

THE OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO  
OUTER SPACE ACTIVITIES: A COMPARISON TO THE UNCITRAL RULES

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I. INTRODUCTION

On December 6, 2011, the Permanent Court of Arbitration (PCA) of the International Chamber of Commerce (ICC) issued the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (the Optional Rules). The Optional Rules are largely based on the 2010 UNCITRAL Rules (the UNCITRAL Rules) with some changes.<sup>1</sup> As announced by the drafters in the Introduction to the Optional Rules, the changes were made to: (1) “reflect the particular characteristics of disputes having an outer space component involving the use of outer space” by private and public national and international entities; (2) reflect the public international law element of outer space activities; (3) allow for the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration (International Bureau); (4) allow parties to have one, three, or five member arbitral tribunals; (5) provide for the creation of specialized lists of arbitrators and scientific and technical experts; and, (6) provide procedures to ensure confidentiality.<sup>2</sup> This article compares the Optional Rules to the UNCITRAL Rules, highlighting the ways in which the drafters of the Optional Rules implemented the goals announced in the Introduction thereto.

Because the Optional Rules are based on the UNCITRAL Rules, the numbering system in each set of rules corresponds to each other. Therefore, if in the discussion below an article is

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<sup>1</sup> Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, introduction (Dec. 6, 2011) [hereinafter Optional Rules], *available at* [http://www.pca-cpa.org/showfile.asp?fil\\_id=1774](http://www.pca-cpa.org/showfile.asp?fil_id=1774).

<sup>2</sup> *Id.*

referred to merely by article number, *i.e.*, “Article 37,” without identifying whether it belongs to the Optional Rules or the UNCITRAL Rules, the reader should assume that the provision is identical under both sets of rules. If this is not the case, the discussion contains an analysis of the differences.

## II. COMPARISON OF THE OPTIONAL RULES AND THE UNCITRAL RULES

### A. INITIATION OF THE ARBITRATION

Article 1 of the Optional Rules and Article 1 of the UNCITRAL Rules define scope of application of each respective set of rules.<sup>3</sup> Although the rules each govern disputes specific to their purpose, the substance of Article 1 is the same under each set of rules, except as noted below. Where the parties have agreed, whether by contract or otherwise, to submit their disputes to the Optional Rules, then the dispute will be resolved using the Optional Rules, regardless of whether the dispute is characterized as relating to “outer space.”<sup>4</sup> Further, the parties’ agreement to submit disputes to the Optional Rules is a waiver of immunity from jurisdiction with regards to the dispute in question.<sup>5</sup> However, most likely in recognition of the variety of potential counterparties in disputes involving outer space—non-governmental organizations, for example—, waiver of immunity does not extend to the execution of the arbitral award, which has to be express.<sup>6</sup> The UNCITRAL Rules are slightly different because they do not address waiver of immunity from jurisdiction.<sup>7</sup> Further, Article 1 of the UNCITRAL Rules states that the UNCITRAL Rules govern except where they contradict a provision of applicable law to which

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<sup>3</sup> UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 61/33, art. 1, U.N. Doc. A/61/33 (Jan 10, 2011) [hereinafter UNCITRAL Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; Optional Rules, *supra* note 1, art. 1.

<sup>4</sup> Optional Rules, *supra* note 1, art. 1(1) (“The characterization of the dispute as relating to outer space is not necessary for jurisdiction where parties have agreed to settle a specific dispute under these Rules.”).

<sup>5</sup> *Id.* art. 1(2).

<sup>6</sup> *Id.* art. 1(2) (“A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.”).

<sup>7</sup> UNCITRAL Rules, *supra* note 3, art. 1.

the parties cannot derogate, in which case, that law shall apply.<sup>8</sup> This issue is addressed in a later article under the Optional Rules, which expressly recognize that the parties' dispute may be governed by a variety of principles, including rules as well as national and international laws.

Article 2 of the Optional Rules, which is identical to Article 2 of the UNCITRAL Rules, governs notice and calculation of periods of time.<sup>9</sup> Although Article 2 states that notices can be transmitted "by any means of communication that provides or allows for a record of its transmission,"<sup>10</sup> Article 2 also provides that notice is only effective if it is sent to the address (whether physical, electronic, or facsimile) designated by the receiving party.<sup>11</sup> In the absence of a designation, a notice is:

- (a) received if it is physically delivered to the addressee; or
- (b) deemed to have been received if it is delivered at the place of business, habitual residence[,], or mailing address of the addressee.<sup>12</sup>

If, "after reasonable efforts," delivery in accordance with the terms described above "cannot be effected," a notice is deemed received if it is sent to a recipient's last known address.<sup>13</sup> The Optional Rules, therefore fulfill two goals because they: (1) provide for accurate notification if a party has designated an address for notice and (2) prevent parties from evading notification by merely refusing to provide or maintaining an address.

Under Article 2, notice is received when it is delivered to a current or last-known address or when there has been an attempt to deliver the notice to a last-known address.<sup>14</sup> Interestingly, and a welcome sign of adaptation to changing technology, the Optional Rules specifically address notice by electronic transmission. Notice sent electronically is deemed to have been

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<sup>8</sup> *Id.* art. 1(3).

<sup>9</sup> *Id.* art. 2; Optional Rules, *supra* note 1, art. 2.

<sup>10</sup> UNCITRAL Rules, *supra* note 3, art. 2; Optional Rules, *supra* note 1, art. 2(1).

<sup>11</sup> UNCITRAL Rules, *supra* note 3, art. 2(2); Optional Rules, *supra* note 1, art. 2(2).

<sup>12</sup> UNCITRAL Rules, *supra* note 3, art. 2(3)(a)-(b); Optional Rules, *supra* note 1, art. 2(3)(a)-(b).

<sup>13</sup> UNCITRAL Rules, *supra* note 3, art. 2(4); Optional Rules, *supra* note 1, art. 2(4).

