88. Most existing conciliation rules deal with this problem, if at all, in general terms by stating, for instance, that "nothing that has transpired in connexion with the conciliation proceedings shall in any way affect the legal rights of any of the parties whether in an arbitration or in a court of law". Such wording would seem to be too narrow in that there may be more at stake than the effects of disclosure on the legal rights of the parties, i.e. other disadvantages which disclosure may have on the position of a party in arbitral or judicial proceedings.

89. On the other hand, such a rule seems to be too wide in that it would cover "all that has transpired". It could include, for example, information contained in an expert opinion or a report about an examination of goods which no longer exist at the time of the other proceedings. In such cases, it would seem reasonable, or even necessary, to allow the use of this evidence in other proceedings.

90. Article 20, therefore, attempts to define certain categories of information which would be inadmissible in other proceedings. Taking into account the purpose of the provision, it lists as "classified material" various kinds of information or statements given for the purpose of reaching a settlement agreement. It is this common thrust of the items listed which makes them potentially prejudicial to one or the other party and justifies their inadmissibility in other proceedings.

91. In conclusion, it may be noted here that article 20 is wider than article 19 in two respects. It does not only relate to subsequent proceedings and, what is even more important in practical terms, not only to proceedings in respect of the same dispute as the conciliation proceedings. This wider scope seems appropriate in view of the practical possibility that a certain legal aspect or fact which is, for example, the object of an admission or is an element of a settlement proposal may become relevant in a different context which is the subject of other proceedings.

F. *Model Conciliation Clause*

92. As has been explained earlier (see paras. 19–21), the Rules are based on the fundamental notion that genuine conciliation can only take place if both parties, once a dispute has arisen, are willing to seek an amicable settlement of their dispute. While the Rules, accordingly, do not pre-suppose a previous commitment of the parties to take some step towards conciliation, parties are free to stipulate in advance that they commit themselves to attempt conciliation before resorting to the courts or to arbitration. In such a case, they may use one of the two variants of the Model Conciliation Clause set forth at the end of the Rules.

93. The first model clause (variant A) is fully non-committal by making it a condition that the parties, when a dispute has arisen, wish to seek an amicable settlement of the dispute. This clause makes it clear that the parties, at the time of the conclusion of the contract, do not undertake any legal obligation to initiate conciliation in the event of a dispute. The only commitment expressed in that clause concerns the application of the Rules as envisaged under article 1, paragraph (1).

94. The second model clause (variant B) provides for a degree of commitment by obliging a party, before resorting to adversary proceedings, to invite the other party to conciliation. The purpose of such invitation is to ascertain, in the event of a dispute, whether the other party is willing to seek an amicable settlement. In view of the right of the other party to refuse conciliation, such an obligation to invite might be regarded as one-sided or even unfair. However, the same imbalance exists in other proceedings where procedural burdens are placed on the party who wishes to pursue his rights. Furthermore, the duty to invite is a relatively light burden which could be even further eased by choosing a shorter period of time for reply than the 30 days laid down in article 2, paragraph (4).

95. There is another aspect of that clause: a party could be required to send an invitation even if he himself is not willing to conciliate. This possibly undesirable result is mitigated by the fact that, as experience shows, the attitude of a party may well change in the light of a positive response by the other party. If the inviting party remains unwilling, he may wish to terminate the conciliation proceedings in accordance with article 15 (*d*). His right to terminate is embodied in the Rules which the parties adopt by virtue of the conciliation clause.

96. If parties prefer a stronger commitment than the mere obligation to invite, a different clause would be required and parties should modify some of the Rules, in particular, articles 2 (requirement of consent of both parties to commencement of proceedings), 15 (right to terminate at any time) and 16 (limited resort to adversary proceedings).

C. Observations and comments by States and international organizations on the revised draft UNCITRAL Conciliation Rules (A/CN.9/187 and Add.1 to 3)*

AUSTRALIA

Article 2. Commencement of conciliation proceedings

It would reduce the possibility of misunderstanding if the Rules were to envisage that the acceptance of the invitation to conciliate would be in writing.

A conversational response would seem more open to the possibility, for example, of the invitor treating as an acceptance, or as a rejection, a response intended to be merely exploratory.

A written response, on the other hand, would be more likely to show whether there was agreement to conciliate—thus attracting the continued application of the Rules—or whether the invitor could proceed on the basis that there would be no conciliation.

* 25 June and 1, 11 and 14 July 1980.

