Recent Developments of the Works by the UNCITRAL Working Group II:
The UNCITRAL Arbitration Rules as Revised in 2010

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I. General Background

The United Nations Commission on International Trade Law (UNCITRAL) adopted a new version of the UNCITRAL Arbitration Rules (the "2010 Rules") on 25 June 2010. The original version of the UNCITRAL Arbitration Rules (the “1976 Rules”) was adopted by UNCITRAL in 1976 so as to provide framework for the resolution of commercial disputes on ad hoc basis. At first, the 1976 Rules were, although in a modified form, tested in the proceedings before the Iran-United States Claims Tribunal which was resulted from the 1979 Islamic Revolution where Iran seized the American embassy and took hostages. The Claims Tribunal's practice provides huge volume of cases decided during the past period of nearly 30 years.

Many arbitral institutions were inspired by the success of the 1976 Rules. Subsequently, the Rules have been adopted as institutional rules by many international and domestic arbitral institutions in modified as well as in original form. The 1976 rules have also been adopted by the United Nations Compensation Commission to decide claims against Iraq arising out of the Gulf War. It is no surprising that many Bilateral Investment Treaties (BITs) and Free Trade Agreements mention the Rules as one of the options for the resolution of mixed claims between foreign investors and host states in the form of treaty-based investor-state arbitrations. The 2010 Rules are the result of the hard work of the Working Group II from the 44th session in January 2006 to the 52nd session in February 2010 under the mandate of the Commission that the 1976 Rules
should be revised to enhance the efficiency of arbitration under the Rules by reflecting changes in arbitral practice since the adoption of the Rules, under the proviso that the original structure of the text, its spirit or drafting style should remain. The 2010 Rules have taken effect from 15 August 2010 and are presumed to apply to all arbitration agreements referring to the arbitration under the Rules concluded after that date, unless parties have agreed otherwise.

I am going to comment on the developments of the work by the Working Group II with specific reference to the 2010 Rules in comparison with the 1976 Rules.

II. Outlines of Changed Provisions

1. Scope of Application (Article 1)
Under the Article 1(1), the writing requirement for the valid arbitration agreement was deleted from the 1976 Rules and was revised on the basis of the words taken out of the UNCITRAL Model Law on International Commercial Arbitration as revised in 2006 (the “2006 Model Law”). The Model Arbitration Clause was slightly changed and was moved from the main text to the annex to the 2010 Rules.

Since the 2010 Rules take effect as to an agreement concluded after 15 August 2010, the 1976 Rules are still applicable to an agreement concluded before 15 August 2010. Even after 15 August 2010, the parties are still be able to agree to apply the 1976 Rules.

2. Notice and Calculation of Periods of Time (Article 2)
At the 52nd session of the Working Group II, until the closing time for simultaneous translating works, many delegates were struggling to search for appropriate words to express the concepts of "deemed received" and "actual or physical delivery".

Under the 2010 Rules, a very wide range of means of notices is allowed, which include electronic ones.

3. Notice of Arbitration (Article 3)
Under the 2010 Rules, arbitration is deemed to commence on the date when the notice of arbitration sent by the claimant is received by the respondent. Some of the particulars
of notice of arbitration are mandatory, and others are not. The requirements for such particulars become loosened because arbitration agreement and, contract or other legal instrument only need to be identified, and claims are to be briefly described. The claimants can elect to treat notice of arbitration as statement of claim in accordance with Article 20(1).

4. **Response to the Notice of Arbitration (Article 4)**
   
   Article 4 of the 2010 Rules has been newly inserted in line with many other arbitration rules. The respondent can now make its position known since it shall communicate its response to the notice of arbitration within 30 days of the receipt of the notice of arbitration.
   
   The particulars of the response to the notice of arbitration are closely interconnected with those of the notice of arbitration. Counter-claims or claims for the purpose of a set-off can be mentioned in such response.

5. **Representation and Assistance (Article 5)**

   Under the 2010 Rules, a person representing one of the disputing parties may be requested to provide proof of authority given on such representation.