<sup>14</sup> UNCITRAL Rules, *supra* note 3, art. 2(4); Optional Rules, *supra* note 1, art. 2(4).

received on the day it is sent, except that notices of arbitration are only deemed “to have been received on the day when [the notice] reach[es] the addressee’s electronic address.”<sup>15</sup>

Calculation of periods of time starts the day after notice is received.<sup>16</sup> If the period of time ends on a holiday or a non-business day, it is extended, or rolled over, to the first business day that follows. Lastly, “[o]fficial holidays or non-business days occurring during the running of the period of time are included in calculating the period.”<sup>17</sup>

Article 3 focuses on the notice of arbitration. While Article 3 of the Optional Rules requires the notice of arbitration to be sent to the opposing party and the International Bureau, the UNCITRAL Rules only require notice to be sent to the opposing party.<sup>18</sup> Under both rules, receipt of a notice of arbitration by the respondent commences the arbitral proceedings.<sup>19</sup> Article 3 of the Optional Rules, like Article 3 of the UNCITRAL Rules, divides the contents of a notice in two categories: mandatory elements and permissive elements. The mandatory elements of the Optional Rules, the ones that notice “shall include,” are:

- (a) A demand that the dispute be referred to arbitration;
- (b) The names and contact details of the parties;
- (c) Identification of the arbitration agreement invoked;
- (d) Identification of the rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises;
- (e) A brief description of the claim and amount involved;
- (f) The relief or remedy sought; and
- (g) A proposal as to the number of arbitrators, language, and place of arbitration, *if the parties have not previously agreed thereon.*<sup>20</sup>

Article 3 of the UNCITRAL Rules only differs by the fact that it allows parties to describe the “relevant relationship” “in the absence of [a] contract or instrument.”<sup>21</sup> Given the contractual

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<sup>15</sup> UNCITRAL Rules, *supra* note 3, art. 2(5); Optional Rules, *supra* note 1, art. 2(5).

<sup>16</sup> UNCITRAL Rules, *supra* note 3, art. 2(6); Optional Rules, *supra* note 1, art. 2(6).

<sup>17</sup> UNCITRAL Rules, *supra* note 3, art. 2(6); Optional Rules, *supra* note 1, art. 2(6).

<sup>18</sup> Compare Optional Rules, *supra* note 1, art. 3 with UNCITRAL Rules, *supra* note 3, art. 3.

<sup>19</sup> UNCITRAL Rules, *supra* note 3, art. 3(2); Optional Rules, *supra* note 1, art. 3(2).

<sup>20</sup> Optional Rules, *supra* note 1, art. 3(3)(a)-(g) (emphasis added); see UNCITRAL Rules, *supra* note 3, art. 3(3)(a)-

(g).

nature of space disputes, as provided for by the Optional Rules themselves, it makes sense that the parties to an arbitration governed by the Optional Rules would be tied by contract, agreement, convention, treaty, or other legal instrument. If nothing else, space activities will most likely ultimately be governed by several United Nations treaties and conventions, giving the parties a legal instrument to refer to.<sup>22</sup> In fact, Article 3 of the Optional Rules expands on the UNCITRAL Rules by listing more than just “contract[s] or other legal instrument[s],”<sup>23</sup> and including in the possible list of documents governing the dispute, “any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship . . . .”<sup>24</sup> The permissive elements of the notice under the Optional Rules, the ones the notice of arbitration “may also include,” are:

- (a) A proposal for the appointment of a sole arbitrator . . . ;
- (b) Notification of the appointment of an arbitrator referred to in articles 9 or 10.<sup>25</sup>

This is different from the UNCITRAL Rules to the extent that under UNCITRAL Rules there is an additional provision allowing a party to designate the Permanent Court of Arbitration at The Hague as appointing authority.<sup>26</sup>

Article 4 of the Optional Rules and Article 4 of the UNCITRAL Rules give the respondent thirty days to respond to the notice of the arbitration.<sup>27</sup> Again, the contents of the response are divided into mandatory and permissive elements. The mandatory elements are:

- (a) The name and contact details of each respondent;
- (b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g) [in the description of a statement of claim].<sup>28</sup>

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<sup>21</sup> UNCITRAL Rules, *supra* note 3, art. 3(3)(d).

<sup>22</sup> *See* Optional Rules, *supra* note 1, art. 3(3).

<sup>23</sup> UNCITRAL Rules, *supra* note 3, art. 3(3)(d).

<sup>24</sup> Optional Rules, *supra* note 1, art. 3(3)(d).

<sup>25</sup> *Id.* art. 3(4)(a)-(b).

<sup>26</sup> UNCITRAL Rules, *supra* note 3, art. 3(4)(a) (citing *id.* art. 6).

<sup>27</sup> UNCITRAL Rules, *supra* note 3, art. 4(1); Optional Rules, *supra* note 1, art. 4(1).

<sup>28</sup> Optional Rules, *supra* note 1, art. 4(1)(a)-(e); *see* UNCITRAL Rules, *supra* note 3, art. 4(1)(a)-(f).

The permissive elements are:

- (a) Any plea [to the arbitral tribunal’s jurisdiction];
- (b) A proposal for the appointment of a sole arbitrator . . . ;
- (c) Notification of the appointment of an arbitrator referred to in articles 9 or 10;
- (d) A brief description of counterclaims or claims for the purpose of a set-off . . . ;
- (e) A notice of arbitration [against any third-parties].<sup>29</sup>

The differences between Article 4 of the Optional Rules and Article 4 of the UNCITRAL Rules are the same as those identified for Article 3 of both authorities above.

