

16. On reconsideration of the matter in the light of this consultation, it seems advisable to replace paragraphs 2 and 3 of article 13 with the following single paragraph:

"If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses or for oral argument. In the absence of such a request, the arbitrators may decide whether the proceedings shall be conducted solely on the basis of documents and other written materials".

D. Affidavit

17. In connexion with the hearing (art. 21), the suggestion was made that special reference should be made to the possibility of presenting evidence by witnesses in the form of written statements. Under some circumstances this method could save considerable time and expense connected with the arrangement of a hearing in international cases as envisaged by the draft rules.

18. This written statement could take the form of an affidavit, sworn to by the person who gives such evidence; it could also be a written statement simply signed by him. The rules need not regulate the form of the written statement. This choice may initially be left to the party offering the written statement, subject to a possible ruling by the arbitrators that might include a request for oral testimony by the person who made the statement.

19. Therefore it seems advisable to supplement article 21 with the following paragraph that might follow the present paragraph 4:

"Evidence of witnesses may also be presented in the form of written statements".

E. Interim measures

20. In connexion with article 22 a question was raised as to the form in which the measures envisaged in this article should be established. It was generally agreed that the article should be clarified by adding the following:

"Such interim measures may be established in the form of an interim award".

CONCLUSION

21. In addition to the modifications and clarifications indicated in this report, other suggestions were received at the New Delhi Congress; as has been noted (para. 4 above), these will be considered in connexion with the preparation of a revised version of the present draft.

22. In addition, the modifications and clarifications of the preliminary draft set forth in this report call for certain adjustments in the commentary. This revision will also be made in the course of preparing a revised version of the rules.

4. 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.3)*

NOTE BY THE SECRETARIAT

The annexes to this note set forth the observations submitted by the Government of Norway, the Hungarian Chamber of Commerce, the Inter-American Commercial Arbitration Commission and the Inter-American Development Bank.

ANNEX I

Observations by Norway

[Original: English]

From a Norwegian point of view there are no major objections to the preliminary draft of the UNCITRAL Arbitration Rules, contained in document A/CN.9/97.** The draft rules seem to provide a good basis for further discussions.

The Norwegian Government will make the following observations to some of the draft articles:

Article 1

The scope of the Rules (para. 1) should be extended to all disputes which may arise out of any contract, any commercial transaction or another specific (defined) commercial relationship between the parties.

Paragraph 3 should follow more closely the pattern of Article II, paragraph 2 of the 1958 New York Convention and read:

3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, signed by

the parties or contained in an exchange of letters, telegrams or telexes.

Article 4

In paragraph 3 the period of five days seems to be rather short in inter-continental air mail services and may perhaps be extended to seven days.

Article 11

In case of replacement of an arbitrator during the course of the arbitral proceedings, the hearings held previously should be repeated, unless the arbitral tribunal decides otherwise with the consent of the party having appointed the replaced arbitrator. The provisions in paragraph 2 should be altered to comply with this.

Article 13

The provision in paragraph 1 that the parties be treated with absolute equality ought to be more precise, as it seems insufficient to prevent real inequality between the parties. Such inequality may occur if the parties meet with problems of different kinds during the arbitral proceedings which are treated separately and in different ways by the arbitrators. It is not sufficient that the same formal rules be applied to both parties.

It seems doubtful whether paragraph 3 would mean that oral hearings other than the rendering of evidence will take place in these cases. It seems recommendable that the arbitrators be competent to refuse evidence that they deem irrelevant, as suggested in the bracketed language.

* 1 April 1975.

** Reproduced in this volume, part two, III, 1.

Article 17

In paragraph 2 the word "contract" should be substituted or doubled by "transaction".

Article 18

The rules of preclusion in paragraph 2 should be made clearly applicable also to the cases provided in paragraphs 1 and 4.

Article 22

The parties should have a right to be heard before the arbitrators take interim measures as laid down in article 22, except in urgent matters. The provision contained in paragraph 4 of article 13 may give some help in this respect.

