III. INTERNATIONAL COMMERCIAL ARBITRATION

1. Report of the Secretary-General: preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97)*

CONTENTS

INTRODUCTION

1. *Terms of reference*

The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (April 1973) requested the Secretary-General:

> "In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;"[1]

The initial version of such draft arbitration rules was prepared by the Secretariat in consultation with Professor Pieter Sanders of the Netherlands who served as a consultant to the Secretariat on the subject.[2] At the invitation of the Secretariat, the International Committee on Commercial Arbitration (formerly known as the International Organizing Committee) of the International Arbitration Congress, a body composed of representatives of centres of international commercial arbitration and of experts in this field, appointed a Consultative Group of four experts to consult with the Secretariat concerning the draft arbitration rules.[3] The

* 4 November 1974.

[1] Report of the United Nations Commission on International Trade Law on the work of its sixth session, 2-13 April 1973, *Official Records of the General Assembly: Twenty-eighth Session, Supplement No. 17* (A/9017), para. 85, (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

[2] The Secretariat gratefully acknowledges the assistance given to it by Professor Pieter Sanders in the preparation of the present draft rules.

[3] The Consultative Group was composed as follows:
(*a*) Dr. Carlos A. Dunshee de Abranches, Director-General of the Inter-American Commercial Arbitration Commission;
(*b*) Professor Tokusuke Kitagawa, Tokyo Metropolitan University;
(*c*) Mr. Donald B. Straus, President of the Research Institute of the American Arbitration Association;
(*d*) Professor Heinz Strohbach, Court of Arbitration of the Chamber of Commerce of the German Democratic Republic.

Consultative Group submitted comments on two earlier versions of the draft arbitration rules.

The present "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" has been circulated for comments to the regional economic commissions of the United Nations and to centres of international commercial arbitration. The present draft rules will also be considered at the Fifth International Arbitration Congress that will be held at New Delhi, India, 7-10 January 1975. Any comments and observations regarding the preliminary draft set of arbitration rules received by the Secretariat will be placed before the Commission at its eighth session in a separate document (A/CN.9/97/Add.1).*

In drafting these rules, the following international conventions were taken into account:

New York 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Geneva 1961	European Convention on International Commercial Arbitration
Washington 1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The following existing arbitration rules were also given special consideration:

ECE Rules	Arbitration Rules of the United Nations Economic Commission for Europe, 1966
ECAFE Rules	Rules for International Commercial Arbitration of the United Nations Economic Commission for Asia and the Far East (now the United Nations Economic and Social Commission for Asia and the Pacific), 1966.

Attention has also been given to the provisions of various other arbitration rules; references to many of these appear in the commentary on individual draft articles.

2. *Organization of the rules*

The rules are divided into four sections:

Section I	Introductory rules (articles 1 to 4)
Section II	Appointment of arbitrators (articles 5 to 12)
Section III	Arbitral proceedings (articles 13 to 25)
Section IV	The award (articles 26 to 32)

Pursuant to the Commission's decision (quoted at paragraph 1 above), these draft rules are designed for arbitration where in accordance with the agreement of the parties a dispute is submitted for decision to a sole arbitrator or an arbitral tribunal established specifically (*ad hoc*) for settling the dispute in question.

* Reproduced in this volume, part two, III, 2.

3. *Administered and non-administered arbitration*

These rules may be used in arbitration that is administered by an arbitral institution or in non-administered arbitration (article 2). The parties are free to decide whether they prefer the assistance of an arbitral institution in the handling of an arbitration (administered arbitration) or whether they will do without such assistance (non-administered arbitration). The rules, however, apply to both types of arbitration.

Most provisions of the rules apply to both administered and non-administered arbitration. However, a few provisions required different wording to meet the particular circumstances of one of these situations. In some of these cases the provisions in the articles concerned are set forth in two columns, the left column dealing with non-administered arbitration and the right column with administered arbitration.

If the parties agree that the arbitration should be administered by a designated arbitral institution, that institution could perform the following functions: appoint the arbitrator(s) if the parties did not make the appointment(s) (articles 6 and 7); decide whether challenge of an arbitrator is justified (article 10); and collect the deposits for arbitration costs from the parties (article 32). The administering institution may also be asked to assist the arbitrators in other ways: e.g. by placing the facilities of the institution at the disposal of the arbitrators, arranging for the maintenance of stenographic records of hearings, and retaining qualified interpreters to service the hearings.

If the parties do not agree on administration by a designated arbitral institution, the rules provide procedures for dealing with the above matters; however, in some cases these procedures are necessarily more complex than they would be under administered arbitration.

4. *The basic arbitration clause*

Arbitrations are normally based upon an arbitration clause in a contract. Only in exceptional cases is an arbitration agreement concluded after a dispute has arisen. An arbitration clause or a separate arbitration agreement should be drafted carefully, since it serves as the legal basis for the arbitration. Arbitrators are incompetent to act beyond the scope of the arbitration clause or agreement.

The rules may be made applicable by a simple reference in a contract that all disputes that may arise out of the contract will be settled according to the UNCITRAL arbitration rules, but more careful wording of the arbitration clause is recommended. Taking into account the various model international arbitration clauses, the following wording is proposed:

> "Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules, which the parties declare to be known to them."

Under such an arbitration clause, the rules apply not only to disputes arising out of the contract, but also to those "relating to this contract (or the breach thereof)". Possible questions as to whether a dispute falls under the arbitration clause should be avoided; the

above language is designed to minimize the grounds giving rise to such questions.

5. *Recommended additions to the arbitration clause*

An arbitration clause may contain more than the basic model clause recommended in paragraph 4, which is merely an agreement by the parties to submit future disputes to arbitration under the UNCITRAL arbitration rules. In the course of an arbitration several problems may arise which the parties could have avoided by careful drafting of a more detailed arbitration clause. The parties may consider the following additions to the model clause in paragraph 4:

(a) *Provision for administrator or appointing authority*

Under paragraph 3 above, reference has been made to the usefulness of advance agreement on the choice of an arbitral institution to function as administrator of the arbitration. While the most important task of the administering arbitral institution is to function as an appointing authority (see articles 6(2), 7(3) and 7(6) herein), such an institution, as was noted in paragraph 3 above, may also be of assistance in other ways. The appointment of an administering arbitration institution may be achieved by adding the following to the basic model arbitration clause in paragraph 4 above:

"The parties also agree that

"(*a*) (i) The arbitration will be administered by ....." (the name of the arbitral institution chosen by the parties).

However, as an alternative, the parties may prefer to choose only an "appointing authority" whose task is confined to assisting the parties in the appointment of arbitrators. (The ECE model arbitration clause recommends the choice of an "appointing authority"). Any third party may be chosen as an appointing authority; the appointing authority may be a physical or a legal person, and, of course, may be an arbitral institution. If the parties prefer that the third party should act only as the appointing authority, the following may be added (as an alternative to clause (*a*)(i), above) to the model arbitration clause in paragraph 4:

["(*a*) (ii) The appointing authority will be ....." (the name of the person or institution chosen by the parties).]

(b) *Place of arbitration*

Some model international arbitration clauses, such as the ECE model clause, also recommend that the parties agree on the place of arbitration. Under article 14 of the present rules, if the parties have not agreed on the place where the arbitration will be held, the place will be determined by the arbitrators. When the parties conclude the agreement to arbitrate, it may not be possible to choose the most suitable place for arbitration since they may not know the nature and particular circumstances of the dispute that will be submitted to arbitration. If the parties wish to decide in advance on the place of arbitration, their choice may be added to the arbitration clause. (See the note at the end of the model arbitration clause in paragraph 6 below.)

(c) *Number of arbitrators*

A question that necessarily arises at the beginning of the arbitral proceedings (unless solved beforehand) is whether the case will be dealt with by a sole arbitrator or by an arbitral tribunal composed of three arbitrators. If there is no advance agreement, the question is settled by article 5 of the rules. However, to facilitate the proceedings by encouraging advance agreement, the model arbitration clause includes the following provision:

"The parties also agree that

"(*b*) The number of arbitrators will be....." (specification of *one* or *three*).