Article 6 of the Optional Rules, like Article 6 of the UNCITRAL Rules, governs appointing authorities.<sup>30</sup> Under certain circumstances, parties may designate an appointing authority to appoint arbitrators. The main difference is that under the UNCITRAL Rules parties can propose the “name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration,” to serve as appointing authority.<sup>31</sup> As a consequence, the UNCITRAL Rules then go on to dictate time limits for the “appointing authority,” to act and consequences for its failure to act.<sup>32</sup> Article 6 of the Optional Rules, however, does not give parties the option to designate anyone other than the Secretary-General of the PCA.<sup>33</sup> Therefore, the drafters of the Optional Rules seemingly found it unnecessary to create checks and balances in case of untimely appointment, trusting that the governing body of the Optional Rules themselves would appoint arbitrators in a timely manner.

Article 7 of the Optional Rules is identical to Article 7 of the UNCITRAL Rules, and both govern the number of arbitrators.<sup>34</sup> Under Article 7, the default number of arbitrators is three.<sup>35</sup> And the default rule applies if the parties fail to agree on using a sole arbiter within

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<sup>29</sup> UNCITRAL Rules, *supra* note 3, art. 4(2); Optional Rules, *supra* note 1, art. 4(2).

<sup>30</sup> UNCITRAL Rules, *supra* note 3, art. 6; Optional Rules, *supra* note 1, art. 6.

<sup>31</sup> UNCITRAL Rules, *supra* note 3, art. 6(1).

<sup>32</sup> *Id.* art. 6(2)-(7).

<sup>33</sup> Optional Rules, *supra* note 1, art. 6.

<sup>34</sup> UNCITRAL Rules, *supra* note 3, art. 7; Optional Rules, *supra* note 1, art. 7.

<sup>35</sup> Optional Rules, *supra* note 1, art. 7.

thirty days of the respondent's receipt of the notice of arbitration.<sup>36</sup> If one party proposes to hold the arbitration before only one arbitrator and the other party fails to appoint a second arbitrator, however, the appointing authority can proceed to the appointment of the sole arbitrator at the request of the party if, "in view of the circumstances of the case, this is more appropriate."<sup>37</sup> Constitution of the arbitral tribunal will not be delayed because of a dispute about the notice of arbitration's or the response's sufficiency, or because the respondent fails to answer.<sup>38</sup>

Article 8 of the Optional Rules is identical to Article 8 of the UNCITRAL Rules and governs the appointment procedure for the appointment of a sole arbitrator.<sup>39</sup> Under Article 8(1), if one party asks to proceed before a single arbitrator and the parties cannot reach an agreement on the number of arbitrators within thirty days after receipt by all parties of such request, then the appointing authority will appoint the sole arbitrator.<sup>40</sup> In order to proceed to the appointment, the Optional Rules provide for a "list-procedure," which may be used unless the appointing authority determines that the list-procedure is not appropriate to the case.<sup>41</sup> Under the list-procedure, the appointing authority sends each of the parties an identical list containing at least three names.<sup>42</sup> Within fifteen days after receipt of this list, each party can return a list deleting the names to which it objects and numbering the remaining names in order of preference.<sup>43</sup> After the fifteen days have passed, the appointing authority appoints from the list of remaining names, and in accordance with the parties' preference.<sup>44</sup> The Optional Rules provide the appointing

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<sup>36</sup> *Id.* art. 7(1).

<sup>37</sup> *Id.* art. 7(2).

<sup>38</sup> *Id.* arts. 3(5), 4(3).

<sup>39</sup> UNCITRAL Rules, *supra* note 3, art. 8; Optional Rules, *supra* note 1, art. 8.

<sup>40</sup> UNCITRAL Rules, *supra* note 3, art. 8(1); Optional Rules, *supra* note 1, art. 8(1).

<sup>41</sup> UNCITRAL Rules, *supra* note 3, art. 8(2); Optional Rules, *supra* note 1, art. 8(2).

<sup>42</sup> UNCITRAL Rules, *supra* note 3, art. 8(2); Optional Rules, *supra* note 1, art. 8(2).

<sup>43</sup> UNCITRAL Rules, *supra* note 3, art. 8(2); Optional Rules, *supra* note 1, art. 8(2).

<sup>44</sup> UNCITRAL Rules, *supra* note 3, art. 8(2); Optional Rules, *supra* note 1, art. 8(2).

authority the flexibility of appointing the sole arbitrator in the exercise of its discretion if, “for any reason the appointment cannot be made according to this [list-]procedure . . . .”<sup>45</sup>

Article 9 of the Optional Rules and Article 9 of the UNCITRAL Rules govern the arbitrator appointment procedure.<sup>46</sup> Only the Optional Rules, however, provide for the appointment of a five-arbitrator tribunal.<sup>47</sup> The UNCITRAL Rules do not provide rules governing appointment of tribunals with more than three arbitrators, leaving the parties to create rules governing such appointments.<sup>48</sup> Under Article 9 each party appoints an arbitrator.<sup>49</sup> The two arbitrators then choose the third arbitrator who acts as the presiding arbitrator of the tribunal.<sup>50</sup> Once a party receives notification of the appointment of an arbitrator, that party has thirty days to appoint a second arbitrator.<sup>51</sup> Failure to do so results in the appointing authority appointing the second arbitrator.<sup>52</sup> The same rule applies if the two party-appointed arbitrators fail to agree on the remaining arbitrators or on the presiding arbitrator.<sup>53</sup> If, within thirty days of the appointment of the second arbitrator, the two arbitrators cannot select the additional arbitrators or the presiding arbitrator, the appointing arbitrator will select them using the list-procedure applied above.<sup>54</sup> Under the Optional Rules, if the arbitral tribunal has five arbitrators, the two party-appointed arbitrators choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.<sup>55</sup> This is consistent with the goal, announced in the Optional Rules’ introduction, of providing rules for the appointment of sole, three, and five arbitrator tribunals.

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<sup>45</sup> Optional Rules, *supra* note 1, art. 8(2)(d).

<sup>46</sup> UNCITRAL Rules, *supra* note 3, art. 9; Optional Rules, *supra* note 1, art. 9.

<sup>47</sup> Optional Rules, *supra* note 1, art. 9.

