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Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal

by
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I. INTRODUCTION

The UNCITRAL Rules¹ do not contemplate a tribunal such as the Iran-United States Claims Tribunal. The UNCITRAL Rules were conceived for tribunals formed to deal with one particular arbitration in international commercial relations, either by ad hoc or administered arbitration. The Iran-United States Claims Tribunal, created pursuant to the Algiers Declarations of January 19, 1981, is a very different animal. First, it was created by an instrument of public international law between two states to resolve claims between nationals of each state and the government of the other state and between the states themselves. Second, the very existence of a security account of one billion U.S. dollars to guarantee payment of awards in favor of United States claimants sets the Tribunal apart from other arbitral bodies. Third, by virtue of the sheer number and complexity of the cases before it, the Tribunal has assumed many of the outward appearances of a full-fledged court system. The Tribunal has been faced with almost 4,000 claims, encompassing issues of expropriation, contracts, and many other questions of commercial and public international law. In response to this caseload, it has created a substantial registry and a highly developed system of filing and distributing documents. Furthermore, the Full Tribunal and its three Chambers officially conduct their proceedings, both written and oral, in English and Farsi. Finally, an agent, who serves as the channel of communication among individual claimants and respondents and who may attend the hearings, permanently represents each government. Despite these qualities, the Tribunal essentially remains dependent on the consent and cooperation of Iran and the United States for its continued smooth functioning.

The Tribunal Rules of Procedure, adopted on May 3, 1983 after the Tribunal's first year of operation, embody the UNCITRAL Rules to a very large

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1. The UNCITRAL Rules are reprinted *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

extent. It is clear that the broad base and inherent elasticity of the UNCITRAL Rules are features which have proved invaluable in laying a firm foundation for the development of these rules. Changes have been introduced, however, to accommodate the special needs of this unique arbitral body as its work has proceeded. In some instances, the text of the Articles themselves has been modified. In others, explanatory notes have been added to assist in interpretation of an Article which was otherwise essentially adopted in its original form.

In examining the application of the UNCITRAL Rules in the Iran-United States Claims Tribunal, I shall first briefly mention some of the individual variations which have been introduced. Next I will concentrate on a few ways in which the UNCITRAL Rules have played a particularly significant part in the development of the Tribunal's practice.

II.

SOME MODIFICATIONS AND APPLICATIONS OF THE RULES

Articles 6-8, on appointment of members, have been maintained unchanged.

Article 9, relating to disclosure, has been left unchanged with the addition of a paragraph providing for disclosure of circumstances likely to give rise to justifiable doubts as to impartiality with respect to "any particular case" before the Tribunal. In the event of a justified challenge to, or withdrawal of, an arbitrator in a particular case, the President will order the transfer of that case to another Chamber.

Article 15, dealing with the conduct of proceedings, is unchanged, but several notes have been added. The Article allows the Tribunal broad discretion concerning the manner in which to conduct proceedings, except that under paragraph 2 the Tribunal is bound to hold a hearing for oral evidence or argument if requested by either party. There have, however, been instances where the Tribunal has indicated its desire to decide a particular issue or an entire case that is straightforward and properly pleaded, on the basis of the documents available, and the parties have not demurred.

Note 4 to Article 15 introduces a significant innovation, the "pre-hearing conference." If it decides that a conference might assist in the disposition of a case, the Tribunal may schedule a pre-hearing conference, usually after the filing of all principal pleadings. This pre-hearing has no exact parallel in any municipal legal system. It is designed to be a more or less informal meeting between the respective parties, their lawyers, and the chamber concerned, with a view to identifying and narrowing the outstanding issues so the chamber may streamline the pattern of further proceedings. Unlike most commercial arbitration, this is perhaps the only occasion when all concerned will meet to exchange views on such matters as the timing of further submissions, the filing of evidence, and the possibility of settlement. After hearing the parties, the chamber normally issues a scheduling order outlining the form

and sequence of subsequent pleadings, though it may not be possible to fix a hearing date at this relatively early stage.

Note 5 to Article 15 allows the two governments, or anyone else whose intervention may be helpful, to assist the Tribunal by submitting oral or written statements in the case.