(d) *Language*

The language or languages to be used in the arbitral proceedings are governed by article 15 of the rules. Under that article, in the absence of an agreement by the parties on this issue, the arbitrators determine the language or languages to be so used. If the parties, by agreement, have resolved this question beforehand, their choice of language(s) may be taken into account in the appointment of the arbitrators, since the arbitrators should preferably have a working knowledge of the language(s) selected.

To facilitate advance agreement by the parties, the model arbitration clause provides:

"The parties also agree that

"(*c*) The language or languages used in the arbitration proceedings will be....."

(e) *Ex aequo et bono ("amiables compositeurs")*

If the parties have not authorized the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), the arbitrators will have to decide according to the rules of the law deemed applicable by the arbitrators, taking into account the terms of any contract between the parties and the usages of the trade (article 27). The parties should note that if they wish the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), they must state this expressly. (See the note at the end of the model arbitration clause in paragraph 6 below.) The effectiveness of such agreement is subject to the arbitration law of the country where the award is rendered.

6. *Model arbitration clause*

In accordance with the above comments, the following wording is proposed for the UNCITRAL model arbitration clause:

Model clause

"Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules, which the parties declare to be known to them."

"The parties also agree that

"(*a*) (i) The arbitration will be administered by ....." (name of the arbitral institution).

[To be filled in if only an appointing authority is named:

"(*a*) (ii) The appointing authority will be ....." (name of the person or institution).

"(*b*) The number of arbitrators will be....." (one or three).

"(*c*) The language or languages used in the arbitral proceedings will be .....".]

Note: If the parties wish to determine beforehand the place of arbitration or wish to authorize the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), such agreements should be added here in further subparagraphs.

INTERNATIONAL COMMERCIAL ARBITRATION RULES AND COMMENTARY

Prepared by the Secretariat pursuant to the decision of the United Nations Commission on International Trade Law taken at the sixth session (A/9017, para. 85)* (UNCITRAL Arbitration Rules)

SECTION I. INTRODUCTORY RULES

SCOPE OF APPLICATION

Article 1

1. Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, such disputes shall be settled according to these Rules, subject to any modifications that may be agreed upon by the parties.

2. "Parties" means physical or legal persons, including legal persons of public law.

3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, including an exchange of letters, signed by the parties, or contained in an exchange of telegrams or telexes.

Commentary

1. The purpose of the UNCITRAL arbitration rules is to facilitate arbitration in international trade. This object is made clear in the title: International Commercial Arbitration Rules. The rules, however, do not include a provision limiting their scope to international trade.

An attempt to limit the applicability of the rules to "international trade" by a binding provision in the rules would present difficult problems of definition and might open up new grounds for challenges to arbitration. It does not appear necessary to provide such a limiting provision, since the rules become applicable only when the parties have entered into a written agreement to this effect. The problem of scope is consequently quite different from the one presented by a uniform law or convention which is applicable in the absence of specific agreement by the parties.

For similar reasons, the rules do not require that the parties, when concluding their agreement, have their habitual places of residence or their principal places of business in different countries. Such a provision would also give rise to problems of interpretation and create additional grounds for challenges to arbitration.

These considerations have led to the conclusion to open a wide field for application of the rules. As a consequence of this choice, under article 1, the rules could also be applied in purely domestic cases. Even if this should occur, no harm would be done. The rules, however, are drafted for international cases, as appears, e.g., from the provision that a sole arbitrator or the presiding arbitrator shall be of a nationality other than the nationality of the parties.

2. Under paragraph 1 the rules become applicable by virtue of an agreement in writing which refers to the rules. This agreement may be concluded after a dispute has already arisen or—the normal case—long beforehand by an arbitration clause in a contract.

3. Paragraph 2 makes it clear that a Government, State agency or State organization may be party to an arbitration clause or agreement which refers to the UNCITRAL rules. Article 11 of the 1961 Geneva Convention also recognizes the right of legal persons, considered by the law applicable to them as "legal persons of public law", to conclude valid arbitration clauses or agreements.

4. Paragraph 3 is substantially based on article II, paragraph 2, of the 1958 New York Convention; however, in recognition of modern business practices, provision has been made for an exchange of telexes as a possible method of entering into an arbitration clause or arbitration agreement.

ADMINISTERED AND NON-ADMINISTERED ARBITRATION

Article 2

1. The parties may at any time select an arbitral institution to administer the arbitration or may choose non-administered arbitration.

2. If the parties reach no agreement regarding the choice of administered or non-administered arbitration, they shall be deemed to have selected non-administered arbitration.

3. If the arbitral institution selected by the parties is for any reason unable or unwilling to administer the arbitration, and if the parties do not select another arbitral institution, the parties shall be deemed to have selected non-administered arbitration.

Commentary

1. Although the parties may refer to the UNCITRAL arbitration rules without designating an arbitral institution to administer the arbitration, the assistance of an arbitral institution functioning as a central administrative body may be very helpful, especially in international cases.

"Administered arbitration" means arbitration administered by an arbitral institution. The choice of the arbitral institution is left entirely to the parties. It does not seem feasible or advisable to restrict the choice of the parties to certain arbitration institutions.

2. The present rules may be used in either administered or non-administered arbitration. Some provisions apply to both administered and non-administered arbitration. Other provisions needed slightly different wording to meet the particular circumstances of one of these situations. In these latter cases the provisions are set out in two columns; the left column

* UNCITRAL Yearbook, vol. IV: 1974, part one, II, A.

being applicable in the case of non-administered arbitration, and the right column in the case of administered arbitration.

3. Under paragraph 2, the parties are considered to have selected non-administered arbitration if they fail to exercise their option of choosing either administered or non-administered arbitration. This seemed the only possible solution, since there is no way of deciding which particular arbitral institution would have been chosen by the parties, had they agreed on administered arbitration.

4. Paragraph 3 takes account of the possibility that the arbitral institution selected by the parties might be unable or unwilling to administer the arbitration under the UNCITRAL arbitration rules instead of its own rules. In that case the arbitration automatically becomes non-administered arbitration unless the parties agree on another arbitral institution to serve as the substitute administrator.

It seemed advisable to state in paragraph 3 the consequence of the failure of a selected arbitral institution to administer the arbitration; otherwise disputes might arise whether such action on the part of the selected arbitral institution brings about the cancellation of the agreement to arbitrate.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant"), shall give to the other party (hereinafter called the "respondent"), notice that an arbitration clause or agreement concluded by the parties is invoked.

2. Such notice (hereinafter called "notice of arbitration") shall contain the following:

(*a*) The names and addresses of the parties;

(*b*) A reference to the arbitration clause or agreement that is invoked;

(*c*) A reference to the contract out of which the dispute arises;

(*d*) The general nature of the claim and an indication of the amount involved, if any;

(*e*) The relief or remedy sought;

(*f*) A reference to any agreement between the parties as to having one or three arbitrators, or, if the parties did not previously reach such agreement, the claimant's proposal as to their number (i.e. one or three).

3. In the case of administered arbitration, the notice of arbitration shall also be sent to the arbitral institution. The following shall also be attached to such notice:

(*a*) A copy of the contract out of which the dispute arises;

(*b*) A copy of the arbitration clause or agreement, if not contained in the contract annexed pursuant to subparagraph (*a*) of this paragraph.

Commentary

1. The notice of arbitration under article 3 serves to inform the respondent (and any administering arbitral institution) that arbitral proceedings have been started and that a particular claim will be submitted for arbitration. In addition, the notice contains information that will be useful in deciding on the number of arbitrators and in the selection of qualified arbitrators.

2. Paragraph 1 provides that arbitral proceedings shall commence with a "notice of arbitration" by the claimant to the respondent, informing the respondent that an arbitration clause or agreement is being invoked. This notice should not be confused with the "statement of claim" under article 16, which is to be submitted only after the arbitrators have been appointed.

3. Paragraph 2 sets forth the specific information that must be included in the notice of arbitration. The required information is sufficient to apprise the respondent of the general context of the claim that will be asserted against him and is useful in selecting qualified arbitrators.