Article 5. Submission of statements to conciliator

The present text could be improved by providing that the parties do not see each other's statements until both statements have been received by the conciliator, who then passes them on.

This would give the conciliator the benefit of each party's view, unaffected by the view of the other, and one party could not obtain an advantage over the other by waiting to see the latter's case before putting his own.

Article 7. Role of conciliator

This article should merely provide that the conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement.

Any attempt to prescribe principles to which he should adhere may hinder him in his task.

Article 16. Resort to arbitral or judicial proceedings

The words "in his opinion" should be deleted.

The existing draft provision to the effect that a party may initiate arbitral or judicial proceedings during the conciliation where, in his opinion, such proceedings are necessary for preserving his rights, might encourage parties to do so on less than substantial grounds.

A party can, of course, at any time undertake such proceedings on any grounds, after withdrawing, pursuant to article 15, from the conciliation.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE (AALCC)

(Section of report of the Sub-Committee on International Trade Law Matters, twenty-first session, 1980, Jakarta, Indonesia)

Examination of the draft Rules on Conciliation prepared by the UNCITRAL Secretariat

1. The Sub-Committee welcomed the initiative taken by UNCITRAL in preparing these Conciliation Rules. The Sub-Committee expressed the hope that the adoption of the Rules by UNCITRAL would be conducive to the expeditious settlement of disputes in international commercial transactions.

2. Although there was a general consensus that the draft Rules on Conciliation as a whole were worthy of support, there were a few divergent views on some of the provisions.

3. The first concerned article 3. Some delegates felt that the number of conciliators should never be even as this might lead to difficulty in reaching a recommendation. Others felt that the number should be one unless the parties decided otherwise.

4. The second observation related to the appointment of conciliators. Some delegates felt that the parties should agree on the appointment of the conciliator(s) because there was the underlying suspicion of the partiality or bias where each party appointed his own conciliator. This view was not shared by other delegates who thought the underlying principle in conciliation was the impartiality of the conciliator(s). Therefore article 4 should be retained in its present form.

5. The third observation related to article 13 (3). Some delegates felt that the provision should be carefully re-examined. In the first place, to the extent that it appeared to lay down the rule that a settlement agreement was binding in the same way as any other contract, this provision stated the obvious. Secondly, the provision might be misconstrued as laying down the rule that such an agreement was enforceable in the same way as a final and binding judgement or arbitral award. Other delegates, however, thought that it was useful to retain this paragraph of article 13.

6. There was some question as to the wisdom of prohibiting the conciliator from acting as an arbitrator or witness in future arbitral or judicial proceedings as envisaged in article 19. The reason was that, first, since the conciliator was not a party to the conciliation agreement, this rule would not bind him and, secondly, these were matters regulated by the applicable procedural rules.

7. In regard to article 20, the view was expressed that the list of matters excluded from being introduced in subsequent arbitral or judicial proceedings was too restrictive, and that it should be expanded to documents prepared specifically for the purpose of the conciliation proceedings, e.g., statements submitted under article 5.

ECONOMIC COMMISSION FOR EUROPE

(Comments of the ECE Secretariat, Trade and Technology Division)

I. *General remarks*

Although it is true that conciliation, as an institution, may have some disadvantages (additional costs, time spending, fear of later risks in adversary proceedings), it is beyond doubt that conciliation should be regarded as the first stage of arbitration and as a viable alternative to arbitration and court proceedings.

The revised draft UNCITRAL Conciliation Rules is a positive contribution to the resolution of disputes that may arise in international commercial relations. If this is the purpose of the Rules, as it appears to be, then certain provisions should be made more precise, as suggested below.

II. *Remarks pertaining to specific provisions*

Article 1

Referring to what was said under (I) above, we believe that the scope of application of the Rules should be restricted to international commercial disputes. The statement in the Commentary (A/CN.9/180)* that the Rules "are designed for universal application" is too vague and could lead to confusion. Will the Rules be applied between the nationals of a country in respect of a dispute arising from a support contract or a real estate contract or, finally, from a non-contractual legal relationship governed by the public law of the country concerned? We do not think so.

* Reproduced as B, above.

It is true that this article has been drafted according to article 1 of the UNCITRAL Arbitration Rules which also lacks precision in this respect. But the shortcomings of the original rules should not be magnified by using them as a basis for the Rules.

