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2010 Amendments to the UNCITRAL Arbitration Rules Regarding Expert Testimony

Paul Cenoz
American University Washington College of Law

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Arbitration is intended to be an expedited process that leads to a fair and equitable outcome, which is the benefit of arbitration over judicial proceedings. As arbitration has become more popular, larger amounts of money are now usually involved creating longer and more costly arbitral proceedings that deal with more intricate evidence that may require expert testimony. Changes to the 1976 United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules are meant to streamline the arbitral process by assuring the impartiality of tribunal appointed experts.

On August 15, 2010, the amendments to the 1976 Arbitration Rules came into effect. UNCITRAL is the United Nations' legal body that deals with international trade and aims to harmonize trade law by purposing efficient dispute resolution mechanisms through the promulgation of model rules. The amended rules include changes resulting from the advancement of technology, such as that notice may now be delivered via facsimile or e-mail when an address is designated or authorized (Article 2). Structural changes were also made and include multiple party arbitration (Article 10), joinder (Article 17), liability (Article 16), and awards (Article 41).

One of the largest changes to the UNCITRAL Arbitration Rules allows parties to object to expert witnesses appointed by the tribunal. Expert witness testimony is an effective, but expensive, tool of persuasion when conveying an opinion to an arbitral tribunal. Article 27(1) of the 1976 Rules and Article 29(1) of the 2010 Rules allow for an arbitrational tribunal to appoint experts to submit reports on the issue being determined, after consultation with the parties. The change in Article 29(2) requires the tribunal appointed expert witness to submit a description of his qualifications, and a statement of his impartiality and independence, to the arbitral tribunal and the parties. Article 27(3)–(4) of the 1976 Arbitration Rules allowed parties to review the expert's report and any document on which the expert has relied in his report, and to interrogate the experts at the hearing. Article 29(2) of the 2010 Arbitration Rules further allows parties to "inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence." The arbitral tribunal then must decide "whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made." The arbitral tribunal then decides what, if any, action it should take. Even though the 2010 Arbitration Rules leave ambiguity as to what actions the tribunal is allowed to take in regards to objections, allowing objections to the court appointed expert witness is a positive step towards the efficiency of the arbitral process.

Because each party may have an expert witness, the time expended on expert witnesses' opinions, which is followed by cross examination, creates an issue with time and the relative cost. Costs of the arbitral proceedings have increased in recent years. A study by the International Chamber of Commerce ("ICC") found that, in 2003 and 2004, parties incurred eighty-two percent of their costs through the presentation of their cases; "including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than" arbitrators' fees and expenses, and administrative expenses.[1] Because both parties are able to call their own expert witness (Article 27), the cost of arbitration can rise substantially. Time factors include inter alia, preparing a witness, testimony, and cross examination. It has been suggested that opposing expert witnesses should be examined at the same time. Further, the tribunal may ask for its own expert witness (Article 29). It may be better to allow the tribunal to request an expert witness if it finds a technical issue requires an explanation. If a fear of impartiality arises, the 2010 Arbitration Rules allow that a party may object to the use of the witness in the proceeding.

To maintain efficiency, it may be prudent for future UNCITRAL Arbitration Rules to limit the use of expert witnesses by parties in arbitration proceedings. The decision would then be left to the impartial arbitrator to decide whether an expert is needed. If the testimony of an expert is necessary, that expert would be chosen by the tribunal. The tribunal appointed expert witness would remove the argumentation time and dual cross examination time that are associated with party presented expert witnesses. The 2010 Arbitration Rules allow parties to maintain an environment that is unbiased, further assuring their interests will not be viewed unfavorably by the tribunal appointed expert witness's assessment of the evidence. This assures the process and determinations are fair. Because the expert witness is under scrutiny, there is a benefit of using a tribunal's expert to save costs in circumstances that interpretation of the facts are unbiased.

The 2010 Arbitration Rules are aimed at creating an efficient arbitral process. UNCITRAL has made adjustments that should allow arbitration to maintain its system of efficiency and efficacy when adopted into arbitration agreement. Likewise, parties with complex disputes that requires expert witnesses should be more satisfied by their ability to ensure impartiality of the tribunal appointed witness.

[1] International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Cost in Arbitration*, Introduction (2007), http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.