6. **Designating and Appointing Authorities (Article 6)**

   It is essential for the success of arbitration under the 1976 or 2010 Rules to have an authority taking the role of appointing an arbitrator in case of disagreement between the parties on the constitution of arbitral tribunal. Under the 2010 Rules, the role of appointing authority remains necessary in the same way as it does under the 1976 Rules. While the role of appointing authority is split for the sole arbitrator and for the three member tribunal under the 1976 Rules, it is compiled in one place under the 2010 Rules. The appointing authority may be an individual, institution, or PCA at the Hague. The Secretary-General of the PCA can be requested to designate an appointing authority, if the parties fail to agree on an appointing authority.
7. **Number of Arbitrators (Article 7)**
Under the 2010 Rules, the default number of arbitrator is three. Under the conditions prescribed in Article 7(2) of the 2010 Rules, however, the appointing authority may appoint a sole arbitrator.

8. **Appointment of Arbitrators (Articles 8 to 10)**
Under the 2010 Rules, basically, the list-procedure is applicable to appoint the sole arbitrator. The three-member tribunal is composed of arbitrators appointed by each of the parties and the presiding arbitrator appointed by two of the party-appointed arbitrators.

The 2010 Rules provide also that multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator. There can be an arbitral tribunal with multiple parties which is composed of a number of arbitrators other than one or three. When the parties cannot reach an agreement to appoint arbitrators in a multiple-party arbitration, the appointing authority may be empowered to constitute an arbitral tribunal by revoking any appointment already made and appointing or reappointing each of the arbitrators and designating one of them as the presiding arbitrator.

9. **Disclosures by and Challenge of Arbitrators (Articles 11 to 13)**
In accordance with Article 11 of the 2010 Rules, a potential arbitrator shall disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence. The arbitrators are under the continuing duty to disclose any such circumstances from its appointment until the end of arbitral proceedings. Model statements of independence pursuant to article 11 are annexed to the Rules.

The 2010 Rules expressly provide that an arbitrator may be challenged when it fails to act or in the event of the de jure or de facto impossibility of performing its functions. Within 30 days of the notice of challenge, if all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the appointing authority, at the request of the challenging party, may be intervened to make a decision on the challenge.
10. **Replacement of an Arbitrator (Article 14)**

Under the 2010 Rules, in exceptional circumstances, a party may be determined to be deprived of its right to appoint a substitute arbitrator and the appointing authority may either appoint the substitute arbitrator or allow the remaining arbitrators to proceed with the arbitration and make any decision or award.

11. **Repetition of Hearings in the Event of the Replacement of an Arbitrator (Article 15)**

The 2010 Rules expressly provide that the suspended proceedings should be resumed at the stage where an arbitrator who was replaced ceased to perform its duties.

12. **Exclusion of Liability (Article 16)**

Article 16 of the 2010 Rules which was newly introduced has raised a lot of debate among delegates in the Working Group II as to the scope of exclusion of liability in light of applicable law. In the 52nd session of the Working Group II, majority of delegates supported the explanation that the current provisions of Article 16 should not be interpreted to allow intentional misconducts or illegal acts to be excluded from the liability of arbitrators or arbitral institutions, even though such conducts or acts might be excluded from liability under some of applicable laws.

13. **General Provisions (Article 17)**

The arbitral tribunal has discretion to conduct arbitral proceedings under the condition that the parties should be treated equally and be given opportunity to present their cases. In exercising its discretion, the arbitral tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense. In the same vein, the arbitral tribunal shall establish the provisional timetable of the arbitration, as soon as practicable after its constitution and after inviting the parties to express their views. The arbitral tribunal is newly empowered to join in the arbitration one or more third persons who are not participating in such arbitration if they are parties to the arbitration agreement.
14. **Statement of Claim (Article 20)**

Under the 2010 Rules, the claimant may treat its notice of arbitration as a statement of claim. It is recommended that the claimant should supply all documents and other relevant evidence on which the claim is based.