At the time the notice of arbitration is sent, the parties may not have reached a decision as to having one or three arbitrators. (The model UNCITRAL arbitration clause at paragraph 6 in the introduction recommends that this question be decided at the time the arbitration clause or agreement is entered). If the issue is still open, the claimant is to express in the notice of arbitration his preference for having one or three arbitrators; this indication or preference by the claimant will aid the parties in resolving this question under the provisions of article 5.

4. Paragraph 3 provides that in the case of administered arbitration the notice of arbitration must also be sent by the claimant to the administering arbitral institution.

REPRESENTATION AND COMMUNICATIONS

Article 4

1. Any party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party, and, in the case of administered arbitration, also to the arbitral institution. This communication is deemed to have been given where an arbitration is initiated by a counsel or agent or where a counsel or agent submits a statement of defence and counter-claim for the other party.

2. All communications between the parties, or between the parties and the arbitrators, or, in the case of administered arbitration, between the arbitral institution and the parties or arbitrators, shall be effective when received by the addressee.

3. It is presumed that a communication sent by telegram or telex has been received one day after it was sent, and a communication by registered air mail five days after it was sent.

Commentary

This article regulates two matters of a technical nature: representation of the parties and the way communications should be made.

1. Paragraph 1 provides that a party may be represented by a counsel or agent at any stage of the arbitral proceedings. (The only exception is that under article 13, paragraph 3, the arbitrators may refuse the request of only one party for oral arguments and such oral arguments would usually be made by counsel for each party.) Normally the parties will designate their representatives at an early stage.

2. Under paragraph 2, communications are deemed to be effective only when they are received by the addressee. Paragraph 3, however, establishes special rules regarding the presumed date of receipt of communications sent by telegram, telex, or registered air mail. Paragraph 3 provides that telegrams and telexes shall be considered as received one day after they were sent, and communications by registered air mail five days after they were sent. The special rules in paragraph 3 are based on the fact that the types of communications mentioned therein are or are rapidly becoming known throughout the world, and offer some guarantee regarding the forwarding and eventual receipt of such communications within the time spans indicated in that paragraph. The presumptions under paragraph 3 may be rebutted by evidence to the contrary.

One may expect that even in the absence of an express requirement in the Rules communications such as the notice of arbitration (article 3), the statement of claim (article 6), and the statement of defence and counter claim (article 17) would normally be sent by registered air mail.

SECTION II. APPOINTMENT OF ARBITRATORS

NUMBER OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within [8] days from the date of receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed. In the case of administered arbitration, any such agreement by the parties regarding the number of arbitrators shall be communicated promptly to the arbitral institution.

Commentary

Under article 5 the parties have a relatively short period of time (8 days from the date of receipt by the respondent of the claimant's notice of arbitration) to reach agreement on having one or three arbitrators. This question will not arise if, as recommended in the model UNCITRAL arbitration clause, the parties have agreed beforehand on the number of arbitrators. If within the 8-day period provided in this article the parties do not agree that only one arbitrator be appointed, then three arbitrators shall be appointed. The 8-day period is believed sufficient to allow the parties to communicate and reach an agreement as to the desired number of arbitrators. In arbitrations concerning international trade matters usually three arbitrators are appointed and the appointment of a sole arbitrator may be regarded as exceptional.

APPOINTMENT OF SOLE ARBITRATOR

Article 6

1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

2. The parties shall endeavour to reach agreement on the choice of the sole arbitrator. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator.

If within 15 days of the receipt by the respondent of the claimant's proposal, the parties have not agreed on the choice of the sole arbitrator and if the parties have not previously agreed on an appointing authority, the claimant may, by telegram or telex, propose the names of one or more third parties, one of whom would serve as appointing authority.

If within 15 days of the receipt of the last-mentioned proposal the parties do not agree on the designation of an appointing authority, the claimant may apply to:

(*a*) An appointing authority designated pursuant to United Nations General Assembly resolution ..... (.....) by the Government of the country where the respondent has his principal place of business (*siège réel*) or habitual residence, or,

(*b*) An arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators, or,

(*c*) The appointing authority designated by

Administered

2A. The arbitral institution shall invite the parties to agree on the choice of the sole arbitrator.

If within 15 days of the receipt of such invitation by both parties, the arbitral institution has not received a communication evidencing agreement by the parties on the choice of the sole arbitrator, the arbitral institution shall serve as appointing authority.

Non-administered	*Administered*
the Secretary-General of the Permanent Court of Arbitration at The Hague.	
2 *bis*. If the appointing authority selected pursuant to paragraph 2 above agrees to function as such, the claimant shall send a copy of his notice of arbitration (article 3) to the appointing authority, together with a copy of the contract out of which the dispute arises and a copy of the arbitration agreement if it is not contained in that contract.	
3. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:	3A. The arbitral institution shall appoint the sole arbitrator according to the following list-procedure:
The appointing authority shall communicate to both parties an identical list containing at least three names;	The arbitral institution shall communicate to both parties an identical list containing at least three names;
Within 15 days after the receipt of this list, each party may indicate to the appointing authority his order of preference or objections regarding the names on the list;	Within 15 days after the receipt of this list, each party may indicate to the arbitral institution his order of preference or objections regarding the names on the list;
After the expiration of the above period, the appointing authority shall appoint the sole arbitrator from among the names on the list transmitted to the parties, taking into account, as far as possible, any preference and objections that may have been stated by the parties.	After the expiration of the above period, the arbitral institution shall appoint the sole arbitrator from among the names on the list transmitted to the parties taking into account, as far as possible, any preferences and objections that may have been stated by the parties.

Commentary

1. Paragraph 1 of article 6 states the requirement that the sole arbitrator be of a nationality other than the nationality of the parties. When there are three arbitrators, the same requirement is applicable to the presiding arbitrator (article 7, paragraph 2). This provision, designed to ensure the neutrality of the sole or presiding arbitrator, is applicable to both administered and non-administered arbitration. It corresponds with the practice of the International Chamber of Commerce when arbitrators are appointed for arbitration under the Rules of the ICC.

2. For non-administered arbitration, paragraph 2 expresses the principle that, if possible, the sole arbitrator should be the parties' own choice. If the parties cannot agree within 15 days, the assistance of a third person (called the "appointing authority") becomes necessary. A further 15 days are provided in order to permit the parties to agree on an appointing authority, and the appointing authority may be anyone acceptable to both parties.

Should the parties fail to agree on an appointing authority, one will be designated, upon request, by one of the authorities mentioned in paragraph 2 of article 6. However, the provisions concerning such possible appointing authorities are only provisional at this stage, since final adoption of these provisions would depend, *inter alia,* on a resolution by the United Nations General Assembly requesting Governments to designate such appointing authorities (as to subparagraph (*a*)), or on ascertaining the availability of the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority (as to subparagraph (*c*)).

13. For administered arbitration, the procedure set forth in paragraph 2A is much simpler. If the parties cannot agree on the choice of the sole arbitrator, the administrator (the arbitral institution designated as such by the parties) will serve as the appointing authority and appoint the sole arbitrator according to the list-procedure set out in paragraph 3A.

4. Paragraph 2 *bis* specifies the documents that the claimant shall send to the appointing authority in order to facilitate the task of that authority to appoint a competent sole arbitrator. This provision is applicable only to non-administered arbitration, since an arbitral institution that is administering the arbitration would have received this information at an earlier stage (article 3).

5. Paragraph 3 deals with the procedure to be followed by the appointing authority. Information which is useful to the appointing authority in proposing the names of possible arbitrators will be contained in the following documents: the notice of arbitration, the annexed copy of the contract out of which the dispute arises or the arbitration agreement if such agreement was not contained in that contract. The appointing authority will appoint the sole arbitrator pursuant to the list-procedure described in this paragraph.

The list-procedure in paragraph 3 is derived from the rules of the American Arbitration Association which has utilized this system with success for a number of years. This system has been adopted in the Inter-American Rules and has also been used in Europe, e.g. in the rules of the Netherlands Arbitration Institute. The advantage of the system is that it gives the parties, who failed to agree on the appointment of the arbitrator, some indirect influence over the appointment by permitting them to express their preferences and objections with regard to the names proposed by the appointing authority.

