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.

** Reproduced as Yearbook ... 1979, part two, III, E.

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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.