<sup>48</sup> UNCITRAL Rules, *supra* note 3, art. 9.

<sup>49</sup> UNCITRAL Rules, *supra* note 3, art. 9; Optional Rules, *supra* note 1, art. 9.

<sup>50</sup> UNCITRAL Rules, *supra* note 3, art. 9(1); Optional Rules, *supra* note 1, art. 9(1).

<sup>51</sup> UNCITRAL Rules, *supra* note 3, art. 9(1); Optional Rules, *supra* note 1, art. 9(1).

<sup>52</sup> Optional Rules, *supra* note 1, art. 9(2).

<sup>53</sup> *Id.* art. 9(3).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* art. 9(1).



Article 10 of the Optional Rules addresses the appointment of arbitrators (three or five) in cases involving more than two parties.<sup>56</sup> Under those circumstances, the parties will follow the procedures described above by appointing the arbitrators jointly as claimant or as respondent.<sup>57</sup> The parties, however, are not required to follow this procedure and may agree on and implement their own appointment method.<sup>58</sup> Further, if the parties agreed to an arbitral tribunal “composed of a number of arbitrators other than one, three, or five, the arbitrators shall be appointed according to the method agreed upon by the parties.”<sup>59</sup> If there is a failure to constitute the arbitral tribunal, the appointing party may—at the request of one of the parties—constitute the arbitral tribunal. Significantly, “in doing so, [the appointing authority can] revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator,”<sup>60</sup> which incentivizes all of the parties—whether they have made designations or not—to cooperate in constituting the tribunal, lest they lose any advantages gained by appointment of their selected arbitrator. Just like Article 9 discussed above, Article 10 of the UNCITRAL Rules is generally the same as Article 10 of the Optional Rules, except it does not provide for a selection process for the appointment of five arbitrators.<sup>61</sup> In addition, Article 10 of the Optional Rules differs from Article 10 of the UNCITRAL Rules because it allows parties to appoint arbitrators who are not members of the PCA.<sup>62</sup> This is consistent with the goal of creating specialized lists for scientific and technical experts most suited at addressing outer space disputes.

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<sup>56</sup> *Id.* art. 10.

<sup>57</sup> *Id.* art. 10(1).

<sup>58</sup> *Id.* art. 10(1).

<sup>59</sup> *Id.* art. 10(2).

<sup>60</sup> *Id.* art. 10(3).

<sup>61</sup> UNCITRAL Rules, *supra* note 3, art. 9.

<sup>62</sup> *Compare* UNCITRAL Rules, *supra* note 3, art. 10 with Optional Rules, *supra* note 1, art. 10.

Articles 11 through 13 govern disclosures by and challenges to arbitrators. Article 11 of the Optional Rules is identical to Article 11 of the UNCITRAL Rules and governs arbitrators' duty to "disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."<sup>63</sup> Article 11 imposes an ongoing duty of disclosure on arbitrators.<sup>64</sup> Article 12 of the Optional Rules and of the UNCITRAL Rules governs the grounds for challenging an arbitrator and its effect on the proceedings. Under the Optional Rules, an arbitrator can be challenged if: "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he or she does not have the qualifications agreed by the parties in their arbitration agreement."<sup>65</sup>

In contrast, the grounds for challenging an arbitrator are narrower under the UNCITRAL Rules, which limit a challenge to "justifiable doubts as to the arbitrator's impartiality or independence."<sup>66</sup> Under both rules, a party can challenge its own arbitrator, but only for reasons of which it became aware of after making the appointment.<sup>67</sup> Under the Optional Rules, if an arbitrator is removed, the other parties can agree to continue the arbitration and issue an opinion. This decision is at their sole discretion. If the arbitrators decide they cannot continue the proceedings without the challenged arbitrator, the arbitral tribunal will declare the office vacant and appoint a substitute arbitrator. The procedure to appoint a substitute arbitrator is set out in Article 14.<sup>68</sup> The ability to proceed with the arbitration in the absence, whether willful or circumstantial, of an arbitrator is unique to the Optional Rules. The UNCITRAL Rules do not provide for the arbitral tribunal to continue with the arbitration if an arbitrator fails to act,

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<sup>63</sup> Optional Rules, *supra* note 1, art. 11.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* art. 12(1).

<sup>66</sup> UNCITRAL Rules, *supra* note 3, art. 12(1).

<sup>67</sup> UNCITRAL Rules, *supra* note 3, art. 12; Optional Rules, *supra* note 1, art. 12.

<sup>68</sup> UNCITRAL Rules, *supra* note 3, art. 14; Optional Rules, *supra* note 1, art. 14.

whether by will or by circumstances.<sup>69</sup> Under the UNCITRAL Rules, under those circumstances, a party will proceed to challenge and remove the arbitrator using the procedure established by Article 13 as described below.<sup>70</sup>

A party's challenge to an arbitrator is governed by Article 13 of the Optional Rules and the UNCITRAL Rules alike.<sup>71</sup> Under the Optional Rules, a party has thirty days from the arbitrator's appointment or from the time it discovers the grounds for its challenge, to actually challenge the arbitrator.<sup>72</sup> Under the UNCITRAL Rules a party only has fifteen days to make that challenge.<sup>73</sup> The parties and the arbitrator, under both the Optional Rules and the UNCITRAL Rules, have fifteen days from the time of the challenge to agree to it.<sup>74</sup> If the fifteen days elapse without an agreement or a withdrawal, the challenging party then has thirty days from expiration of the fifteen days to "seek a decision on the challenge by the appointing authority."<sup>75</sup>

Article 14 of the Optional Rules and the UNCITRAL Rules governs replacement of an arbitrator.<sup>76</sup> Under both sets of rules, if a party is deprived of its right to appoint an arbitrator, the remaining arbitrators can appoint a substitute arbitrator.<sup>77</sup> Under the UNCITRAL Rules, the appointing authority, after closure of the hearings, can also allow the remaining arbitrators to proceed to a decision without the missing arbitrator.<sup>78</sup> This particular addition is unnecessary under the Optional Rules because, as discussed above, the arbitrators are allowed to proceed to an award without a removed arbitrator at any time, whether before or after closure of the

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<sup>69</sup> UNCITRAL Rules, *supra* note 3, art. 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* art. 13(4); Optional Rules, *supra* note 1, art. 13(4).