APPOINTMENT OF THREE ARBITRATORS

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators

thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal.

2. The presiding arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered	*Administered*
3. If within 15 days after receipt of the claimant's notice appointing an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, and if the parties have not previously agreed on an appointing authority, the claimant may propose, by telegram or telex, the names of one or more third persons, one of whom would serve as appointing authority.	3A. The arbitral institution shall invite each party to appoint an arbitrator and to notify, by telegram or telex, both the other party and the arbitral institution of such appointment within 15 days after receipt of the invitation.
If within 15 days after receipt of such proposal the parties agree on the designation of an appointing authority, that appointing authority will appoint the second arbitrator. The appointing authority may determine the method for appointing the second arbitrator.	
4. If within the above 15 days the parties do not agree on the designation of the appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the second arbitrator. The appointing authority may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.	4A. If within the above 15 days the respondent has not notified the arbitral institution of the name of the arbitrator he appoints, the institution shall appoint the second arbitrator. The arbitral institution may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.

5. If within 15 days after the appointment of the second arbitrator, the two arbitrators appointed in accordance with the foregoing procedures have not agreed on the choice of the presiding arbitrator, the parties shall endeavour to agree on the designation of the presiding arbitrator.

Non-administered	*Administered*
6. The claimant shall, by telegram or telex communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator.	6A. The claimant shall, by telegram or telex, communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator.
If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator and if the parties have not previously agreed on an appointing authority, each of the parties may, by telex or telegram, propose the names of one or more third persons, one of whom would serve as the appointing authority.	If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator, the arbitral institution, on request by either party, shall appoint the presiding arbitrator.
7. If, within 15 days after receipt of such proposal, the parties agree on the designation of an appointing authority, that appointing authority will appoint the presiding arbitrator.	7A. The arbitral institution shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, paragraph 3.
If, within the above 15 days, the parties do not reach agreement on the designation of an appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article, for the designation of the presiding arbitrator. The appointing authority mentioned in this paragraph shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, paragraph 3.	

Commentary

1. This article regulates the normal situation where three arbitrators are to be appointed and follows, in paragraph 1, the usual procedure in international arbitration: each party has the right to appoint one arbitrator and the two arbitrators thus appointed choose the president of the arbitral tribunal.

2. Like article 6 for the sole arbitrator, paragraph 2 requires that the presiding arbitrator be of a different nationality than the parties. The reasons for this provision are stated in the commentary to article 6.

3. A problem that may arise in the appointment of an arbitral tribunal composed of three members, consists of the possibility that the respondent will fail to appoint his arbitrator. This complication has been

dealt with in paragraphs 3 and 4 for non-administered arbitration and in paragraphs 3A and 4A for administered arbitration.

In view of the non-co-operative attitude of the respondent who failed to name his arbitrator, the appointing authority (which may be an arbitral institution) is left entirely free to determine the method for designating the second arbitrator. This authority may decide whether it will submit proposals for the designation of the second arbitrator to the party who failed to name an arbitrator or will proceed directly to the appointment of the second arbitrator.

4. Another difficulty may arise in connexion with the appointment of the presiding arbitrator. The procedure to be followed, if neither the parties nor the two arbitrators can agree on the choice of the president, has been regulated in paragraph 6. Paragraph 6 deals separately with non-administered and with administered arbitration, and the appointing authority (under paragraph 6A, the arbitral institution) shall appoint the presiding arbitrator according to a list-procedure: under this procedure both parties have an equal influence on the final appointment of the presiding arbitrator.

CHALLENGE OF ARBITRATORS (ARTICLES 8-10)

Article 8

1. Either party may challenge an arbitrator, including an arbitrator nominated directly by a party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

2. The circumstances mentioned in paragraph 1 include any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent.

3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed, shall disclose any such circumstances to the parties and the arbitral institution unless they have already been informed by him of these circumstances.

Commentary

Articles 8 to 10 deal with the challenge of arbitrators. Challenge of an arbitrator is infrequent, but the subject needs careful regulation since the impartiality and independence of the arbitrators is an essential requirement for every arbitration.

1. Paragraph 1 applies the rule as to arbitrator impartiality and independence to every arbitrator, including the arbitrator appointed by a party when three arbitrators are to be appointed. Paragraph 1 corresponds to similar provisions in the ECE Rules (article 6) and ECAFE Rules (article III under 1). Under the Rules of the American Arbitration Association, (section 18), only persons appointed as neutral arbitrators, (i.e. sole or presiding arbitrators) may be subject to disqualification.

2. Paragraph 2 gives non-exclusive examples of possible partiality or dependence. Justifiable doubts as to impartiality or independence may exist when the arbitrator has any financial or personal interest in the outcome of the arbitration (cf. article II of the Inter-American Rules and section 18 of the Commercial Arbitration Rules of the American Arbitration Association) or when he has any family or commercial tie with a party or party's counsel.

3. Paragraph 3, like section 17 of the Inter-American Rules and section 18 of the AAA Rules, requires that arbitrators disclose to the parties any circumstances that are likely to give rise to grounds for a challenge. No one knows better than the arbitrator himself whether such circumstances exist. The obligation to disclose these circumstances is extended to the pre-appointment stage. Notwithstanding such disclosure, the appointment may nevertheless be made. After appointment, therefore, these circumstances should also be disclosed to those parties who were not yet informed (this may be both parties if the appointment was made by an arbitral institution or appointing authority), or to the arbitral institution that administers the arbitration but may not have been involved in the appointment of the arbitrator.

Article 9

1. The challenge of an arbitrator shall be made within 15 days after his appointment has been communicated to the challenging party or, if the circumstances mentioned in article 8 became known to such party at a later time, within 15 days after such time.

2. The challenge shall be made by written notice to both the other party and the arbitrator and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment.

Commentary

1. This article regulates certain procedural aspects of the challenge: paragraph 1 states the period within which the challenge shall be made; paragraph 2 regulates the form of the challenge.

2. After circumstances that would justify a challenge become known, a party may waive his right to challenge. A waiver takes place automatically when no challenge has been made within the 15 days mentioned in the first paragraph.

3. On the other hand, a challenge may be accepted either by the other party or by the arbitrator. Paragraph 3 provides that if a challenge was successful, the appointment of the substitute arbitrator shall be made pursuant to the procedure that was applicable to the initial appointment.

Article 10

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the arbitral institution or appointing authority that made the initial appointment shall decide whether the challenge is justified.

2. If the initial appointment was not made by an arbitral institution or appointing authority, the decision on the challenge will be made:

Non-administered	*Administered*
by an appointing authority to be agreed upon by the parties, if they have not previously agreed on such an authority. If the parties do not promptly agree on an appointing authority, the challenging party in accordance with the provisions of article 6, para. 2, may request any one of the appointing authorities mentioned in that article, to decide on the challenge.	by the arbitral institution that administers the arbitration.

3. The decision of the arbitral institution or appointing authority concerning the challenge is final. If the decision sustains the challenge, a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment.

Commentary

This article deals with the case where the challenge is *not* accepted (article 9, paragraph 3 deals with the case where the challenge is accepted). A decision on the challenge must then be made by the appropriate arbitral institution or appointing authority.

1. Paragraph 1 entrusts the decision concerning the challenge to the arbitral institution or appointing authority that made the initial appointment.

2. If the appointment was made by the parties or by the arbitrators (by choosing the presiding arbitrator), another solution had to be provided in paragraph 2. In the case of administered arbitration, this solution is simple; the arbitral institution takes the decision. In non-administered arbitration, it was necessary to provide for the choice or appointment of an appointing authority. This has been done by reference to article 6, paragraph 2, which sets forth alternative appointing authorities; the challenging party may apply to any one of these authorities to decide the challenge.

3. Challenge and appointment procedures are connected. If the challenge is sustained, a substitute arbitrator shall be appointed pursuant to the procedure applicable to the initial appointment (paragraph 3).