Article 27

In paragraph 1 delete the three words after "applicable".

ANNEX II**Observations by the Hungarian Chamber of Commerce**

[Original: English]

Upon studying the draft of the *ad hoc* arbitration rules of procedure foreseen to be adopted in international trade (UNCITRAL Arbitration Rules) we came to the conclusion that it contains acceptable and appropriate solutions for the methods of settlement of the discussions between the parties, consequently we agree in general with the draft.

Besides our understanding in general we naturally deem it necessary that its specific rules should be discussed in detail by the experts. The discussion of the specific rules seems to be useful as the right ideas could be—in our opinion—further polished by which the rules could be simplified but on the other hand some of the problems of the practice could be partly eliminated. With this point in view we would suggest the consideration of some questions as indicated hereunder. Our suggestions and remarks are attached to certain articles of the draft rules.

Article 3

In connexion with the arbitration proceedings it would be expedient to state also the date when the legal effects (e.g. interruption of limitation) begin; either the date when the arbitration procedure has been invoked by one party giving notice about his standpoint to the other, or should it begin when the sole arbitrator undertook the office, or when the three-member arbitration council's establishment has been declared. In our opinion the legal effects must be counted from the written notice of the initiative party. This point of view corresponds also with the practice known by us.

Article 4

We think that paragraph 1 of the draft should be modified in a way—as rightly stated in the commentary part—that the parties participate in the procedure through their representatives unrestrictedly chosen. Although the planned rules are not in contradiction with the above, I would deem it more expedient if the optional representation of the parties could be clearly stated in the text.

Article 5

To keep to an 8 days' delivery date in international trade poses difficulties. This is why we stipulate this period of 30 days, or at least a minimum of 15 days.

Article 6

For a non-administered procedure we find that of paragraph 2 far too difficult, thus we propose to omit statements under

points "a" and "c". We consider the suggestion of point "b" quite sufficient and appropriate. We deem that the commercial chambers playing a significant role in international trade, may act satisfactorily as "appointing authority" for courts of arbitration and in accordance with the requirements of business life, they would not refuse to fulfil such requirements.

Article 7

As to the nomination of the third arbitrator acting as president, in case of non-administered procedure our suggestion corresponds to our notes to article 6. In connexion with paragraph 5 of article 7 we would only add that it would be proper to make independent from the parties the appointment of the third arbitrator acting as chairman. Otherwise the election of the third arbitrator would rather postpone the establishing of the arbitration court.

Article 10

Our standpoint concerning the challenge of the arbitrator in case of a non-administered procedure is connected with our notes made for article 6.

Article 13

The general regulations consider an oral hearing practically as a question of secondary importance. The relevant commentary even emphasizes that the arbitrators may refuse the demand of one of the parties for an oral hearing. It is obvious that the court of arbitration must come to a decision on the basis of the written reports, evidence and of the respective provision of applicable law. The facts of the case serving as a basis for the dispute at law may of course be very different and the real facts are known actually first of all by the parties. Therefore, in knowledge of the facts of the case, if any of the parties requires oral hearing, this wish cannot be refused according to our opinion. Starting from that principle the rule of procedure setting limits in the possibilities to submit documents, would rarely be accepted by the parties. Since the rules of procedure in question aim, on the contrary, at satisfying the demands of economic life, we think that this solution—meaning a restriction—ought to be abolished in the draft. In our opinion, if any of the parties wishes that the arbitration court should hold verbal proceedings, this must be granted. Besides, it has to be mentioned that the agreements between the parties come to conclusion in general by verbal proceedings directed by the court of arbitration. Should such proceedings be realized only depending on the decision of the arbitration court, a number of agreements which mean the better solution, could not be concluded.