15. **Statement of Defence (Article 21)**

Under the 2010 Rules, the respondent may treat its response to the notice of arbitration as a statement of defence. It is recommended that the respondent should supply all documents and other relevant evidence on which the response is based. The respondent may make a counter-claim or a claim for the purpose of a set-off which falls under the jurisdiction of the arbitral tribunal.

16. **Amendment to the Claim or Defence (Article 22)**

Under the 2010 Rules, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

17. **Pleas as to the Jurisdiction of the Arbitral Tribunal (Article 23)**

Article 23 of the 2010 Rules has been revised in close connection with Article 16 of the 2006 Model Law. It adds the phrases as to counter-claim or claim for the purpose of a set-off, but it does not mention the challenges to the preliminary decision by the arbitral tribunal as to the existence of its jurisdiction.

18. **Interim Measures (Article 26)**

Article 26 of the 2010 Rules is heavily influenced by the 2006 Model Law as to the definition, purpose, and conditions or legal consequences of interim measures so that it is more detailed than that of Article 26 of the 1976 Rules. The arbitral tribunal has discretionary power to make interim measures 'without being limited to' the examples of interim measures mentioned in Article 26(2). The arbitral tribunal may make an award
that the requesting party should be liable for costs and damages incurred by the interim measures granted to such party if the interim measures are later determined not to have been granted.

19. **Evidence (Article 27)**

Under the 2010 Rules, any individual including a party to the arbitration or other related person may be a witness or expert witness.

20. **Hearings (Article 28)**

Under the 2010 Rules, a witness or an expert witness who is a party or a person related to a party to the arbitration shall not, in principle, be asked to retire. Witness or expert witness examination may be possible through telecommunication or videoconference.

21. **Experts Appointed by the Arbitral Tribunal (Article 29)**

Under the 2010 Rules, any party may object to the qualifications, independence, and impartiality of the experts appointed by the arbitral tribunal within the time specified by the arbitral tribunal.

22. **Default (Article 30)**

Under the 2010 Rules, when the arbitral tribunal shall terminate arbitral proceedings on the basis of the claimant's failure to communicate its statement of claim, the arbitral tribunal shall decide whether there are any remaining issues to be decided and whether it is appropriate for the arbitral proceedings to be terminated.

The arbitral tribunal shall continue the arbitral proceedings when the respondent fails to communicate its response to the notice of arbitration or its statement of defence, or when the claimant fails to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

23. **Waiver of Right to Object (Article 32)**

While it is crucial whether a party 'knows' that any provision of, or requirement under the 1976 Rules has not been complied with and yet proceeds with the arbitration
without prompt objection, it is necessary under the 2010 Rules to determine whether a party does not 'show' that its failure to object was justified, before it is deemed to have waived its right to object.

24. **Form and Effect of the Award (Article 34)**
Under the 2010 Rules, forms of arbitral awards are not depicted as interim, interlocutory, partial, or final awards, but as separate awards made on different issues at different times. Although all awards are final and binding on the parties, the finality shall depend on the wishes of the parties that any form of recourse against an award, which is available under the applicable law, should be excluded. Model waiver statement can be found in the annex to the 2010 Rules.

The requirement under the 1976 Rules that the final award shall be filed or registered by the arbitral tribunal is omitted and left to be dealt with by the mandatory provisions of the applicable law in accordance with Article 1(3) of the 2010 Rules.

25. **Applicable Law, Amiable Compositeur (Article 35)**
Under the 2010 Rules, failing agreement between the parties as to the rules of law applicable to the substance of the dispute, the arbitral tribunal shall directly find the law which it determines to be appropriate, without trying to find the law determined by the conflict of laws rules which it considers applicable as under the 1976 Rules.

26. **Definition of Costs (Article 40)**
Under the 2010 Rules, the definition of costs includes not only the costs of arbitration in the final award, but also those in another decision.

In fixing the costs of arbitration, the arbitral tribunal shall take account of the reasonableness especially in light of travel and other expenses incurred by the arbitrators or witnesses, expert advice and of other assistance required by the arbitral tribunal.