DEATH, INCAPACITY OR RESIGNATION

Article 11

1. In the event of the death, incapacity or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed pursuant to the procedures that were applicable to the initial appointment.

2. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings shall be repeated at the discretion of the arbitral tribunal.

Commentary

1. All arbitration rules regulate the replacement of arbitrators in the event of death, incapacity or resignation. The underlying idea for the procedure to be followed in these cases, as set forth in paragraph 1, is that the substitute arbitrator will be appointed in the same way as his predecessor. The wording of this paragraph also provides for situations where the person or persons who appointed the predecessor fail to appoint the substitute: the "procedures" applicable are those according to which the initial appointment would have been made had the appointing authority failed to make the initial appointment.

2. Paragraph 2 requires that if the sole or presiding arbitrator is replaced, any hearings held prior to such replacement be repeated. However, if any other arbitrator is replaced, the arbitral tribunal is free to decide whether or not to order that hearings held previously be repeated.

EXTENSION OF TERMS FOR APPOINTMENT; PARTICULARS ON PROPOSED ARBITRATORS

Article 12

1. The time-limits set forth in section II for the appointment of arbitrators may at any time be extended by agreement of the parties. If the arbitration is administered by an arbitral institution, such time-limits may also be extended by that institution on its own initiative.

2. Where names for the appointment of arbitrators are proposed either by the parties or by an appointing authority, including an arbitral institution serving as appointing authority, full names and addresses shall be given, accompanied, as far as possible, by a description of their qualifications for appointment as arbitrators.

Commentary

1. This article concludes section II of the rules dealing with the appointment of arbitrators. It contains provisions that seem useful in connexion with the appointment procedure in general. Paragraph 1 permits extension by the parties of time-limits concerning the appointment of arbitrators (but not the challenge); paragraph 2 deals with personal data concerning persons who are proposed as arbitrators.

2. Article 12 applies to all appointments of arbitrators. In fact three methods of appointment may be distinguished under these rules:

Appointment by the parties;

Appointment by an arbitral institution where the parties agreed that their arbitration be administered by a particular arbitral institution;

Appointment by an appointing authority, agreed upon by the parties for the sole purpose of appointing arbitrators or selected for this sole purpose pursuant to article 6, paragraph 2. This appointing authority appears only in non-administered arbitration and only, as its name indicates, for the appointment of arbitrators. In administered arbitration, the administrator (the arbitral institution) is automatically available to serve as the appointing authority, although it may also assist the parties in other matters.

SECTION III. ARBITRAL PROCEEDINGS

GENERAL PROVISIONS

Article 13

1. Subject to these Rules, the arbitrators may conduct the arbitration in such a manner as they consider appropriate, provided that the parties are treated with absolute equality.

2. The arbitrators may decide that the proceedings shall be conducted solely on the basis of documents and other written materials, unless both parties agree that oral arguments shall be presented.

3. Oral hearings must be held if one of the parties offers to produce evidence by witnesses [unless the arbitrators unanimously decide that such proposed evidence is irrelevant].

4. All documents or information supplied to the arbitrators by one party shall be communicated by that party at the same time to the other party.

Commentary

1. Article 13 contains some general provisions concerning the conduct of arbitral proceedings. Paragraph 1 gives great freedom to the arbitrators in this respect, provided the parties are treated with absolute equality.

2. Paragraph 2 authorizes the arbitrators to decide that the arbitral proceedings shall be conducted solely on the basis of documentary evidence. Oral arguments must be permitted by the arbitrators if both parties agree that they or their counsel should plead their case orally before the arbitrators. However, the arbitrators may refuse a request by only one party for oral argument.

3. Under paragraph 3 oral hearings must be held if at least one of the parties wishes to introduce testimony by witnesses. [The bracketed language would permit the arbitrators to refuse to convoke an oral hearing at the request of only one party, when they consider that the evidence that the party intends to present at such a hearing would be irrelevant.]

It may be observed that the ECE and the ECAFE Rules employ different approaches to the question of oral hearings. Under the ECE Rules, oral hearings are the rule (article 22) and arbitrators may render an award based on solely documentary evidence only if the parties have so agreed (article 23). The ECAFE Rules (article VI, para. 5) provide that normally proceedings should be conducted on the basis of documents (in view of the large distances that usually separate the places of business of parties engaged in international trade).

4. Paragraph 4 introduces the same rule as that found in article VI, paragraph 2 of the ECAFE Rules: all documents or information supplied by one party to the arbitrators shall at the same time be communicated by that party to the other party. Equal treatment and equal opportunity for both parties are basic principles for arbitral proceedings. The principle of equal treatment has to be observed by both the parties and the arbitrators. Thus, the arbitrators may not base their award, *inter alia,* on a document submitted to them by one party but unknown to the other party.

PLACE OF ARBITRATION

Article 14

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators.

2. If the parties have agreed upon the place of arbitration, the arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties.

3. The arbitrators may decide to hear witnesses, or to hold interim meetings for consultation among themselves, at any place they deem convenient.

4. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspections.

Commentary

1. In conformity with article 14 of the ECE Rules, paragraph 1 provides that the place of arbitration shall be determined by arbitrators unless the parties have agreed upon such place.

2. Paragraphs 2, 3 and 4 preserve some freedom of movement for the arbitrators, even in cases where the parties have reached agreement on the place of arbitration.

LANGUAGE

Article 15

1. Subject to any provision that has been made by the parties in their agreement, the arbitrators, promptly upon their appointment, shall determine the language or languages to be used in the proceedings. This determination shall apply to any written notice or statement, and, if hearings should take place, to the language(s) to be used in such hearings.

2. Arbitrators may order that documents, delivered in their original language, shall be accompanied by a translation into the language(s) determined by the parties or the arbitrators.

Commentary

This article provides a solution for the language problems that may arise in international arbitrations by ensuring that the language or languages to be used in the arbitral proceedings are established at the commencement of such proceedings.

STATEMENT OF CLAIM

Article 16

1. Within a period to be determined by the arbitrators, the claimant shall send his written statement of claim to each of the arbitrators and to the respondent. All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(*a*) The names and addresses of the parties;

(*b*) A full statement of the facts and a summary of the evidence supporting these facts;

(*c*) The points at issue;

(*d*) The relief or remedy sought.

3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered provided the respondent is given an opportunity to express his opinion concerning the change.

Commentary

1. The statement of claim should not be confused with the notice of arbitration, which is dealt with in article 3. The notice of arbitration serves to inform the

respondent (and, in the case of administered arbitration, also the arbitral institution) that the claimant resorts to arbitration, and indicates the general nature of the claim and the remedy sought. That notice also sets into motion the appointment machinery, beginning (if not already agreed upon beforehand) with the establishment of the number of arbitrators, and followed by the appointment of the sole arbitrator or the arbitral tribunal.

The arbitrators may have received a copy of the notice of arbitration on the occasion of their appointment. They may have asked for it before accepting their appointment or it may have been sent to them when they were invited to act as arbitrator. However, it did not seem necessary to require that the *notice of arbitration* be transmitted to the arbitrators since, for them, the first important document is the *statement of claim,* which is regulated by the present article 16.

2. Pursuant to paragraph 1, the arbitrators must first determine the period within which the claimant shall send his written statement of claim (together with a copy of the contract and of the arbitration agreement if not contained in the contract) to each of the arbitrators and to the respondent. When determining this period, the arbitrators shall take into account article 20, which states that as a rule the time limit for written communications should not exceed 30 days. The statement of claim shall be sent directly both to the arbitrators and to the respondent in order to avoid any unnecessary delays.

All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed to the statement of claim. This provision is also found in article 15 of the ECE Rules. For the benefit of both the arbitrators and the respondent, the information should be as complete as possible at every stage of the proceedings.

3. This principle also underlies paragraph 2, which describes the required contents of the statement of claim. A full statement of the facts should be given together with a summary of the evidence supporting these facts. This requirement is also found, e.g., in the Rules (article 2) of the Foreign Trade Arbitration Commission in Moscow.

In addition, the remedy sought should be clearly defined. This, however, should not exclude the possibility that, during the course of the proceedings, the claim may be supplemented or altered.

