

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).** 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.

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

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.

9. For the reasons stated earlier, the *raison d'être* of such guidelines is to ensure the UNCITRAL Arbitration Rules are, to the extent possible, left unchanged. Interested arbitral institutions would be invited to examine whether, under their statute, charter or organizational structure, they could administer arbitration proceedings under the UNCITRAL Arbitration Rules as they are, or whether it is necessary to draw up new administrative rules.

10. The task of reviewing administrative rules or of drawing up new rules is facilitated by the fact that the UNCITRAL Arbitration Rules do not deal with administrative issues in an extensive or strict manner. While there are detailed provisions on such special matters as appointment and challenge of arbitrators and on costs, other administrative services are referred to only in an indirect and general manner (e.g. article 38 (c) "The costs of expert advice and of other assistance required by the arbitral tribunal"; article 15 (1) "...the arbitral tribunal may conduct the arbitration as it considers appropriate...").

11. Even where an issue is explicitly regulated by the UNCITRAL Arbitration Rules, a different administrative arrangement need not necessarily be in conflict with the relevant rule. For example, according to article 15 (3) "all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party". However, the American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules provide that "all oral or written communications from a party to the arbitral tribunal—except at hearings—may be directed to the AAA, which will transmit them to the arbitral tribunal and to the other party".⁴

12. This different arrangement can be reconciled with article 15 (3) and the underlying policy of fairness which is to prevent the arbitral tribunal from basing a decision on any information of which the other party has no knowledge. The arrangement of the AAA deviates merely in terms of the means of communication. This may not be so in respect of, for example, administrative provisions under which a party must file with the administering body a copy of all communications to the arbitral tribunal or the other party.⁵

13. Where an arbitral institution intends to adopt an administrative rule which differs in substance from, and is to prevail over, a provision in the UNCITRAL Arbitration Rules, it should clearly indicate that change. An appropriate way of doing so may be found in Rule 8 of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre. That Rule identifies the provision which it replaces: "In lieu of the provisions of article 41 of the UNCITRAL Arbitration Rules the following provisions shall apply:..."

14. Another way could be to incorporate the changes in the body of the Rules as was done, for example, by the Inter-American Commercial Arbitration Commission

(IACAC) in its Rules of Procedure. Here, several articles of the UNCITRAL Arbitration Rules have been adapted to the institutional requirements of IACAC. This fact and the specific articles and paragraphs are explicitly identified in the introductory note to the Rules.⁶ Thus, readers and potential users are informed about the changes. In general, however, it would seem preferable, at least where an arbitral institution does not adopt the Rules as its own, not to incorporate any changes in the body of the Rules but to adapt them by suitable administrative provisions which should indicate the articles of the Rules derogated from.

15. It is suggested that the following draft guidelines, after consideration and approval by the Commission, be communicated to arbitral institutions and organizations throughout the world:

GUIDELINES FOR ADMINISTERING ARBITRATIONS UNDER THE UNCITRAL ARBITRATION RULES

Introduction

These guidelines are intended to assist arbitral institutions that are willing to act as appointing authorities or to provide administrative services for arbitrations conducted under the UNCITRAL Arbitration Rules. Arbitral institutions may wish to draw up administrative rules and procedures for cases under the UNCITRAL Arbitration Rules. These guidelines set forth the possible content of such rules and procedures. They are drawn up in the form of recommendations and should enable arbitral institutions to adopt rules that take account of local conditions and their own organizational structure.

Arbitral institutions are invited to make available information about the services they are prepared to provide for arbitrations under the UNCITRAL Arbitration Rules. It is recommended that administrative rules be adopted that would supplement the UNCITRAL Arbitration Rules without, however, modifying them. Nevertheless, if modifications are necessary, it is recommended that they be noted in the administrative rules by a reference to the relevant article of the UNCITRAL Arbitration Rules.⁷

Possible content of administrative rules

(a) *Offer of services*⁸

An arbitral institution may declare that it is prepared to provide services for arbitrations conducted under the UNCITRAL Arbitration Rules. In making such a declaration the institution may wish to include, in addition to a description of its traditional activities, information regarding the UNCITRAL Arbitration Rules; in particular, that they were adopted in 1976 by UNCITRAL, a world-wide organization in which the various legal, economic and social systems and geographic regions are represented and that the General Assembly has recommended the use of the Rules for inclusion in international commercial contracts.