The arbitral tribunal may charge costs of limited nature when the services of interpretation, correction or completion of award are provided.
27. **Fees and Expenses of Arbitrators (Article 41)**

Under the 2010 Rules, the arbitral tribunal, right after it is constituted, shall inform the parties of its proposal as to the way how to determine its fees and expenses, which is subject to the review of the appointing authority. At the request of the parties, the arbitral tribunal's determination of fees and expenses is subject to the primary supervision of the appointing authority, and to the review and adjustment of the PCA when the appointing authority is absent or is not functioning.

Even when the fees and expenses determined by the arbitral tribunal are being reviewed by either the appointing authority or the PCA, the arbitral tribunal shall proceed with the arbitration. Such review shall not affect the validity or the recognition and enforcement of an award other than parts of the award relating to the determination of the arbitral tribunal’s fees and expenses.

28. **Allocation of Costs (Article 42)**

Under the 2010 Rules, the arbitral tribunal may decide on the allocation of costs between the parties although the unsuccessful party shall, in principle, bear the burden of paying all the costs of arbitration. The arbitral tribunal shall mention its decision on such allocation in the final award or, if it deems appropriate, in any other award.

**III. Conclusion**

The provisions of the 2010 Rules are reflecting the law and practice of international arbitration developed since the inception of the 1976 Rules.

There are clauses newly added with regard to exclusion of liability of the arbitrators, the appointing authority, and any other person appointed by the arbitral tribunal, multiple parties, joinder, objections to tribunal-appointed experts, and review or adjustment procedure for the arbitral tribunal’s fees and expenses.

Some provisions of the 2010 Rules are closely following the drafting style of the 2006 Model Law. These are exemplified in the clauses on arbitration agreement with regard to the scope of application, uses of electronic means with regard to notice or witness examination, jurisdictional pleas, interim measures, and so on. Furthermore, the 2010
Rules provide that traditional *ad hoc* international arbitration should be linked with new generation of investment treaty arbitration although further works are scheduled to be started right after the adoption of the Rules. The follow-up works have just begun at the recent 53rd session of the Working Group II in Vienna.

The impact of the 2010 Rules in Asia is likely to be three dimensional. The first is about the arbitral proceedings on *ad hoc* basis which is non-institutional. The second is about the arbitral proceedings administered by arbitral institutions. The third is the mixed or treaty-based arbitration. In Korea, *ad hoc* arbitration is thought to be very small in number. The general public, some of whom may be potential users of international arbitration, may not even know about the existence of the 2010 Rules. As for the institutional arbitrations, the Korean Commercial Arbitration Board (KCAB), which is the most prominent arbitration institution in Korea, may need time before it decides to adopt in full or in selective manner the provisions of the 2010 Rules, since the international arbitration rules of the KCAB have just been updated to encounter the changing situations in the practice of international arbitration in Korea. Arbitral institutions in other countries in Asia seem to be in similar situations as KCAB, save for the Kuala Lumpur Regional Centre for Arbitration which has modified its arbitration rules based on the 2010 Rules.

In cases where treaty-based arbitrations are involved, government officials and agencies of Korea are closely monitoring the discussions on the development of the law and practice involving such arbitrations. For the present, almost all of BITs, one of the parties to which is Korea, have dispute resolution clauses providing for investor-state arbitration under the UNCITRAL Rules as one of options. The possible changes in form to such treaties because of the taking into effect of the 2010 Rules were thoroughly debated in the 53rd session of the Working Group II in Vienna. I am not going to address in further detail the impact of the 2010 Rules on the treaty-based arbitration because that topic is on the agenda for the second day of this conference.

All in all, it is too early to estimate the impact of the 2010 Rules in Asia. It is, however, most likely that just as the 1976 Rules have been considerable enough to drive arbitration institutions in various regions to revise their arbitration rules, the 2010 Rules will be a good food for thoughts when the arbitration institutions in Asia are
thinking of changing their arbitration rules. Although it might be too risky supposition, there shall be no less impact on individual users of *ad hoc* arbitration and treaty-based investor-state arbitration.