In our opinion, it would be preferable if the application of the Rules was restricted to disputes arising from (i) contractual relationship only, whether the contract is written or oral; (ii) relationship with elements of foreignness only, i.e. from international contracts; and (iii) relationship of a commercial nature which means from commercial contracts of whatever type.

Articles 2–12

No comments.

Article 13

In the footnote to paragraph 2 of this article it is recommended that the settlement agreement contain a clause that any dispute arising out of, or relating to, the interpretation and performance of the settlement agreement shall be submitted to arbitration.

Naturally, the parties to any type of contract may agree to submit it to arbitration solely for the sake of interpretation. Hence, this possibility could be applicable also to the settlement agreement. Nevertheless, we would prefer to have the footnote deleted because an agreement on the successful completion of conciliation proceedings should not be made subject to arbitration even in respect of interpretation of its clauses. If the conciliation did result in the settlement of the dispute, then a new dispute could not arise because no interpretation problem should be possible. By the nature of things, settlement achieved in the course of conciliation excludes any further disputes. If, however, a dispute still arises, this would mean that no real settlement was reached. In such a case, the conciliation proceedings should be reinstituted or a recourse to litigation or arbitration should be made on the understanding, however, that the subject of the reinstituted conciliation or judicial or arbitral proceedings would not be "the interpretation and performance of the settlement agreement" but the *original dispute* for which the parties had agreed to seek an amicable settlement and for which they had instituted conciliation by application of the Rules.

Articles 14–15

No comments.

Article 16

We suggest that a second sentence be added to the text of this article to read: "Before initiating arbitral or judicial proceedings, such a party must first issue written declaration provided in article 15 (*d*)."

Articles 17–18

No comments.

Article 19

We propose that the qualification "Unless the parties have agreed otherwise" be deleted so that the sentence begins instead as follows: "A conciliation may . . .".

We do not think that the reasons advanced in paragraph 86 of the Commentary (A/CN.9/180)* could justify the performance of arbitral or other functions listed in article 19 by a conciliator. It seems highly debatable whether the conciliator's familiarity with the dispute could be regarded as an asset in subsequent arbitral proceedings.

Article 20

No comment.

Model conciliation clause—Variant A

This variant is quite acceptable.

Model conciliation clause—Variant B

This clause is onerous to the party initiating conciliation and therefore seems not to be in conformity with the spirit of the Rules.

ECUADOR (Addendum I)

1. The Government of Ecuador considers that the revised draft of the Conciliation Rules is an improved text embodying important principles and meaningful elements.

2. *Article 1.* In accordance with paragraph 23 of the commentary in document A/CN.9/180, reference should be made in the preamble of the Rules to "international commercial disputes", since that would indicate the principal field of application of these Rules.

3. *Article 2.* In view of the observations made in paragraph 31 of the above-mentioned commentary, there should be inserted in paragraph (4) of this article, before the last sentence and after the word "conciliate;", the following words: "the inviting party may indicate that decision already in the invitation". The paragraph would then continue with the sentence beginning: "If he so elects . . .".

4. *Article 3.* In view of the arguments indicated in paragraph 33 of the commentary, the word "normally" should be inserted in article 3, so that this provision would read: "There shall normally be one conciliator unless the parties have agreed that there shall be two or three conciliators."

5. *Article 4.* With reference to paragraph 40 of the commentary, the following sentence should be added at the end of article 4 (1) (*c*): "The parties may consult with the party-appointed conciliators concerning the appointment of the presiding conciliator."

6. *Article 5.* In view of what is stated in paragraph 47 of the commentary, the word "brief" in paragraph (1) of this article should be replaced by "succinct" since this would beter reflect the principle that the written statement by the parties should not be an actual pleading, an extensive statement, but a neat and concise document.

7. *Article 13.* In view of the footnote to paragraph (2) of this article, it would be desirable to add at the end of that paragraph, after the words "the settlement

* Reproduced as B, above.

agreement", the following sentence: "The settlement agreement may contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration."

8. *Article 14.* There is a reference in this article to the fact that, where the obligation of the conciliator and the parties to keep confidential all matters relating to the conciliation proceedings is concerned, some different provision may be made by law. This must, of course, refer to national law, which governs the conciliation process if this question should arise. However, it can also happen that national law is silent on the subject. Although we should prefer the deletion of the words "or required by law", the reference could be made clearer, if it is considered necessary to retain it, by using the following wording: ". . . or required by the law applicable to the conciliation . . .".

