit resignation after a hearing, a situation the Rules expressly address.²²⁹

2. Failure or Impossibility to Act

The other grounds for replacement are failure to act and the *de jure* or *de facto* impossibility of acting.²³⁰ What is a "failure to act"? Not signing an award should not be considered a failure to act, because article 32(4) of the UNCITRAL Rules states explicitly what happens if an arbitrator refuses to sign an award.²³¹ A more difficult issue arises when an arbitrator

227. Compare *Sedco, Inc. v. Nat'l Iranian Oil Co.*, Award No. 309-129-3, 15 IRAN-U.S. C.T.R. 23 (1987) (Judge Mangård continuing after his resignation); *Harris Int'l Telecom., Inc. v. Iran*, Award No. 323-409-1, 17 IRAN-U.S. C.T.R. 31 (1987) (Judge Mostafavi continuing after his resignation); *William L. Pereira Assocs. v. Iran*, Award No. 116-1-3, 5 IRAN-U.S. C.T.R. 198 (1984) (Judge Mosk continuing after his resignation); see also cases cited *supra* note 131 (Judge Sani refusing to sign awards after his resignation); *Uiterwyk Corp. v. Iran*, Award No. 375-381-1, 19 IRAN-U.S. C.T.R. ____ (1988), 3 MEALY'S No. 12, § A (July 22, 1988) (Judge Mostafavi refusing to sign award after his resignation); *Schering Corp. v. Iran*, Award No. 122-38-3, 5 IRAN-U.S. C.T.R. 361, 3 (1984) (Judge Mosk continuing after his resignation and Judge Sani refusing to participate after his resignation); IALR 9,506 (Oct. 26, 1984) (Mosk rule not applied to Shafeiei and Kashani).

228. See Supplemental Opinion of Mr. Boeckstiegel and Mr. Holtzmann in *Uiterwyk Corp. v. Iran*, Award No. 375-381-1, 19 IRAN-U.S. C.T.R. ____ (1988), 3 MEALY'S No. 14, § A, at 45, 46-47.

229. UNCITRAL RULES art. 14.

230. *Id.* art. 13(2).

231. *Id.* art. 32(4) (if an arbitrator fails to sign, the award "shall state the reason for the absence of the signature"). The Tribunal's practice has been not to consider failure to sign as failure to act under article 13. See "refusing to sign" cases, *supra* note 131; see also *Uiterwyk Corp. v. Iran*, Award No. 375-381-1, 19 IRAN-U.S. C.T.R. ____ (1988), 3 MEALY'S No. 12, § A, at 3 (July 22, 1988); *Starrett Hous. v. Iran*, Award No. 314-24-1, 16 IRAN-U.S. C.T.R. 112 (1987); *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. 310-129-3, 15 IRAN-U.S. C.T.R. 23 (1987); *Saghi v. Iran*, Award No. 66-298-2, 14 IRAN-U.S. C.T.R. 3 (1987); *American Int'l Group v. Iran*, Award No. 93-2-3, 4 IRAN-U.S. C.T.R. 96 (1983); *Charles T. Main Int'l, Inc. v. Khuzestan Water*, Award No. ITL 23-120-2, 3 IRAN-U.S. C.T.R. 156 (1983); *Craig v. Ministry of Energy*, Award No. 71-346-3, 3 IRAN-U.S. C.T.R. 280 (1983); *John Carl Warnecke & Assoc. v. Bank Mellat*, Award No. 72-124-3, 3 IRAN-U.S. C.T.R. 256 (1983); *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3, 3 IRAN-U.S. C.T.R. 239 (1983); *Blount Bros. Corp. v. Ministry of Hous.*, Award No. 74-

does not participate in the deliberations for some period of time.²³² How long must parties and arbitrators wait before the delinquent arbitrator is demonstrably failing to act? In the meantime, can the other arbitrators go ahead without one arbitrator being present? In the Tribunal, when Iranian arbitrators made themselves unavailable for deliberations, their Chambers generally continued deliberations and issued awards without them, although occasionally schedules were modified to accommodate the Iranian arbitrator, potentially causing inconvenience and increasing the cost to the affected parties.²³³

The Tribunal practice of continuing proceedings despite an arbitrator's absence will sometimes be necessary to avoid disruption at the hands of partisan arbitrators. The UNCITRAL Rules must be interpreted so as to allow arbitral proceedings to continue despite tactical absences on the part of an arbitrator. Certainly, a deliberate absence is a "failure to act" and grounds for removal, but as the Tribunal's experience shows, this is not the exclusive remedy—the Tribunal can go forward without the absent arbitrator. Only in the event of involuntary nonparticipation of an arbitrator (for example, because of illness) should proceedings be suspended.²³⁴ Of course, a prolonged impossibility to perform the function

62-3, 3 IRAN-U.S. C.T.R. 225 (1983); *Kimberly-Clark Corp. v. Bank Markazi Iran*, Award No. 46-57-2, 2 IRAN-U.S. C.T.R. 334 (1983); *Esphahanian v. Bank Tejarat*, Award No. 31-157-2, 2 IRAN-U.S. C.T.R. 157 (1983); *Golpira v. Iran*, Award No. 32-211-2, 2 IRAN-U.S. C.T.R. 171 (1983); *Haroonian v. Iran*, Award No. 33-418-2, 2 IRAN-U.S. C.T.R. 226 (1983) (Shafeiei refusing to sign Farsi text).