As to the written pleadings themselves, Article 18 was modified to require greater details in the statement of claim. Deadlines for the filing of claims were established, with the assurance in paragraph 3 that "no priority in the scheduling of hearings or the making of awards" would be based on the date of filing the statement of claim. In practice, the chambers have employed a variety of methods for determining the order of scheduling the filing of statements of defense.

A modified Article 19 stipulates that not more than 135 days should be granted for filing statements of defense. It does, however, provide for extensions if the Tribunal considers it "justified." In view of the fact that all claims were filed at roughly the same time, before January 19, 1982, and that most of them were directed against one or more of a limited number of agencies or instrumentalities of the Government of Iran, three or more extensions have not infrequently been granted.

Article 22 allows the Tribunal to determine what further written statements will be required. In practice, the Tribunal solicits from the claimant a reply to any counterclaim, together with comments on the statement of defense, followed by a rejoinder from the respondent. In exceptional cases the Tribunal permits each party to file post-hearing submissions, for example where a new issue or new evidence has emerged at the hearing.

Experts, as envisaged by Article 27, have been utilized relatively infrequently in the Tribunal's history to date.

Though individual parties have frequently requested default proceedings under Article 28, the Tribunal has so far not resorted to them.

Article 33 dealing with the applicable law has been modified to reflect Article V of the Claims Settlement Declaration. Article V provides:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

It also provides, interestingly, for a decision *ex aequo et bono* if the parties expressly authorize this in writing. Although there have been occasional requests by one party or another for a decision *ex aequo et bono*, the Tribunal has never applied the terms of the amended Article to a contested case.

Article 34 provides that the Tribunal can make a binding award based on settlements informally negotiated between the parties, frequently through meetings at the Tribunal's premises. These constitute over half of all the cases decided. The parties normally submit the settlement agreement to the

Tribunal in both languages in the standard form of a "joint request" for an arbitral award on agreed terms under paragraph 1 of Article 34.

III.

INDIVIDUAL RULES WHICH HAVE PROVED PARTICULARLY IMPORTANT IN THE DEVELOPMENT OF THE TRIBUNAL'S PRACTICE

A. *Tenure of Arbitrators: The "Mosk Rule"*

One change in the Rules which gave rise to extensive debate in the Full Tribunal and which has had far-reaching consequences for the continuity of the Tribunal's work, involves the participation of a member after his resignation takes effect. Article 13 had already been expanded by the addition of new paragraphs providing for the appointment of substitute arbitrators in certain limited circumstances. In March 1984, the Tribunal also adopted paragraph 5, which has become popularly known as the "Mosk Rule" after the arbitrator whose departure sparked the debate. Paragraph 5 provides:

After the effective date of a member's resignation he shall continue to serve as a member of the Tribunal with respect to all cases in which he had participated in a hearing on the merits, and for that purpose shall be considered a member of the Tribunal instead of the person who replaces him.

The effect of this provision has been to enable a former arbitrator—including even the Chairman of a chamber—to return and participate in the deliberation and disposition of cases he has heard. Thus, his successor is able to concentrate on the current workload. This ensures continuity and fairness in a situation where deliberations are not always possible within a short time after a hearing. The provision is regarded as mandatory, and has been applied, notably, in the cases of Mr. Richard Mosk and former President Gunnar Lagergren.

B. *Objections to Jurisdiction*

Article 21, which remains unchanged, empowers the Tribunal to rule on issues relating to its jurisdiction over any given case, and recommends that, "in general," any plea as to jurisdiction should be decided "as a preliminary question." In practice, however, Article 21 is rarely followed except in cases where there is an obvious question as to jurisdiction in view of the workload and pace of the Tribunal's proceedings, in particular the limited time available for oral hearings. The more usual practice is to join the jurisdiction issue with the merits in a single hearing and award.

Most jurisdictional issues relate to the interpretation of the pertinent provisions of Article VII of the Claims Settlement Declaration and fulfilling the requirements of *in personam* jurisdiction. In the typical case of a U.S. claimant these include establishing the claimant's nationality and the continuous ownership interest in the claim. The respondent entity must be a political

subdivision of Iran, or an "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof."