9. *Article 16.* There is a typing error in the fourth line of the Spanish text of this article, where the words *"arbitral o conciliatorio"* should read *"arbitral o judicial"*. In any event, we agree with the exception made in the last part of this provision, although we should prefer the word *"proteger"* instead of *"conservar"*.

10. *Article 19.* In view of the observations made in paragraph 84 of the commentary, the Spanish text of this provision should be clarified by inserting the word *"abogado"* after *"representante"*, so that the passage in question would read: *". . . ni como representante, abogado o consejero de una parte . . .".* The point is that the term *"representante"* may mean the attorney for the case but not the lawyer *(abogado)* pleading it, while a *consejero* may not always be the pleader or *abogado* but an expert who advises the *representante* or the pleader.

ARGENTINA (Addendum 2)

1. The fundamental purpose of the revised draft UNCITRAL Conciliation Rules is to ensure the full autonomy of the parties in conciliation proceedings. This principle, which was upheld by Argentina at the twelfth session, with the support of Austria, France and Singapore among other countries, is now more fully respected at the commencement, in the course of, and at the termination of proceedings.

2. The principle is reflected, for example, in the flexibility of the time-limit referred to in article 2, paragraph (4), which states that the party initiating conciliation may elect to treat the expiry of the time-limit as a rejection of the invitation to conciliate.

Thus the possibility of conciliation remains despite the expiry of the time-limit.

3. It is suggested that, in article 7, paragraph (2), the words "arising from the contract" should be added after the words "the rights and obligations of the parties". This wording indicates that the first consideration would be the terms established by the parties at the time of entering into the contract. This would ensure that solutions could be envisaged without the necessity of subordinating the issue to any national law which might be applicable.

4. The criterion that the settlement should be considered final and binding (art. 13, para. (3)) is also acceptable. This is a general principle which is universally accepted in national legislations (cf. art. 850 of the Argentine Civil Code, under which settlement has the same effects as a judgement that has acquired the authority of *res judicata*). On the other hand, whether the performance of the agreement may be enforced under the procedure for the implementation of judgements is an issue that should be determined in the light of national legislation. It should be made clear, however, that the settlement may be challenged on grounds of nullity. This is a fundamental principle to be taken into consideration vis-à-vis the final and binding nature of the settlement, since the right to challenge on the ground that consent has been vitiated cannot be waived unless it is a case of relative nullity, which can be remedied.

5. Since the conciliation proceedings must be based on the full autonomy of the parties, it should be borne in mind that although it is normally appropriate for the parties to refrain from initiating any arbitral or judicial proceedings during the conciliation, recourse to such proceedings should not in itself be regarded as an obstacle to the conciliation proceedings even when the arbitral or judicial proceedings have been initiated for reasons other than the specific purpose of preserving rights, as stipulated in the exception clause in article 16. Recourse to conciliation should be possible in other circumstances as well. It is therefore suggested that there should be an express provision which would clearly envisage the possibility of recourse to conciliation during arbitral or judicial proceedings. Thus the parties would be able to pursue two parallel proceedings: arbitral or judicial proceedings, on the one hand, and conciliation proceedings, on the other. These parallel proceedings could be pursued when arbitral or judicial proceedings are temporarily suspended. Yet such suspension cannot be a prerequisite for initiating the conciliation proceedings if the parties are to be allowed full freedom in the settlement of disputes. The parties themselves can best judge whether parallel proceedings are compatible.

6. It is suggested that a special provision should be included which would envisage the possibility of the parties determining the law applicable to various questions which might give rise to disputes and which it would be inappropriate to regulate by means of specific provisions in the Conciliation Rules. The choice of the law applicable to the settlement (art. 13) is extremely important, as is agreement on the law applicable to the rendering of an accounting of the deposits received, referred to in article 18, paragraph (4).

7. As a model conciliation clause, variant A is more in keeping with the idea that conciliation proceedings may be initiated at any time, there being no requirement that the initiating party should send an invitation to the other party before resorting to arbitral or judicial proceedings.

Variant B could be interpreted as binding on the party which wishes to have recourse to an arbitrator or a judge.

Nevertheless, both clauses are based on prior and legitimate agreement between the parties and are valid possibilities within the context of the idea of autonomy of will.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (Addendum 3)

1. *Article 1.1.* We consider that this paragraph should be amended so as to provide that the Rules apply to conciliation of disputes of the type mentioned where the parties have agreed *in writing* that the Rules should apply.