<sup>72</sup> Optional Rules, *supra* note 1, art. 13.

<sup>73</sup> UNCITRAL Rules, *supra* note 3, art. 13.

<sup>74</sup> Optional Rules, *supra* note 1, art. 13.

<sup>75</sup> UNCITRAL Rules, *supra* note 3, art. 13; Optional Rules, *supra* note 1, art. 13.

<sup>76</sup> UNCITRAL Rules, *supra* note 3, art. 14; Optional Rules, *supra* note 1, art. 14.

<sup>77</sup> UNCITRAL Rules, *supra* note 3, art. 13; Optional Rules, *supra* note 1, art. 13.

<sup>78</sup> UNCITRAL Rules, *supra* note 3, art. 14.

hearings. Article 15 of the Optional Rules is identical to Article 15 of the UNCITRAL Rules and states that proceedings will resume at the stage where the arbitrator who was replaced ceased to perform his functions, unless the arbitral tribunal decides otherwise.<sup>79</sup>

Article 16 of the Optional Rules and the UNCITRAL Rules is a waiver by the parties of any claims against the arbitrators.<sup>80</sup> Article 16 of the UNCITRAL Rules makes an exception to the waiver in case of “intentional wrongdoing.”<sup>81</sup>

## B. *THE ARBITRATION*

Articles 17 through 32 govern the arbitral proceedings. Under Article 17, the arbitral tribunal, under both the Optional Rules and the UNCITRAL Rules, is given significant latitude in carrying out the arbitration as “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate . . . .”<sup>82</sup> The tribunal, however, is subject to a few mandatory provisions.<sup>83</sup> For example, the tribunal must create a “provisional timetable” for the arbitration.<sup>84</sup> The tribunal, however, can then abridge any period of time prescribed under the rules or as agreed to by the parties.<sup>85</sup> If the parties do not request oral hearings, the tribunal is authorized to decide the dispute on the papers alone.<sup>86</sup>

### 1. *Confidentiality*

The UNCITRAL Rules and the Optional Rules differ significantly in regard to the way the tribunal can handle confidential information. The Optional Rules address confidentiality of information in detail and create unique measures to protect confidentiality of information produced by parties to a dispute. Article 17(6) of the Optional Rules, for example, allows parties

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<sup>79</sup> *Id.* art. 15; Optional Rules, *supra* note 1, art. 15.

<sup>80</sup> UNCITRAL Rules, *supra* note 3, art. 16; Optional Rules, *supra* note 1, art. 16.

<sup>81</sup> UNCITRAL Rules, *supra* note 3, art. 16.

<sup>82</sup> *Id.* art. 17(1); Optional Rules, *supra* note 1, art. 17(1).

<sup>83</sup> UNCITRAL Rules, *supra* note 3, art. 17; Optional Rules, *supra* note 1, art. 17.

<sup>84</sup> UNCITRAL Rules, *supra* note 3, art. 17(2); Optional Rules, *supra* note 1, art. 17(2).

<sup>85</sup> UNCITRAL Rules, *supra* note 3, art. 17(2); Optional Rules, *supra* note 1, art. 17(2).

<sup>86</sup> UNCITRAL Rules, *supra* note 3, art. 17(3); Optional Rules, *supra* note 1, art. 17(3).

to designate certain information as confidential.<sup>87</sup> If a party designates certain information as confidential, the arbitral tribunal will decide whether it is in fact confidential. In order to do so, the arbitral tribunal determines “whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party or parties invoking its confidentiality.”<sup>88</sup> If the tribunal finds the information is in fact confidential, it will advise the parties under what conditions and to whom the confidential information can be disclosed and “shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.”<sup>89</sup>

The UNCITRAL Rules are devoid of these provisions. This portion of the Optional Rules will undoubtedly be of particular interest to space companies because of the proprietary technology each is developing. Space companies spend considerable resources on research and development and these articles regarding confidentiality will encourage international arbitration by assuaging fears that a dispute necessarily means a risk of losing a company’s competitive advantage. It should also, hopefully, encourage production of certain documents, which should facilitate a search for the truth and, as a consequence, a fair and just resolution of the dispute.

Interestingly, and in addition to the unique protections outlined above, under the Optional Rules the parties can ensure that the opposing party as well as the arbitral tribunal does not see the confidential information. The arbitral tribunal can, at the request of a party, appoint a “confidentiality advis[or].”<sup>90</sup> Such confidentiality advisor will act as an expert and “report to [the arbitral tribunal] on the basis of the confidential information on specific issues designated by the arbitral tribunal . . . .”<sup>91</sup> The confidentiality advisor will not disclose the underlying

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<sup>87</sup> Optional Rules, *supra* note 1, art. 17(6).

<sup>88</sup> *Id.* art. 17(7).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* art. 17(8).

<sup>91</sup> *Id.*

confidential information to either “the party from whom the confidential information [did] not originate or to the arbitral tribunal.”<sup>92</sup> This is significant because it provides, in theory, utmost protection to confidential information.<sup>93</sup>

## 2. *Location and Language*

Articles 18 and 19 of the Optional Rules and of the UNCITRAL Rules are identical and govern location and language. Neither rule provides either a mandatory or default rule for location or language. If the parties do not agree on a location, the tribunal will determine the location “having regard to the circumstances of the case.”<sup>94</sup> Subject to the parties’ agreement, the arbitral tribunal is tasked with “promptly” determining the language or languages to be used in the proceedings.<sup>95</sup>

## 3. *Memorials*

Articles 20 to 25 of the Optional Rules and the UNCITRAL Rules are nearly identical<sup>96</sup> and generally govern the exchange of memorials and the tribunal’s authority to determine whether it does or does not have jurisdiction over the dispute.

