THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF THE PRACTICE OF THE IRAN UNITED STATES CLAIMS TRIBUNAL

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I take issue with those who object to publication of this book. Failure to acknowledge error, however belatedly, can only endanger more lives. Whether their cause was "noble" or not, the American dead and wounded in Vietnam did what they were sent to do: to help South Vietnam win its war. That it failed in the end—that American ideals were misdirected—was not their fault.\(^5\) Whether it was the task of the United States to assist that Government militarily, and whether the United States should have done more or done less, was not their decision. McNamara's painful book takes nothing from them. Nor does it "vindicate" (as President Clinton said he was vindicated by)\(^6\) the war's opponents. If the objectors were right to object, they did not need Robert McNamara to legitimize that objection; and if they were wrong to object, McNamara's belated support does not make their objection right.

"Belated" is of course the principal criticism that has been directed at the book, for understandable reasons. There is some truth to McNamara's thought that a Secretary of Defense is on a different footing, politically if not legally, from a man on the street or even a U.S. Senator. It was known long before McNamara wrote this book that he opposed the war during his final months as Secretary of Defense. A bitter public split between a President and his military chief might have resulted in even more casualties.

In any event, McNamara invites us to look soberly and purposefully at what went wrong in Vietnam, and to avoid making those same mistakes—his mistakes—again. This would be a priceless gift from any public servant in any country; one hopes that his country, sooner rather than later, will be able to receive it.

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\(^5\) As Frances FitzGerald has written, the United States "reduce[d] its majestic concerns for the containment of communism and the security of the Free World to a dimension where governments rose and fell as a result of arguments between two colonels' wives." FRANCES FITZGERALD. FIRE IN THE LAKE (1972).

\(^6\) Clinton Feels He's Vindicated on Vietnam by McNamara Book. N.Y. TIMES. Apr. 15, 1995, §1, at 7.
the constitution of the Tribunal; third, the preliminary stages and written pleadings; and fourth, the core questions of evidence, witnesses and hearing procedure relating to the direct presentation of the case. Each sequential part begins with the direct citation of a specific relevant UNCITRAL Rule and any modifications formally adopted by the Tribunal. This is followed by a commentary that succinctly summarizes the relevant drafting history of the UNCITRAL Rule, explaining the significant underlying issues and choices made; discusses the practical and legal issues that are presented by the subject in question in the context of international arbitration law and procedure and also relevant national law that may bear on validity and enforcement; discusses the relevant Tribunal practice and how it fits into this general context; and offers valuable practical and legal advice to the practitioner and arbitrator on how to handle a variety of issues if they arise. Finally, for each subject there is set forth illustrative practice of the Tribunal, consisting of excerpts of relevant party submissions and Tribunal and appointing authority orders and awards, many of which are not otherwise available in a published source.

Chapter 1, the introduction, addresses the general importance of the international arbitration process and the UNCITRAL Rules, the origins and structure of the Iran-U.S. Claims Tribunal, and the Tribunal's use of the UNCITRAL Rules. Chapter 2 addresses the domestic and international law framework within which an arbitration functions, the fundamental principles of the UNCITRAL Rules and how they interact with this framework, and the legal and practical issues presented in connection with the choice of a situs for arbitration. This chapter thus addresses factors that may govern the conduct of the arbitration and the ultimate validity and enforceability of the award, including the New York Convention on the Enforcement of Arbitral Awards. Regarding the place of arbitration, there is, in addition to a sophisticated discussion of the issues and pitfalls to be considered in deciding on the local law and possible ancillary proceedings in other countries, a highly practical discussion of the administrative and logistical requirements, ranging from availability of facilities and translators to the assured issuance of necessary visas.

Chapter 3 addresses the law applicable to the merits of the dispute. The Tribunal has a very specific and possibly unusual provision specifying applicable law, agreed to by the United States and Iran in the governing Claims Settlement Declaration, which is notable in that it endorses the use of general principles of commercial law, or lex mercatoria. As the book notes, the Tribunal practice is particularly significant here insofar as it purports to apply this body of law to a wide variety of commercial disputes. This chapter is not confined to Tribunal practice, however, but also sets forth the general issues presented by the choice of applicable substantive law, with advice to the arbitrator and practitioner.

Chapters 4–7 discuss the many issues that can arise in connection with the selection and conduct of arbitrators, including their number, appointment, resignation, absence, death, failure to act and challenge. In this area in particular the Tribunal presents an unparalleled wealth of practice, with seven highly disputed challenges on grounds ranging from the typical (prior relationship with a party) to the bizarre (attack on another arbitrator), as well as the regular resignation and replacement of arbitrators and a number of unusual dilatory tactics such as impromptu departure.