Article 28

According to paragraph 2 in case the parties have not agreed concerning payment of the arbitration court's fees, these fees are to be borne in equal proportion. This planned provision needs, in our opinion, an amendment according to the practice. The *ad hoc* arbitration procedure—even if it is realized on the basis of a previous agreement of the parties—is, in the last analysis, a court procedure destined to decide in a dispute between the parties. Considering furthermore that every court procedure, thus the arbitration procedure too, involves risks, the right solution corresponding to practice would be, if—like in the case of civil legal proceedings—the fees of the arbitration proceedings would charge the parties according to the proportion of the failure of the lawsuit. This solution is supported also by the rules of proceedings of the administered arbitration courts.

We would ask you kindly to take into consideration our remarks when studying and discussing the draft.

ANNEX III**Observations by the Inter-American Commercial Arbitration Commission**

[Original: Spanish]

I should like to inform you of the results of the Fifth Conference of the Inter-American Commercial Arbitration Com-

mission, held at Bogotá, Colombia, from 4 to 6 December 1974, with particular reference to the draft rules prepared for UNCITRAL on *ad hoc* arbitration relating to international trade.

First, our Executive Committee decided that, in principle, the UNCITRAL rules should be adopted as its own, just as if the draft had been approved by the United Nations. In the meantime, the draft that was forwarded to us has been distributed to the National Sections and to the Commission for information.

A formal resolution in line with the views of the Executive Committee was submitted to, and adopted by, the Conference. A copy of this resolution is annexed hereto.

We are convinced that this draft contains the best rules which have been elaborated for international commercial arbitration. We therefore wish to express to you and to UNCITRAL our congratulations on your initiative, and we hope that both UNCITRAL and the United Nations will take appropriate action to adopt the draft as soon as possible.

ANNEX IV

Observations by the Inter-American Development Bank

[Original: English]

I refer to your letter of 21 November 1974 with which you forwarded document A/CN.9/97 containing a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade.

We have reviewed these UNCITRAL Arbitration Rules which take into account important international conventions held in 1958, 1961 and 1965, and also are based on Rules of the Economic Commission for Europe and of the Economic Commission for Asia and the Far East.

These proposed Rules seem to be well-organized and demonstrate a solid foundation in the commercial law field. I do not believe that we can make any improvements, and I therefore wish merely to offer my congratulations to your office for its useful work in this field.

5. 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.4)*

NOTE BY THE SECRETARIAT

The annex to this note contains the observations received from the Commission of the European Communities.

ANNEX I

Observations by the Commission of the European Communities

You were kind enough to transmit to the Commission of the European Communities, by letter dated 18 November 1974, the English text of the UNCITRAL arbitration rules (A/CN.9/97 of 4 November 1974), and some days ago you sent us the French version of the same draft rules.

I thank you for sending these documents, on which we have tried to obtain the opinions of member States and the observations of interested circles.

Unfortunately, it has not been possible to obtain all the information requested within the time-limit specified and on the basis of the English text only. In view of the importance of the draft and its undoubted value for business relations, it is highly desirable that the adoption of the UNCITRAL arbitration rules should be preceded by extensive consultation not only of centres

of international commercial arbitration, but also of organizations representing the enterprises involved. Such a wish was also expressed by the Fifth International Arbitration Congress (see resolution No. IV). In order to ensure the success of these consultations, it would seem that more time should be allowed.

Two main considerations emerge from the positive reactions we have thus far received. The first relates to the optional nature of the uniform rules, and the second to the need to limit the application of these rules to non-administered arbitration. It has, in fact been highly appreciated that, in principle, the proposed rules leave the parties free to choose the rules governing the organization of the arbitration procedure. On the other hand, it was observed that the proposed rules should enable the parties to know, with the maximum possible certainty, all the rules to which the arbitral proceedings would be subject. However, the reference simultaneously both to the UNCITRAL arbitration rules and to an international arbitral institution might give rise to some confusion, in that an institution of this kind normally applies its own rules. The rules of the institution and the manner in which they are applied might not be known to the parties and might not be in keeping with the spirit of the proposed UNCITRAL rules.

Until the current consultations have been completed, these observations can be considered only as provisional. I nevertheless wished to communicate them to you before the opening of the eighth session of UNCITRAL on 1 April.

* 7 April 1975.