There is, however, an exception to the Tribunal's jurisdiction over claims based on contract, expressed in Article II, paragraph 1, of the Claims Settlement Declaration. This provision denies jurisdiction over disputes:

arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian Courts, in response to the Majlis position.

Not surprisingly, this exclusion has been invoked in a number of cases based on contracts presenting a wide variety of "choice of forum" clauses. It was perceived very early on that there was a clear need for consistent decisions which would guide the chambers in resolving future cases. To meet this goal, six "test cases" were selected, covering a spectrum of forum clauses in which the respective chambers referred jurisdiction to the Full Tribunal to rule on their jurisdictional implications. In its series of Interlocutory Awards rendered on November 5, 1982,² the Full Tribunal thus provided working precedents for the Chambers to use in approaching similar clauses in the future. With a certain predictability in decisions thus assured, the Tribunal has reduced to a minimum the number of occasions when a forum-clause issue has warranted separate briefings and a hearing leading to an interlocutory award.

C. Hearings and Evidence

Much of the Tribunal's practice is dictated, or at least colored, by the limited time available for dealing with the multitude of claims before it on a fair and satisfactory basis. This is most evident in the conduct of oral proceedings, although the provisions of Article 25 of the UNCITRAL Rules have been adopted in their entirety. It is rare for a chamber to allocate more than two or, exceptionally, three days of its time to a final oral hearing, even in the most complex of cases. Thus, the emphasis is very much on the presentation of written argument and evidence well in advance. It is an unfortunate paradox that in the very instances where contemporaneous documentary evidence would be most acutely desirable, it is by the nature of most claimants' situations most scarce and difficult to obtain. Furthermore, in order to avoid devoting precious hearing time to the examination of oral witnesses, the Tribunal urges parties to file evidence in the form of affidavits where possible. This practice should also be encouraged because of the absence of any official transcript or recording of most of the oral proceedings.

D. Interim Measures of Protection

Article 26 of the UNCITRAL Rules remains unchanged and the Tribunal has extensively invoked and applied it in a variety of situations. Indeed,

2. 1 Iran-U.S. C.T.R. 236 (1982).

in a line of cases commencing with the decision in *E-Systems, Inc. v. The Islamic Republic of Iran, Bank Melli Iran*,³ the Tribunal has declined to interpret this Article as applying exclusively to the “subject matter” of a dispute in its limited, physical sense. Instead, it has preferred to view it in the context of the Tribunal’s “inherent power to issue such orders as may be necessary to conserve the respective rights of the parties and to ensure that this Tribunal’s jurisdiction and authority are made fully effective.” The Tribunal has rendered many of these interim awards in cases where duplicative proceedings have been commenced by respondents before the Iranian Courts to exclude the case from the Tribunal’s jurisdiction pursuant to a choice of forum clause.

E. The Tribunal’s Awards

Article 32, unchanged except for minor modifications, empowers the Tribunal to render final, interim, interlocutory, and partial awards. As of June 30, 1986, the total number of awards rendered in each category was as follows:

Final awards in contested cases	112
Partial awards in contested cases	9
Interim awards	25
Interlocutory awards	34
Combined interim and interlocutory awards	2

In addition, in the “final awards” category there have been 109 awards on agreed terms rendered pursuant to Article 34 and ten partial awards on agreed terms. In principle, all awards and other decisions are made available to the public and are published in two regular information services and in the *Yearbook Commercial Arbitration* and other journals. Article 32, however, provides an exception to the rule of publication. Modified paragraph 5 provides that:

upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted.

Paragraph 3 has also been modified to allow an arbitrator to record “his dissenting vote or his dissenting vote and the reasons therefor.” In practice, dissenting and concurring opinions frequently follow an award, even an award on agreed terms.

Finally, it might be mentioned that there have been a number of instances where an arbitrator has either refused to sign an award or is intentionally absent from the signing meeting. In these cases, paragraph 4 of Article 32 of the UNCITRAL Rules has been applied. Under paragraph 4, an explanatory note, signed by the other two arbitrators, is then appended to the award before it is filed.

3. Award No. ITM 13-388-FT, 2 Iran-U.S. C.T.R. 51 (1982).