Chapters 8–15 discuss a wide range of matters preliminary to the hearing: the notice initiating arbitration, the choice of language, notice and the calculation of periods of time, the content and amendment of statements of claim and defense, further written pleadings and the time limits on submission, interim measures and pleas to the jurisdiction of the arbitral tribunal. These chapters cover logistics, technicality and fundamental legal standards in the same straightforward manner, providing an excellent general treatment as well as an exposition of specific Tribunal practice.

Finally, chapters 16 and 17 discuss the essential core of the presentation of the case: the burden of proof, the method of presentation, rules of evidence, the presentation of witnesses and the conduct of a hearing. Tribunal practice on these subjects is particularly interesting, among other reasons, in that it demonstrates the compromise procedure jointly developed by arbitrators of both common and civil law backgrounds.

This book does not cover all of the UNCITRAL Rules. With the exception of Rule 33 on applicable law, Rules 27–41 are touched on, if at all, only in passing. For example, there is no section specifically dedicated to the award: how it is rendered; its form and effect; its finality; and requests for correction, interpretation or additional awards. Key questions bearing on validity and enforcement, however, are addressed in
connection with the choice of *situs* of the arbitration, including esoteric but potentially significant questions—such as whether the arbitrators must meet in a given place to sign the award.

Nonetheless, within its scope it is a very comprehensive work; its five hundred-odd pages are densely packed with content. It follows that a close reading of the text is sometimes required. Major issues may be treated in only a few very carefully worded sentences and the full import must be extracted by parsing the relatively terse analysis.

This book is not unique in its subject matter and should not be viewed as excluding other valuable sources. Among recent works, perhaps the closest in conception is *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran–United States Claims Tribunal*, by Stewart Baker and Mark Davis (1992). The two books supplement and complement each other; Baker and Davis provides an excellent treatment of the drafting history of each UNCITRAL Rule and the relevant Tribunal practice overall. It does not, however, include the more extensive general commentary on the broader arbitral framework, the identification of risks, issues and useful advice; or extensive direct quotations from the Tribunal documents, which Caron and Pellonpää provide. *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal*, by Jacomijn J. van Hof (1991), is also a useful work, from a different perspective, but it is again more narrowly focused.

*The UNCITRAL Arbitration Rules as Interpreted and Applied* is thus distinctive in its approach, managing to combine the practical utility of a practitioner’s guide with the rigorous scholarship of an educational work. For anyone involved in the conduct of an arbitration, as well as the serious student or educator, it should be one of the very first references consulted.

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In 1990 Advocate General Tesauro reminded the European Court of Justice that “the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection” (p. 68). This observation leaves no doubt that the power of international courts to indicate interim protection is potentially important. However, as anyone familiar with international litigation will know, deciding when that power may be exercised gives rise to a good many problems in practice. In a commendable effort to shed some light on the matter, the Max Planck Institute organized a colloquium on interim protection in 1993 and this book, dedicated, as was the colloquium, to Judge Hermann Mosler, is the result.

In the first part, the four main contributors examine the record of individual institutions. Thus, Hugh Thirlway writes on the International Court of Justice (ICJ), Francis Jacobs on the European Court of Justice (ECJ), Thomas Buergenthal on the Inter-American Court of Human Rights and Rudolf Bernhardt on the European Court of Human Rights. To focus debate, the authors were asked to concentrate on a number of key issues: the legal basis of interim measures; the circumstances in which they may be indicated; their content, legal force and enforceability; and the legal consequences, if any, of measures subsequently found to be unjustified. Following the essays, the volume is completed by a summary of the various contributions to the discussion during the colloquium.

Far more issues are raised in this study than can be mentioned here, but a number of points concerning the institutions under examination may be worth noting. Thirlway wisely concentrates on the ICJ cases since 1984 and makes some particularly interesting observations on both the legal status of interim measures and the issues in the *Passage through the Great Belt* case. Unfortunately, the Court’s orders in the *Genocide Convention* cases (1993) appeared too late to be fully considered. Jacobs notes the unique position occupied by the ECJ and demonstrates that despite a considerable amount of case law, the topic of interim measures in the European Communities is still surrounded by considerable uncertainty. Rightly, the important issue of interim measures in national courts in respect of Community law also receives attention. Of the two essays on human rights, Buergenthal’s is the more detailed and interesting. Bernhardt, while emphasizing the need for research into the practice of the Commission, describes, but does not evaluate, the only deci-