It is appreciated that the Rules are intended to provide a flexible means of resolving commercial disputes without unnecessary delay. Nevertheless it is considered that a requirement that the parties must enter into a written agreement that the Rules are to apply both makes it clear that this is an UNCITRAL conciliation and is of importance having regard to article 20. Such a requirement will be unlikely to cause any delay in starting the conciliation proceedings and in some cases it might save time because it will encourage parties to include a conciliation clause in the contracts before any dispute has arisen. If an oral agreement that the Rules should apply were to be sufficient the parties might wait until some time after a dispute had arisen before entering into the necessary agreement.

Her Majesty's Government does, however, consider that in the interests of a quick settlement of the dispute it is desirable that the parties should be free to modify the Rules orally, as well as in writing. They do not therefore wish to amend *article 1.2* so as to require any modification of the Rules to be in writing. However, an amendment is in our view required to this paragraph since power to modify the Rules does not seem to include power to exclude the application of any of the Rules. The parties may, for example, wish to adopt the Rules with the exception of article 6, whose adoption they might consider likely to delay a settlement. We consider that the parties should be free to adopt the Rules subject to any exclusion or variation and we suggest that article 1.2 should be amended to read as follows:

"The parties may agree to exclude or vary any of these Rules."

2. *Article 3.* We think that the proviso to the article is somewhat misleading in that it suggests that it is only possible for the parties to agree that there should be two or three conciliators instead of one. In view of the general power to modify the Rules contained in *article 1.2* it is not in our view necessary to include a proviso to this article. However, if it is thought desirable that the article should contain a qualification to the rule that there should be one conciliator, we suggest that the words

"unless the parties have agreed that there shall be a greater number"

be substituted for

"unless the parties have agreed that there shall be two or three conciliators".

3. *Article 4.1.* This will need to be amended if the proposal made above in relation to article 3 is adopted. If that proposal is adopted it is suggested that *subparagraphs* (b) *and* (c) be amended to read as follows:

"(*b*) If the parties agree that there should be an even number of conciliators, each party shall appoint an equal number;

"(*c*) If the parties agree that there should be an uneven number of conciliators, and more than one, each party shall appoint an equal number. The parties shall endeavour to reach agreement on the appointment of the remaining conciliator."

The expression "presiding conciliator" which is used in *article 4.1* (c) *and 4.2* suggested that this conciliator is to have special functions or powers. These are not, however, provided for in the Rules although it is stated in paragraph 38 of the Commentary (A/CN.9/180) that "in conciliation with three conciliators, the view of the presiding conciliator should normally prevail". It is suggested that the use of the expression "presiding conciliator" should be avoided. If it is retained, reference to the special powers which he is to have should be made in the Rules themselves and not merely in the Commentary.

4. *Article 5. Paragraph 1* requires each party to submit a statement of his case to the conciliator and to the other party "upon the appointment of the conciliator". In order to ensure that both parties are aware that a conciliator (or conciliators) have been appointed, and that the requirement in *article 5.1* has therefore become operative, we suggest that the Rules should contain a provision requiring the conciliator(s) to notify both parties in writing of his or their appointment.

We suggest that *paragraph 1* should contain a time-limit within which a party must send his statement to the conciliator and to the other party: a party should be required to comply with the requirements of *paragraph 1* within 21 days of his receiving notice of the conciliator's appointment under the provision suggested above.

5. *Article 6A.* The Rules do not expressly provide for a party to call witnesses, including expert witnesses, to make statements before the conciliator and the other party. It is suggested that this right should be made clear in the Rules by the addition of a new article (which could be placed after article 6) in the following terms:

"(1) A party may at any stage of the conciliation proceedings request the conciliator to hear witnesses (including expert witnesses) whose evidence the party considers relevant.

"(2) Witnesses called by one party may be examined by both parties before the conciliator who may also examine the witnesses."

The effect of the second sentence of *article 17.2* will be that the party who calls the witness will be responsible for paying his travel and other expenses.

6. *Article 7.* The reference to "previous business practices of the parties" suggests that the conciliator is to have regard to the parties' previous dealings with others, as well as with each other. It would not in our view normally be appropriate in conciliation proceedings between two parties to take into account practices which one of the parties may have adopted in relation to a party who has no connexion with the dispute. We therefore suggest that the words "any business practices which the parties have previously established between themselves" should be substituted for the words "any previous business practice of the parties."