4. Under paragraph 3, the statement of claim may be modified with the permission of the arbitrators. However, when such a modification is made, the respondent is given an opportunity to express his opinion concerning the change.

STATEMENT OF DEFENCE AND COUNTER-CLAIM

Article 17

1. Within a period to be determined by the arbitrators, the respondent shall communicate in writing, a statement of defence to each of the arbitrators and to the claimant.

2. In his statement of defence, the respondent may make a counter-claim arising out of the same contract. The provisions of article 16 with respect to the claim also apply to the counter-claim.

Commentary

1. The statement of defence is the second written pleading that is required in each case. The respondent must be given the same opportunity as the claimant to present his case in writing. In determining the period within which the statement of defence has to be presented, the arbitrators must take into account article 20 which provides that as a rule the period should not exceed 30 days.

2. Paragraph 2 provides that the respondent, in his statement of defence, may set forth a counter-claim if it arises out of the same contract. The requirements of article 16, paragraph 2, also apply to counter-claims: the respondent shall give a full statement of the facts on which the counter-claim is based and a summary of the evidence supporting those facts. Regarding changes in the counter-claim during the proceedings, paragraph 3 of article 16 applies. The claimant, in turn, will be given an opportunity to present a written reply to the counter-claim (article 19).

3. The statement of defence constitutes, for the respondent, the final opportunity to make a plea as to the arbitrator's jurisdiction. This important issue is dealt with separately in article 18.

PLEAS AS TO THE ARBITRATOR'S JURISDICTION

Article 18

1. The arbitrators shall be the judges of their own competence and shall rule on objections that the dispute is not within their jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. An objection to the competence of the arbitrators shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. Where delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible.

3. The arbitrators may rule on such an objection as a preliminary question or they may proceed with the arbitration and rule on such objection in their final award.

4. The arbitrators have jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part.

Commentary

1. Paragraph 1 and 3 are largely based on article 41 of the Convention on the Settlement of Investment Disputes (Washington 1965), which reads as follows:

> "1. The tribunal shall be the judge of its own competence.
>
> "2. Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the jurisdiction of the tribunal, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

Paragraph 1 of article 18 refers both to "the objections that the dispute is not within the jurisdiction of

the arbitrators", and also to "objections with respect to the existence or validity of the arbitration clause or agreement". The second clause might be deemed to be covered by the more general first clause concerning "objections that the dispute is not within the jurisdiction of the arbitrators". However, it does not seem advisable to leave any doubt on this point and, consequently, the second clause is added in the interest of clarity.

2. Paragraph 2 is based largely upon article 17 of the ECE Rules, which read as follows:

> "The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed *shall* do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that arbitrators have exceeded their terms of reference shall be raised as soon as the question on which the arbitrators are alleged to have no jurisdiction is raised. Where the delay in raising the claim is due to a cause which the arbitrators deem justified, the arbitrators shall declare the plea admissible."

However, it did not seem necessary for the present rules to deal with objections that the arbitrators have exceeded their terms of reference.

3. Paragraph 4 has been added in order to dispel any possible doubt as to the competence of the arbitrators to determine the existence or validity of a contract of which the arbitration clause forms a part. This paragraph gives effect to the view that the arbitration clause is "separate" from the contract, as has been decided, *inter alia,* by the Supreme Court of the United States of America in 1967 in the case of *Prima Paint Corporation* v. *Flood and Conklin Manufacturing Co.* (388 U.S. 395). This view may also be considered to conform with the underlying intention of the parties when they entered into a written contract containing an arbitration clause. Consequently, a decision by the arbitrators that a contract is null and void will not affect the validity of the arbitration clause in that contract and will not undermine the competence of the arbitrators to make that decision.

FURTHER WRITTEN STATEMENTS; FURTHER DOCUMENTARY EVIDENCE

Article 19

1. Arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods for presenting such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements.

2. If a counter-claim is raised in the statement of defence, the arbitrators shall afford the claimant an opportunity to present a written reply to this claim.

3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period as they shall determine.

Commentary

1. The rules provide that arbitrations shall commence with an exchange of written statements. In every case the claimant must deliver his statement of claim and the respondent shall have an opportunity to reply to this statement in his statement of defence.

The arbitrators are free to decide whether any further exchange of written statements (rejoinder and reply to the rejoinder) should be required. Under several arbitration systems, and especially in civil law countries, a second statement by the claimant (in French: *réplique*) and an answer to this by the respondent (*duplique*) is quite customary. It has therefore been provided that even when the arbitrators would deem that the information already received by them in writing is sufficient, the parties may agree on a further exchange of statements and clarifications.

2. Paragraph 2 provides that the claimant shall have an opportunity to reply if the respondent, in his statement of defence, has raised a counter-claim.

3. Paragraph 3 repeats a provision found in article 24 of the ECE Rules. This provision is not strictly necessary because of the general rule already expressed in article 13, paragraph 1, to the effect that the arbitrators may conduct the arbitration in such a manner as they consider appropriate.

TIME-LIMITS

Article 20

1. The periods of time allowed by the arbitrators for the communication of written statements should, as a rule, not exceed 30 days.

2. The parties may agree to extend the various time-limits laid down in section III of the Rules. In the absence of such agreement, the arbitrators shall be entitled to extend the time-limits if they conclude that an extension is justified.

Commentary

1. This article is designed to underline the principle that disputes should be settled as quickly as possible. The rules cannot prescribe fixed time-limits, as this is hardly possible in domestic arbitrations and would be even more difficult in international cases. The 30 days mentioned in paragraph 1 may, however, serve as a useful guideline, particularly for the claimant who can commence the preparation of his statement of claim long before the arbitrators are even appointed.

2. Paragraph 2 permits extension of the time-limits for the communication of written statements and for other acts required from the parties. In connexion with the appointment of arbitrators, the possibility of extending time-limits has been introduced in article 12; paragraph 2 of the present article contains a similar provision in respect of section III. Such a provision is contained in article 25 of the ECE Rules.

HEARINGS, EVIDENCE

Article 21

1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to

the arbitrators and to the other party the names and addresses of the witnesses he intends to call and the language in which such witnesses will give their testimony.

3. The arbitrators shall make arrangements for interpretation of oral statements made at a hearing and for a stenographic record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case or if the parties have agreed thereto and have notified the arbitrators of such agreement at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitrators may decide whether persons other than the parties and their counsel or agent may be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated.

5. Arbitrators shall determine the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary.

Commentary

1. This article contains some general provisions deemed useful for the regulation of hearings. Pursuant to paragraph 1 adequate advance notice of each hearing must be given to the parties.

2. If witnesses are to be heard, information concerning them must be communicated to the arbitrators and to the other party at least 15 days before the hearing (para. 2). The hearing of witnesses may require preparation for which some time might be needed.

3. Paragraph 3 deals with preparatory measures for hearings. In case of administered arbitration, arbitrators may call on the arbitral institution for assistance.

4. Pursuant to paragraph 4, hearings shall generally be *in camera*. This is in conformity with the principle of privacy that is customary in arbitration. The manner in which witnesses will be interrogated is left to the arbitrators. Thus, the arbitrators may decide whether to permit cross-examination of witnesses: this technique is not customary in many areas of the world and cannot therefore be prescibed for international arbitration. The only adequate solution is to leave the arbitrators free to decide on the manner in which witnesses are to be examined. If both parties or their counsel are accustomed to the technique of cross-examining witnesses, there would be no objection to permitting cross-examination. On the other hand, if one or both parties are unacquainted with this technique, the arbitrators may find it inappropriate to impose it on the parties.

5. Paragraph 5 is modelled after the Inter-American Commercial Arbitration Rules (article 29). In making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe the strict legal rules of evidence.

INTERIM MEASURES OF PROTECTION

Article 22

The arbitrators may take any interim measures they deem necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Commentary

This article is derived from a combination of article VI, paragraph 6 of the ECAFE Rules ("Arbitrators shall be entitled to take any interim measures of protection which they deem necessary in respect of the subject-matter of the dispute") and the more specific provision contained in article 27 of the ECE Rules.