## 4. *Interim Measures*

Under Article 26 of the Optional Rules and of the UNCITRAL Rules, which are substantively identical, the tribunal is authorized to issue interim measures, which include, for example, but are not limited to the tribunal ordering a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* art. 18.

<sup>95</sup> *Id.* art. 19.

<sup>96</sup> Compare Optional Rules, *supra* note 1, arts. 20-21 with UNCITRAL Rules, *supra* note 3, arts. 20-21, respectively (the only two differences are: (1) under Optional Rules the parties have to send their statement of claim or defense to the respondent and the arbitrators, as well as the International Bureau, the latter not being required under UNCITRAL Rules; and (2) under UNCITRAL Rules a party has to attach the “contract or other legal instrument,” governing the relationship or dispute, while under Optional Rules a party will attach any “rule, decision, agreement, contract, convention, treaty, constituent or other legal instrument,” governing the same).

- (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.<sup>97</sup>

The grounds for an interim award are similar to the elements for a United States temporary restraining order. A party must show: (1) “[h]arm not adequately reparable by an award of damages”; (2) “such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and [(3)] [t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.”<sup>98</sup> Article 26 allows the tribunal to request security in exchange for issuing the interim award.<sup>99</sup> “The party requesting an interim award may be liable for any costs or damages caused by the measure . . . if the arbitral tribunal later determines that . . . the measure should not have been granted.”<sup>100</sup> This should inspire caution among parties when requesting interim awards and allows a party to recoup any losses if it was unfairly targeted or restrained by the tribunal. In addition, the Optional Rules expressly state that parties can seek interim measures from judicial authorities, such as national courts, and that such applications for interim awards will not be waivers of the agreement to arbitrate.<sup>101</sup>

Article 27 of the Optional Rules and Article 27 of the UNCITRAL Rules are similar and govern the production of evidence.<sup>102</sup> Article 27 of the Optional Rules, however, gives the tribunal the right to ask the parties to provide a “non-technical document summarizing and

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<sup>97</sup> UNCITRAL Rules, *supra* note 3, art. 26(2)(a)-(e); Optional Rules, *supra* note 1, art. 26(2)(a)-(e).

<sup>98</sup> UNCITRAL Rules, *supra* note 3, art. 26(3)(a)-(b); Optional Rules, *supra* note 1, art. 26(3)(a)-(b).

<sup>99</sup> UNCITRAL Rules, *supra* note 3, art. 26(6); Optional Rules, *supra* note 1, art. 26.

<sup>100</sup> UNCITRAL Rules, *supra* note 3, art. 26(8); Optional Rules, *supra* note 1, art. 26(8).

<sup>101</sup> Optional Rules, *supra* note 1, art. 26(9).

<sup>102</sup> UNCITRAL Rules, *supra* note 3, art. 27; Optional Rules, *supra* note 1, art. 27.

explaining the background to any scientific, technical[,] or other specialized information . . . .”<sup>103</sup>

This is not provided in Article 27 of the UNCITRAL Rules.<sup>104</sup> In all likelihood, this was added to address the need for the tribunal to fully understand the scientific and technical information involved in space-related disputes.

## 5. *Evidence and Experts*

Under Article 28, the tribunal can require production of documents, exhibits, and other evidence as it deems fit.<sup>105</sup> Article 28 also governs hearings.<sup>106</sup> “Hearings [are to] be held *in camera* unless the parties agree otherwise.”<sup>107</sup> The arbitral tribunal can exclude witnesses, including expert witnesses, during certain portions of testimony. The tribunal cannot ask a party to retire during the proceedings.<sup>108</sup>

Article 29 of the Optional Rules and Article 29 of the UNCITRAL Rules govern the tribunal’s appointment of experts.<sup>109</sup> Under Article 29, the tribunal can appoint one or more independent experts after consultation with the parties.<sup>110</sup> The parties can object to the expert within a time period set by the tribunal.<sup>111</sup> After the time expires, a party can only object to the expert “for reasons of which the party becomes aware after the appointment has been made.”<sup>112</sup> After the expert produces her expert report, the parties will have an opportunity to examine the expert before the tribunal.<sup>113</sup> At this hearing, the parties can present their own expert witnesses to testify on the points at issue.<sup>114</sup>

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<sup>103</sup> UNCITRAL Rules, *supra* note 3, art. 27(4); Optional Rules, *supra* note 1, art. 27(4).

<sup>104</sup> UNCITRAL Rules, *supra* note 3, art. 27.

<sup>105</sup> *Id.* art. 28; Optional Rules, *supra* note 1, art. 28.

<sup>106</sup> UNCITRAL Rules, *supra* note 3, art. 28; Optional Rules, *supra* note 1, art. 28.

<sup>107</sup> UNCITRAL Rules, *supra* note 3, art. 28(3); Optional Rules, *supra* note 1, art. 28(3).

<sup>108</sup> UNCITRAL Rules, *supra* note 3, art. 28(3); Optional Rules, *supra* note 1, art. 28(3).

<sup>109</sup> UNCITRAL Rules, *supra* note 3, art. 29; Optional Rules, *supra* note 1, art. 29.

<sup>110</sup> UNCITRAL Rules, *supra* note 3, art. 29; Optional Rules, *supra* note 1, art. 29.

<sup>111</sup> UNCITRAL Rules, *supra* note 3, art. 29; Optional Rules, *supra* note 1, art. 29.

<sup>112</sup> UNCITRAL Rules, *supra* note 3, art. 29(3); Optional Rules, *supra* note 1, art. 29(3).

<sup>113</sup> UNCITRAL Rules, *supra* note 3, art. 29; Optional Rules, *supra* note 1, art. 29.

<sup>114</sup> Optional Rules, *supra* note 1, art. 29.