7. *Article 7A.* It is pointed out in paragraph 60 of the Commentary that the conciliator has no discretion with regard to appointing an expert or hearing a witness, and that the Rules require him to obtain the consent of the parties before either of these courses is adopted. We agree with the policy in this respect but suggest that the conciliator's power to appoint experts and call witnesses and the limitations imposed upon it should be dealt with more clearly in the Rules, instead of being dealt with somewhat obliquely in *article 17.1* (c) *and* (d).

We therefore suggest that the Rules should contain a new provision (which could be placed after article 7) in the following terms:

"The conciliator may, with the consent of the parties, appoint an expert or call a witness whose evidence he considers may be relevant."

8. *Article 8.* This article requires the conciliator to consult the parties before arranging for administrative assistance to be provided by an institution. In view of the fact that the parties will be reponsible for paying the costs of the administrative assistance by virtue of *article 17.1* (e), we consider that article 8 should make it clear that both parties must agree to the assistance being provided.

We therefore suggest that the words "with the agreement of the parties" in *article 8* should be substituted for "after consultation with the parties".

9. *Article 9.2.* We suggest that the words "circumstances which appear to him to be relevant" should be substituted for "circumstances of the conciliation proceedings".

10. *Article 10.* We agree that the conciliator should have the discretion whether or not to disclose information provided by one party to the other party to the conciliation proceedings. However, we are concerned at the inclusion of the proviso to this article since this would enable a party to provide the conciliator with information subject to its not being made available to the other party. Such information, if it were made available to the other party, might well influence that party's decision on whether or not to agree to a settlement proposed by the conciliator, who has full knowledge of the confidential information.

We are, moreover, concerned about the qualification of the conciliator's discretion as to whether or not to disclose to one party non-confidential information provided by the other party. By directing the conciliator to have regard to "the settlement of the dispute" the Rules could be taken as encouraging the conciliator not to reveal information provided by one party which might influnce the other party not to accept a settlement. It is unlikely that the discretion would be abused in this way having regard to the conciliator's duty to be guided by the principles of fairness, equity and justice imposed under *article 7.2* but we do not consider that the possibility of abuse should be suggested in article 10.

We therefore suggest that article 10 should be amended so that it provides as follows:

"The conciliator may determine the extent to which anything made known to him by a party will be disclosed to the other party."

11. *Article 14.* The first proviso to this article relating to the contrary agreement of the parties does not seem to be necessary in view of the parties' power to vary or exclude the application of any provision under article 1.2 as proposed to be amended above.

12. *Article 15* (b). Termination of the conciliation proceedings by the conciliator is dependent upon his having consulted the parties, although *article 18.3* suggests that where the required deposits have not been paid the conciliator may terminate the proceedings without consultation.

We consider that a requirement that the conciliator must consult the parties before he can give a declaration of termination might be difficult to fulfil, and not only in cases where the parties, or one of them, have failed to pay the deposit. We therefore suggest that the conciliator should only be required to give prior notice to the parties and that *article 15* (b) be amended to read as follows:

"By a written declaration of the conciliator, after notice to the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration."

It is not clear whether the ground for termination mentioned in *article 18.3* is intended to be in addition to those mentioned in article 15. This appears to be the case and it appears to be the intention that the conciliator should not be required to consult (or give prior notice to) the parties when he terminates on that ground although the declaration under *article 18.3,* unlike that under *article 15* (b), is required to be given to the parties. We think that the position should be made clear by inserting into article 15 a new paragraph (*bb*) after the existing paragraph (*b*), in the following terms:

"By a written declaration of the conciliator to the parties that the required deposits under article 18.1 and 2 have not been paid, on the date of the declaration."

13. *Article 17.2.* The proviso to the first sentence of this paragraph is unnecessary in view of the power to modify these Rules conferred by article 1.2. We suggest that it should be deleted.

14. *Article 18.3.* If the proposal made above for adding a new paragraph (*bb*) to article 15 is accepted, the following should be substituted for the words from "written declaration" to the end of paragraph 3:

"... written declaration of termination in accordance with article 15 (*bb*) above".

15. *Article 18.4.* This paragraph does not give an indication of the proportions of the unexpended balance which should be returned to each of the parties. Normally each party will be entitled to an equal share in the balance since each will have contributed an equal amount but there will not always have been an equal contribution. It is suggested that general words such as "taking into account the advance payments made by them" be added at the end of paragraph 4 since this will deal with the less usual as well as the normal case.