232. See K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 12 (1946); R. M. Mosk, *Additional Comments Concerning the Reasons for Absence of Signature*, in *Craig v. Ministry of Energy*, Award No. 71-346-3, 3 IRAN-U.S. C.T.R. 294 (1983) (discussing authorities in favor of continuation of arbitral proceedings); *Letter, supra* note 219, at 7, 105.

233. See *Tribunal Postpones Plenary Hearings*, IALR 7,098 (Sept. 2, 1983); *Iran Appoints Arbitrator to Replace Sani*, IALR 7,155-56 (Sept. 16, 1983).

234. In adapting UNCITRAL Rule 13, the Tribunal added to the Rule a provision as follows:

2. . . . In applying the provisions of this paragraph, if the President, after consultation with the other members of the Full Tribunal, determines that the failure of a member to act or his impossibility to perform his functions is due to a temporary illness or other circumstances expected to be of relatively short duration, the member shall not be replaced but a substitute member shall be appointed for the temporary period in accordance with the same procedures as are described in Note 5 to Articles 9-12.
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4. A substitute member appointed for a temporary period shall continue to serve with respect to any case in which he has participated in the hearing, notwithstanding the member for whom he is a substitute is again available and may work on other Tribunal cases and matters.

This provision for temporary absence was invoked, not without controversy, in early 1978 when Judge Brower temporarily left the Tribunal to serve as Deputy Special Counsellor to President Reagan with responsibility for initial investigations of the Iran-Contra affair. During Judge Brower's absence, Carl F. Salans, previously appointed by the United States to serve

of arbitrator, even if outside the control of the arbitrator, should also be grounds for replacement.

D. REPETITION OF HEARINGS (ARTICLE 14)

Pursuant to article 14 of the UNCITRAL Rules, any hearings held prior to the replacement of a sole or presiding arbitrator must be repeated.²³⁵ If any other arbitrator is replaced, however, prior hearings need not be repeated at the discretion of the arbitral tribunal. The Tribunal altered this rule so that the arbitral tribunal (either the Full Tribunal or a three-judge Chamber, depending on the situation) may use its discretion in deciding whether to repeat all or any part of the previous hearings, regardless of the status of the arbitrator who is permanently or temporarily replaced.²³⁶ While the "Mosk rule" should mean that repetition of hearings will not occur after an arbitrator's voluntary resignation, some arbitrators have refused to continue to participate in deliberations following their resignation.²³⁷ In such a situation the Chamber involved occasionally ordered a new hearing,²³⁸ but this action is rare; generally no new hearing has been held.²³⁹

IV. Summary

The UNCITRAL Rules 1 through 14, which govern the largely preliminary issues of establishment of the arbitration, choice of the arbitrators, procedure for challenge, and related matters, have undergone rigorous testing in the Tribunal. Although the Rules could be clarified or improved in a number of areas in light of Tribunal experience, the UNCITRAL

as substitute member of the Tribunal, served as Judge Brower's replacement in several cases. *See* Presidential Orders 51 and 53 (Feb. 2, 1987, and Apr. 8, 1987), 14 IRAN-U.S. C.T.R. 353-54. Under TRIBUNAL RULES, *supra* note 6, art. 13(4), Judge Salans continued to serve on all cases which he heard as Judge Brower's substitute, even after Judge Brower returned to the Tribunal. *See Tribunal Notes*, 2 MEALY'S 306-07 (Apr. 17, 1987).

235. UNCITRAL RULES art. 14 reads as follows: "If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal."

236. TRIBUNAL RULES, *supra* note 6, art. 14.

237. *See supra* note 227.

238. *See, e.g.*, Order of October 24, 1983, in R.J. Reynolds Tobacco Co. v. Iran, Case No. 35, 4 IRAN-U.S. C.T.R. 2 (1983) (rescheduling hearing after resignation of Iranian arbitrator).

239. *See, e.g.*, Ultrasystems, Inc. v. Iran, Award No. 89-84-3, 4 IRAN-U.S. C.T.R. 77 (1983); Dames & Moore v. Iran, Award No. 97-54-3, 4 IRAN-U.S. C.T.R. 212 (1983); American Int'l Group v. Iran, Award No. 93-2-3, 4 IRAN-U.S. C.T.R. 96, 98 (1983); Schering Corp. v. Iran, Award No. 122-38-3, 5 IRAN-U.S. C.T.R. 361, 362 (1984) (noting that no rehearing was held despite the resignation of the Iranian arbitrator).

Rules have generally shown themselves capable of practical and effective implementation. The variety and importance of the issues arising in the Iran-United States Claims Tribunal and the satisfactory resolution of those issues under the rubric of the Rules bolsters confidence in the stability and adaptability of the Rules in the real world of international commercial arbitration.