The Optional Rules differ from the UNCITRAL Rules in two respects. First, the Optional Rules make any information provided to the experts subject to the confidentiality provisions discussed above.<sup>115</sup> Second, under Article 29 of the Optional Rules—and not under Article 29 of the UNCITRAL Rules—the Secretary General is tasked with providing an indicative list of persons considered to have expertise in the scientific or technical matters at issue.<sup>116</sup> Furthermore, under Article 29 of the Optional Rules, the parties are not limited to the names appearing on that list for selection of their experts.<sup>117</sup> As has been the case for many of the distinctions identified between the Optional Rules and the UNCITRAL Rules, this is also likely an attempt to address the fact that outer space disputes are a novel area and, more specifically, outer space disputes between private entities will be the product of a nascent private space industry. Allowing the parties to find the most qualified person, rather than one on a list, allows them to bring into the arbitration world individuals who, up until now, may have had no reason to be involved.

#### 6. *Removal or Absence of an Arbitrator*

Article 30 of the Optional Rules and Article 30 of the UNCITRAL Rules are identical and authorize the tribunal to continue the arbitration and make a decision based on the information before it if one of the parties ceases participation in the procedure by either failing to file memorials within the set deadlines or to appear at hearings.<sup>118</sup> The Optional Rules, however, do not provide for a default judgment against the defaulting party.<sup>119</sup> Rather, the Optional Rules allow the arbitration to proceed and the tribunal to reach a decision on the merits.<sup>120</sup>

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<sup>115</sup> Compare Optional Rules, *supra* note 1, art. 29 with UNCITRAL Rules, *supra* note 3, art. 29.

<sup>116</sup> Optional Rules, *supra* note 1, art. 29(7).

<sup>117</sup> *Id.* art. 29(7).

<sup>118</sup> UNCITRAL Rules, *supra* note 3, art. 30; Optional Rules, *supra* note 1, art. 30.

<sup>119</sup> Optional Rules, *supra* note 1, art. 30.

<sup>120</sup> *Id.*

## C. *THE AWARD*

### 1. *Issuance of the Award*

Articles 33 and 34 of the Optional Rules and of the UNCITRAL Rules govern the tribunal's decision on the merits and the award. Under both the Optional Rules and the UNCITRAL Rules, decisions are made by a majority of the tribunal.<sup>121</sup> Under both rules, the tribunal can issue separate awards on different issues and at different times.<sup>122</sup> Further, under both the Optional Rules and the UNCITRAL Rules, the award must contain supporting reasons. Only the Optional Rules under Article 34, however, expressly allow written dissenting opinions.<sup>123</sup>

Article 35 of the Optional Rules is very similar to Article 35 of the UNCITRAL Rules. Article 35 of the Optional Rules states that the tribunal will apply the "law or rules of law designated by the parties," and in the absence thereof, "national and/or international law and rules of law it determines to be appropriate."<sup>124</sup> The UNCITRAL Rules are, substantively, very similar but use slightly less precise language. Most importantly, as noted by the Introduction to the Optional Rules, the language in the Optional Rules is the result of a concerted effort to recognize the role of international law in the resolution of disputes involving outer space activities.<sup>125</sup> Article 35 of the UNCITRAL Rules directs the tribunal to apply "the rules of law designated by the parties," and failing an agreement, "the law which it determines to be appropriate."<sup>126</sup> As a result, the Optional Rules are slightly more specific about the latitude given to tribunals and explicitly invoke international law, but do not thereby contradict the UNCITRAL Rules.

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<sup>121</sup> UNCITRAL Rules, *supra* note 3, art. 33; Optional Rules, *supra* note 1, art. 33.

<sup>122</sup> Optional Rules, *supra* note 1, art. 34.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* art. 35(1).

<sup>125</sup> *Id.* introduction.

<sup>126</sup> UNCITRAL Rules, *supra* note 3, art. 35(1).

Article 36 of the Optional Rules and the UNCITRAL Rules are identical and govern settlement or other grounds for termination.<sup>127</sup>

## 2. *Revision of the Award*

After the tribunal issues the award, under Article 37 of the Optional Rules and Article 37 of the UNCITRAL Rules, the parties have thirty days to ask for an interpretation of the award.<sup>128</sup>

The tribunal then has forty-five days after receipt of the request to interpret the award.<sup>129</sup>

Alternatively, the parties can ask for a correction to the award under Article 38.<sup>130</sup> The time limits are the same as those for interpretation of the award.<sup>131</sup> Further, the tribunal can, on its own initiative, correct the award within thirty days of issuance.<sup>132</sup> Under Article 39, the parties can, within thirty days of receipt of the termination order or award, ask for an additional award on a claim submitted to the tribunal but not decided by it.<sup>133</sup> Articles 37, 38, and 39 of the Optional Rules and the UNCITRAL Rules are substantively identical.<sup>134</sup>

## 3. *Costs*

Articles 40 through 43 govern costs, definition of costs, and the fees and expenses of arbitrators. First, the rules provide an exhaustive list of “costs.”<sup>135</sup>

The term “costs” includes only:

- (a) The fees of the arbitral tribunal . . . ;
- (b) The reasonable travel and other expenses incurred by the arbitrators;
- (c) The reasonable costs of expert advice and of other assistance required by the tribunal;
- (d) The reasonable travel and other expenses of witnesses . . . [if the expenses were] approved by the tribunal;

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<sup>127</sup> Compare Optional Rules, *supra* note 1, art. 36 with UNCITRAL Rules, *supra* note 3, art. 37.

<sup>128</sup> UNCITRAL Rules, *supra* note 3, art. 37; Optional Rules, *supra* note 1, art. 37.

<sup>129</sup> UNCITRAL Rules, *supra* note 3, art. 37; Optional Rules, *supra* note 1, art. 37.

<sup>130</sup> UNCITRAL Rules, *supra* note 3, art. 38; Optional Rules, *supra* note 1, art. 38.