EXPERTS

Article 23

1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

2. The parties shall give the expert any relevant information he may require of them. Any dispute between a party and such expert as to the relevance of any required information shall be referred to the arbitrators for decision.

3. Upon receipt of the expert's report, the arbitrators shall transmit a copy of the report to the parties who shall be given an opportunity to express, in writing, their opinion of the report.

4. On request of either party the expert, after delivery of the report, may be heard in a hearing where the parties and their counsel or agent are present and may interrogate the expert. At this hearing either party may bring expert witnesses in order to testify on the points at issue. The provisions of article 21 are applicable to such proceedings.

Commentary

Especially in cases of a technical nature the arbitrators may wish to have the benefit of expert advice. Experts may also be appointed on matters such as the existence of particular commercial usages or questions of law.

The rules of arbitral institutions generally contain a simpler provision, stating merely that arbitrators may request the opinion of experts "to elucidate questions requiring special knowledge, which arise during the examination of the case, including questions as to the existence of particular commercial usages" (article 23 of the Rules of the Foreign Trade Arbitration Commission in Moscow) or "to report on technical or legal issues, provided that their terms of reference are laid down in advance" (article 20 of the Rules of Arbitration of the International Chamber of Commerce, Paris). However, it seems advisable to cover more fully in the present rules the possible use of experts appointed by the arbitrators.

ABSENCE OF A PARTY

Article 24

1. If the respondent, after having been duly notified, fails to submit his statement of defence, or if either party fails to appear at a hearing properly called under these Rules, without showing sufficient cause

for such failure, the arbitrators may proceed with the arbitration and may render an award as if all parties were present.

2. If either party, after having been duly notified, fails, without sufficient cause, to submit documentary evidence when an award is to be rendered on the basis of such evidence without an oral hearing, then the arbitrators may render their award on the evidence before them.

Commentary

1. For every arbitration the rules provide for an exchange of at least two written statements: the statement of claim (article 16) and the statement of defence (article 17).

Paragraph 1 deals first of all with the case where the respondent does not present his statement of defence. This should not be a possible means of frustrating the proceedings, and notwithstanding the failure of the respondent to submit his statement of defence, the arbitrators may proceed with the arbitration.

A similar situation arises when either party fails to appear at a hearing properly convoked. Paragraph 1 provides, following a similar provision in article 31 of the ECE Rules, that the arbitrators may proceed with the arbitration. Paragraph 1 adds, "and render an award as if all parties were present", following the example of the ICC Rules (article 21, para. 3).

2. Where the respondent does not reply to the statement of claim, the arbitrators may nevertheless order a hearing and inquire further into the merits of the case. If the arbitrators order a hearing, the respondent shall again be given adequate advance notice thereof. This result follows from the previous articles (articles 13, paras. 1 and 2, and article 21); therefore, these provisions need not be repeated in the present article.

It did not seem necessary to include an express provision dealing with the hypothetical case where the claimant does not present his statement of claim. What should happen under these circumstances may be left to the discretion of the arbitrators, pursuant to article 13.

3. Paragraph 2 has been adopted from article 31, paragraph 2, of the ECE Rules.

WAIVER OF RULES

Article 25

Any party who knows or should know that any provision or requirement of these Rules has not been complied with and proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Commentary

This provision follows similar rules set forth in article 37 of the Commercial Arbitration Rules of the American Arbitration Association and article 37 of the Inter-American Commercial Arbitration Rules.

SECTION IV. THE AWARD

FORM AND EFFECT OF THE AWARD

Article 26

1. The award shall be binding upon the parties. The award shall be made in writing and shall contain reasons, unless both parties have expressly agreed that no reasons are to be given.

2. The award by an arbitral tribunal shall be determined by a majority of arbitrators.

3. The award shall be signed by the arbitrators. Where there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the enforceability of the award. The award shall state the reason for the absence of an arbitrator's signature, but shall not include any dissenting opinion.

4. The award may only be published with the consent of both parties.

5. Copies of the award duly signed by the arbitrators shall be transmitted to the parties by the arbitrators. If the arbitration is administered by an arbitral institution (article 2), a signed copy of the award shall also be transmitted to the arbitral institution.

6. If the arbitration law of the country where the award is rendered requires that the award be filed or registered, the arbitrators shall comply with this requirement within the time required by law.

Commentary

1. Paragraph 1, in stating that the award shall contain reasons unless both parties have expressly declared that no reasons are to be given, corresponds with article 40 of the ECE Rules. The Convention on the settlement of Investment Disputes (Washington 1965) and the European Convention for a Uniform Arbitration Law (Strasbourg 1964) do not contain an exception permitting the parties to agree that no reasons are to be given. On the other hand, the European Convention of 1961 and the ECE Rules contain such an exception.

2. Paragraph 2 requires that an award rendered by an arbitral tribunal be determined by a majority of the arbitrators. The ECE Rules provide, in addition that failing a majority, the presiding arbitrator alone shall render the award. Under such a provision the position of the presiding arbitrator is considerably strengthened; without such a provision the arbitral tribunal would decide in conformity with Court practice at the place of arbitration, which generally requires that judges (and in this case, the arbitrators) continue their deliberations until they arrive at a majority decision.

3. If one arbitrator fails to sign the award (where there are three arbitrators), under paragraph 3 the award shall state the reason for the absence of his signature, but shall not contain any dissenting opinion. Dissenting opinions are generally unknown in arbitration practice outside the socialist countries. If the award is published (permitted under paragraph 4 only if both parties agree to it), it will not contain any dissenting opinion. When publication of an award does take place, the names of the parties are usually omitted and other measures are taken to avoid the disclosure of their identity.

4. The scope of application of article 26 is not limited to final, definitive awards. Although it has not been deemed necessary to define in these rules the term "award" (as has been done in the ECE and ECAFE Rules), here also "award" is meant to include interim, interlocutory or partial awards, as well as final

awards. Under these rules the arbitrators are free to make any such interim awards before arriving at their final award.

APPLICABLE LAW

Article 27

1. The arbitrators shall apply the law expressly designated by the parties as applicable to their contract.

2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable.

3. The arbitrators shall decide *ex aequo et bono* (as "amiables compositeurs") if the parties have authorized the arbitrators to do so and the arbitration law of the country where the award is rendered permits such arbitration.

4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade.

Commentary

1. This article is largely based on articles 38 and 39 of the ECE Rules which, in turn, are based on article VII of the Geneva Convention of 1961. For the sake of comparison these articles are quoted below:

(*Geneva Convention*)

"*Article VII. Applicable Law*

"1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

"2. The arbitrators shall act as 'amiables compositeurs' if the parties so decide and if they may do so under the law applicable to the arbitration."

(*ECE Rules*)

"*Article 38*

"Subject to the provisions of article 39, the arbitrator's award shall be based upon the law as determined by the parties of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and the trade usages."

"*Article 39*

"The arbitrators shall act as 'amiables compositeurs' if the parties so decide and if they may do so under the law applicable to the arbitration."

2. Paragraphs 1 and 2 of the present article are concerned with arbitral proceedings that are subject to the rules of some applicable law. Such law may have been designated by the parties expressly in a contract; otherwise, the arbitrators must determine the applicable substantive law according to the conflict of laws rules that they deem applicable in the light of the particular circumstances of the case.

3. Paragraph 3 deals with arbitrators acting *ex aequo et bono* (as "amiables compositeurs"). In arbitration rules intended for world-wide use, this type of arbitration cannot be neglected. It is used in many countries of Western Europe, Africa, Asia and Latin America. The formula in paragraph 3 gives arbitrators acting as "amiables compositeurs" great freedom in arriving at their award, although it is generally accepted that such arbitrators are bound by rules of public order (*ordre public*), if not by "*jus cogens*" in general.

4. Paragraph 4 provides that "in any case", whether the arbitrators are to decide according to the rules of law or as "amiables compositeurs", they shall take into account the terms of the contract and the usages of the trade. This gives arbitrators wide latitude, divorced from any specific system of municipal law. In the international commercial arbitrations for which these rules are designed, this approach corresponds with the intention of the parties.