16. *Article 19.* The proviso to this article also appears to be unnecessary in view of article 1.2.

We note that the conciliator is prohibited from acting as

arbitrator in "*subsequent* arbitration proceedings" and from acting as representative etc., ... in "any arbitral or judicial proceedings" specified in the article. We wonder whether it is intended that there should be any distinction between the arbitration proceedings mentioned in the first part of the article (*subsequent* arbitral proceedings) and those mentioned in the second part (*any* arbitral proceedings).

D. Note by the Secretary-General: issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority (A/CN.9/189)*

INTRODUCTION

1. The United Nations Commission on International Trade Law, at its twelfth session, considered certain issues relevant in the context of the UNCITRAL Arbitration Rules as set forth in a note by the Secretariat (A/CN.9/170).**[1] These issues related to the use of the Rules in administered arbitration and to the designation of an appointing authority.

2. The Commission, after deliberation, decided to request the Secretary-General:

"(*a*) To prepare for the next session, if possible in consultation with interested international organizations, guidelines for administering arbitration under the UNCITRAL Arbitration Rules, or a check-list of issues which may arise when the UNCITRAL Arbitration Rules are used in administered arbitration;

"(*b*) To consider further, in consultation with interested international organizations, including the International Council for Commercial Arbitration, the advantages and disadvantages in the preparation of a list of arbitral and other institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules, and to submit its report to the Commission at a future session;

"(*c*) To consider methods to promote and facilitate use of the UNCITRAL Arbitration Rules."[2]

3. Pursuant to that request, the Secretariat had consultations with members of the International Council for Commercial Arbitration (ICCA) and representatives of the International Chamber of Commerce (ICC) at Paris in May 1980. Pertinent information was also obtained from the Secretariat of the Economic Commission for Europe.

I. THE USE OF THE UNCITRAL ARBITRATION RULES IN ADMINISTERED ARBITRATION

4. The Commission, at its twelfth session, considered whether it should take steps to facilitate the use of the UNCITRAL Arbitration Rules in administered arbitration and seek to prevent disparity in their use by arbitral institutions. The question had been generated by the fact, illustrated in the earlier mentioned note (A/CN.9/170, paras. 4 to 6),*** that arbitral institutions in various parts of the world have approached the Rules in the context of administered arbitration in widely differing ways. In addition to the information provided there, the Commission may wish to note that a second regional arbitration centre was established under the auspices of the Asian-African Legal Consultative Committee (AALCC) at Cairo (Egypt) in February 1980. Like the Regional Centre for Arbitration established by the AALCC at Kuala Lumpur (Malaysia) in 1978, the Cairo Centre has adopted as its own rules the UNCITRAL Arbitration Rules and the administrative rules of the Kuala Lumpur Centre. Furthermore, in May 1980 the Spanish Arbitration Association appointed a committee to adopt the UNCITRAL Arbitration Rules for use by its centre in international cases.

5. The consultations held with ICCA and ICC confirmed the prevailing view in the Commission that the preparation of guidelines or a check-list of issues relevant to administrative services would assist arbitral institutions in formulating their administrative rules for administering arbitrations under the UNCITRAL Arbitration Rules and encourage them to leave these Rules unchanged.[3]

6. It is suggested that this purpose would best be served by the issuance of guidelines in the form of recommendations which could then be used by the institution concerned with due regard to local conditions and its own organizational structure. Such recommendations would invite arbitral institutions to review their administrative rules as to their compatibility with the UNCITRAL Arbitration Rules and to publicize the services available and the procedures followed.

7. It is suggested that the main advantage of guidelines is that they would promote the application of similar, if not uniform, administrative rules whenever arbitration under the UNCITRAL Arbitration Rules are administered by an arbitral institution.

8. An arbitral institution which is willing to administer arbitrations conducted under the UNCITRAL Arbitration Rules should make this fact known and supply information on the administrative services it provides. Such information should relate to the various administrative services available, such as transmission of communications, registration, arrangements for meeting rooms and interpretation and, above all, to its acting as an appointing authority. The institution may also specify the fees and state the administrative procedures or rules applied in respect of the different services. The suggested guidelines for administered arbitration are designed to assist arbitral institutions in respect of these matters.

* 8 July 1980.

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[1] See report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras. 57–70 (Yearbook ... 1979, part one, II, A).

[2] *Ibid.* para. 71.

[3] *Ibid.*, para. 66.