<sup>131</sup> UNCITRAL Rules, *supra* note 3, art. 38; Optional Rules, *supra* note 1, art. 38.

<sup>132</sup> UNCITRAL Rules, *supra* note 3, art. 38; Optional Rules, *supra* note 1, art. 38.

<sup>133</sup> UNCITRAL Rules, *supra* note 3, art. 39; Optional Rules, *supra* note 1, art. 39.

<sup>134</sup> Compare Optional Rules, *supra* note 1, arts. 37, 38, 39 with UNCITRAL Rules, *supra* note 3, arts. 37, 38, 39 respectively (the only difference between the two sets of rules is that under Optional Rules a party has to give notice of its request for interpretation of, correction of, or additional award to the International Bureau).

<sup>135</sup> UNCITRAL Rules, *supra* note 3, art. 40; Optional Rules, *supra* note 1, art. 40.

- (e) The legal and other costs incurred by the parties in relation to the arbitration . . .;
- (f) The fees and expenses of the International Bureau, including fees and expenses of the appointing authority.<sup>136</sup>

Article 41 of the UNCITRAL Rules adds a provision whereby if an appointing authority applies or states that it will apply a schedule or particular method to determine fees, the tribunal must abide by it.<sup>137</sup> This is likely because, under the UNCITRAL Rules, the parties can select an appointing authority other than the arbitral institution resolving their dispute. Logically, Article 41 of both sets of rules provides that the parties can, within fifteen days of receiving the arbitral tribunal's determination of fees and expenses, submit such determination to the appointing authority. Again, the UNCITRAL Rules add a provision to address a situation whereby the appointing authority fails to act "within the time specified by the [UNCITRAL] Rules," in which case review will be made by the Secretary-General of the PCA.<sup>138</sup>

Most interesting to attorneys, however, is Article 42, of both the Optional Rules and the UNCITRAL Rules, which states that the losing party will bear all the costs. "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties."<sup>139</sup> If the tribunal believes it is more reasonable to apportion costs, however, it has the option to do so.<sup>140</sup>

In order to prevent a party from simply walking away from costs, the tribunal, under Article 43, can ask a party to deposit equal amounts as an advance for the costs described above.<sup>141</sup> If a party fails to make the requested deposits within a certain number of days from being asked to do so, the tribunal will suspend or terminate the arbitral proceedings.<sup>142</sup> The

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<sup>136</sup> Optional Rules, *supra* note 1, art. 40(2)(a)-(f); *see*. UNCITRAL Rules, *supra* note 3, art. 40(2)(a)-(f) (wording differs slightly from the quoted language of the Optional Rules).

<sup>137</sup> UNCITRAL Rules, *supra* note 3, art. 41.

<sup>138</sup> *Id.* art. 41(4)(b).

<sup>139</sup> *Id.* art. 42(1); Optional Rules, *supra* note 1, art. 42(1).

<sup>140</sup> Optional Rules, *supra* note 1, art. 42.

<sup>141</sup> *Id.* art. 43(1).

<sup>142</sup> *Id.*

relevant number of days is thirty under the UNCITRAL Rules and sixty under the Optional Rules. The UNCITRAL Rules have an additional provision governing an appointing authority's ability to comment on the tribunal's fixing of deposits.<sup>143</sup> If the parties so request and the appointing authority agrees, the arbitral tribunal will consult the appointing authority before fixing the amounts of deposits or supplementary deposits. The appointing authority will then "make any comments to the arbitral tribunal that it deems appropriate . . . ."<sup>144</sup> An additional difference between the UNCITRAL Rules and the Optional Rules is that under the Optional Rules, the International Bureau is responsible for rendering accounting to the parties of the deposits received, while under the UNCITRAL Rules, the arbitral tribunal does so. This is consistent with the Optional Rules' goal of involving the International Bureau.

The Annex of the Optional Rules and the UNCITRAL Rules both contain: (1) a model arbitration clause for contracts; (2) a possible waiver statement, waiving recourse against an award to any court of other competent authority; and (3) model statements of independence by arbitrators.<sup>145</sup> The Annexes are substantively identical except the UNCITRAL Rules suggest the parties identify an appointing authority, while the Optional Rules—consistent with the analysis already conducted above—do not provide for an appointing authority other than the International Bureau.

### III. CONCLUSION

As promised in the Optional Rules' Introduction, the Optional Rules largely implement the UNCITRAL Rules, while making significant changes to adapt to the scientific and technical requirements of disputes involving outer space activities. As announced by the Introduction to the Optional Rules, the changes identified above do, in fact: (1) "reflect the particular

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<sup>143</sup> Compare UNCITRAL Rules, *supra* note 3, art. 43(3) with Optional Rules, *supra* note 1, art. 43.

<sup>144</sup> UNCITRAL Rules, *supra* note 3, art. 43(3).

<sup>145</sup> See *id.* annex; Optional Rules, *supra* note 1, annex.

characteristics of disputes having an outer space component involving the use of outer space by” private and public national and international entities by allowing a variety of documents, including conventions and treaties, to govern disputes; (2) “reflect the public international law element” of outer space activities by specifically referring to international law as a governing law; (3) allow for the role of the Secretary-General and the International Bureau by requiring notices and memorials to be sent to it; (4) allow parties to have one, three, or five member arbitral tribunals, as noted above; (5) provide for the creation of specialized lists of arbitrators and scientific and technical experts; and, (6) provide procedures to ensure confidentiality, such as—in certain cases—shielding information from the tribunal itself by using experts.<sup>146</sup> To date, no party has used the Optional Rules. Given the particular attention to the likely concerns of the space-related industry, practitioners would benefit from at least familiarizing themselves with these rules and determining if they are best suited for their clients, and beginning to incorporate arbitration clauses into their agreements, allowing for resolution of disputes related to outer space activities.

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<sup>146</sup> Optional Rules, *supra* note 1, introduction.