SETTLEMENT

Article 28

1. If, before the award is rendered, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award.

2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of the arbitration as specified under article 31. Unless otherwise agreed to by the parties, these costs shall be borne equally by both parties.

3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, duly signed by the arbitrators, shall be transmitted by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

Commentary

1. The ECAFE Rules, the Inter-American Rules, as well as the ICSID Arbitration Rules[4] all regulate the case where the parties agree to a settlement of the dispute during the arbitration proceedings. The Investment Rules distinguish between an "order of discontinuance" and a "settlement in the form of an arbitral award" (rule 43); the Inter-American Rules and the ECAFE Rules mention only the latter possibility. The advantage of a settlement in the form of an award lies in the fact that such a settlement acquires the legal force of an award.

2. Paragraph 1 follows the patterns of the Investment Rules in distinguishing between a discontinuance of the arbitral proceedings and a settlement in the

[4] Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes as adopted by the Administrative Council of the Centre pursuant to article 6 (1) (c) of the Convention on the Settlement of Investment Disputes.

form of an arbitral award on agreed terms. The present article does not require the parties to transmit to the arbitrators the full and signed text of a settlement that may be embodied in an award. In practice, a settlement may be reached during a hearing, often with the assistance of the arbitrators, provided the parties request and the arbitrators are willing to render such assistance. The arbitrators may also draft the award on agreed terms, embodying the settlement orally arrived at by the parties during a hearing. It was considered preferable not to require that arbitrators embody in an award any settlement reached by the parties. Under paragraph 1 the arbitrators may refuse to "record the settlement in the form of an arbitral award on agreed terms"; they may do so at their discretion, *e.g.* if the settlement would be against public policy. In such a case the arbitrators would confine themselves to issuing an order for the discontinuance of the arbitral proceedings.

3. Paragraphs 2 and 3 have been added to settle certain practical points. It is believed that paragraph 2 recognizes the spirit of the settlement when it divides the costs of arbitration equally between the parties unless the parties have agreed otherwise.

INTERPRETATION OF THE AWARD

Article 29

1. Within 30 days after the communication of the award to the parties, either party, with notice to the other party, may request that the arbitrators give an official interpretation of the award, which will be binding upon the parties.

2. Such an interpretation shall be given in writing and duly signed by the arbitrators within 45 days after receipt of the request and shall be transmitted by the arbitrators to both parties and, if the arbitration is administered by an arbitral institution, to that institution.

Commentary

After the ward has been rendered, one or both parties may wish that the arbitrators provide an official interpretation of the meaning or scope of the award. The present article follows the example of article VIII, paragraph 2, of the ECAFE Rules. Article 50 of the Convention on the Settlement of Investment Disputes contains a similar provision.

CORRECTION OF THE AWARD

Article 30

1. Within 30 days after the communication of the award to the parties, the arbitrators, on their own initiative or on request of a party, may correct any error in computation, any clerical or typographical error, or any error of similar nature in the award.

2. Any such correction, in writing and duly signed by the arbitrators, shall be communicated by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

[3. Within 15 days of the communication of the award to the parties, a party may request the arbitrators to render an additional award as to claims presented in the arbitral proceedings but omitted from the award. A copy of such request shall be sent to the other party. If the arbitrators consider the request justified, they shall complete their award within 60 days of receipt of the request. The additional award shall comply with the provisions of article 26.]

Commentary

1. Paragraphs 1 and 2 contain provisions similar to those contained in article VIII, paragraph 3 of the ECAFE Rules.

[2. Paragraph 3 is designed to prevent the invalidation of awards on the ground of an omission or failure to decide upon one or more claims presented in the arbitral proceedings. National arbitration laws generally consider the failure or omission of arbitrators to deal with points at issue as grounds for setting aside an award. Thus, under article 25(e) of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration, "an arbitral award may be set aside by a court if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made".

By adopting the UNCITRAL Arbitration Rules, the parties agree to an augmentation of the power of the arbitrators, authorizing the arbitrators not only to correct any clerical or typographical errors (para. 1) but also to complete their award (para. 3). The authority thus given to the arbitrators under paragraph 3 to complete an award by removing an omission presents issues quite distinct from national rules of law dealing with awards where an omission *has not been corrected,* or where the arbitration rules agreed to by the parties do not authorize such action by the arbitrators. It may be noted that under this paragraph the arbitrators may complete the award only as to points at issue that were presented in the arbitral proceedings. Consequently, the rule in paragraph 3 would apply, e.g. to an inadvertent failure to fix or apportion the costs of arbitration or to rule on a claim for interest. The rule could also apply to a case in which a counterclaim was asserted without substantial evidence in its support, but as to which the arbitrators failed to express their opinion in the award. In the absence of a provision like paragraph 3 in these Rules, a lengthy and costly arbitration might be totally invalidated; permitting completion of the award on points at issue that had been presented in the arbitral proceedings would be in the interest of an efficient and effective disposition of the dispute between the parties.]

COSTS

Article 31

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

Non-administered	*Administered*
(*a*) The fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves;	A(*a*)(i) The fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves after consultation with the arbitral institution which may make any comment it

Administered

deems appropriate concerning the fee suggested by the arbitrators;

(ii) The costs of administration as declared by the arbitral institution;

(*b*) The travel and other expenses incurred by the arbitrators;

(*c*) The costs of expert advice and of other assistance required by the arbitrators;

(*d*) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(*e*) The compensation for legal assistance of the successful party, if the arbitrators deem that legal assistance was necessary under the circumstances of the case and if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators.

2. The costs of arbitration shall, in general, be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties.

Commentary

1. Paragraph 1 gives a non-exhaustive enumeration of items that may be considered as included in the costs of arbitration. Concerning the fee of arbitrators, the general rule is that the fee is fixed by the arbitrators themselves. In the case of administered arbitration, however, the arbitrators must consult the arbitral institution concerning the amount of their fee and the arbitral institution may comment on the size of the fee proposed by the arbitrators.

It should be noted that the fee of the arbitrators must be stated separately in the award. All other costs of arbitration may be combined in one figure.

2. A provision similar to paragraph 2 may be found in article 43 of the ECE Rules and in article VII, paragraph 7, of the ECAFE Rules.

DEPOSIT OF COSTS

Article 32

Non-administered	*Administered*
1. Arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of arbitration.	1A. The arbitral institution may require, after consultation with the arbitrators, that each party deposit an equal amount as an advance for the costs of arbitration.
2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.	2A. During the course of the arbitral proceedings the arbitral institution may require supplementary deposits from the parties if requested to do so by the arbitrators.
3. If the required deposits are not paid in full within 30 days the arbitrators shall notify the parties of the default and give an opportunity to either party to make the required payment.	3A. If the required deposits are not paid in full within 30 days the arbitral institution shall notify both the arbitrators and the parties of the default and give an opportunity to either party to make the required payment.
4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.	4A. The arbitral institution shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Commentary

1. Requirement of a deposit for costs is customary. Pursuant to paragraph 1, each party shall pay one half of the advance payment. During the course of the arbitral proceedings and, in the light of the development of the proceedings, further deposits may be required (paragraph 2). If any of the required deposits, i.e. either the initial or a supplementary deposit, is not paid in full, both parties are notified and each has an opportunity to make the required payment (paragraph 3). This solution is a practical one since a party who has fulfilled his own obligations may have a strong interest that the arbitration proceed to a conclusion and may therefore be willing to make the payment required of the other party.

2. One advantage of administered arbitration is that the arbitral institution takes care of requiring and collecting the deposits for the costs of arbitration.

2. Report of the Secretary-General (addendum): observations on the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97/Add.1)*

NOTE BY THE SECRETARIAT

1. As was stated in the introductory part of the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (A/CN.9/97, hereinafter referred to as the "preliminary draft"), any comments and observations regarding the preliminary draft received by the Secretariat would be placed before the Commission at its eighth session in a separate document.

2. In accordance with the decision taken by the Commission at its sixth session, the preliminary draft was circulated to the regional economic commissions of the United Nations and to some 75 centres of Com-

* 6 March 1975.