As to the services provided, it is recommended that the institution state whether, in addition to offering the usual administrative services, it is prepared to act as appointing authority. If so, the institution

⁶ The pertinent footnote reads: "There are several articles of the UNCITRAL Arbitration Rules which have been adapted to the institutional requirements of IACAC." For example the term "IACAC" is substituted for "UNCITRAL" and "appointing authority" throughout the text. In addition, there are changes in the following articles to permit accommodation of the UNCITRAL Arbitration Rules by IACAC: 3, 4 (a); 6, 1; 6, 1 (a) and (b); 6, 2; 7, 2; 7, 2 (a) and (b); 12, 1; 12, 1 (a), (b) and (c); 12, 2; 38 (f); 39, 2, 3 and 4; 41, 3.

⁷ See e.g. Rule 8 of the Kuala Lumpur Regional Arbitration Centre.

⁸ See e.g. introductory paragraphs and model clauses of the AAA Procedures for Cases under the UNCITRAL Arbitration Rules.

⁴ See section on Administrative Services, 1. Communications, of the Procedures for Cases under the UNCITRAL Arbitration Rules of the American Arbitration Association.

⁵ E.g. Rules 2 and 5 of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

should state clearly that it would act as appointing authority only if it had been so designated by the parties in the arbitration clause or in a separate agreement. Administrative services would be provided when requested by the parties or by the arbitral tribunal.

(b) *Services as appointing authority*⁹

An arbitral institution that is prepared to act as the appointing authority under the UNCITRAL Arbitration Rules may list the various tasks of an appointing authority envisaged by those Rules, and the manner in which it intends to carry them out:

Appointment of arbitrators under articles 6 and 7

The arbitral institution may indicate how it will select the arbitrator; in particular, whether it maintains a panel of arbitrators from which it would select arbitrators or whether it will use the list procedure referred to in article 6, paragraph (3).

Decision on challenge of arbitrator under article 12

The arbitral institution may indicate who within the organization (e.g. Director, President, a special committee) would decide on the challenge, and according to what principles.

Replacement of an arbitrator under article 13

Assistance in fixing the fees of the arbitrators under article 39 (2) and (3) and any deposits under article 41 (3)

The arbitral institution should indicate whether it has issued a schedule of fees of arbitrators in international cases which it administers, as envisaged under article 39 (2), or, in the absence of such a schedule, whether it is prepared to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the institution appoints arbitrators, as envisaged under article 39 (3). The institution may offer to provide the arbitral tribunal with an estimate of the costs of arbitration, to assist in the accounting and to hold the deposits. If the institution intends to hold the deposits, based on its estimate, and to render an accounting at the close of the proceedings, this would amount to a modification of article 41 which should be clearly identified in any administrative rules.

(c) *Administrative services*¹⁰

The arbitral institution may describe the various administrative services it is prepared to provide or arrange for. The institution should specify whether the costs of any of such services are included in the general administrative fee or are charged separately. The following services may be included in the description:

- Providing meeting rooms for the arbitral tribunal;
- Assisting the arbitral tribunal in establishing the date, time, and place of hearings, and in giving advance notice to the parties;
- Arranging for stenographic transcripts of hearings;
- Arranging for interpretation at the hearings;
- Providing secretarial assistance;
- Transmitting communications of or to the arbitral tribunal or from a party to the other party;
- Assistance in filing or registering arbitral awards.

(d) *Fee schedule*

The arbitral institution may state its own fee schedule or, in the absence of such a schedule, the basis for calculating its administrative

fees. It is recommended to state separately the fees or charges for each of the following services: (i) arbitral institution acts as appointing authority and provides administrative services; (ii) arbitral institution acts only as appointing authority; (iii) arbitral institution provides only administrative services.

II. ADVISABILITY OF ISSUING A LIST OF ARBITRAL INSTITUTIONS PREPARED TO ACT AS APPOINTING AUTHORITY

16. The second issue relating to the use of the UNCITRAL Arbitration Rules considered by the Commission at its twelfth session was whether it would be desirable and feasible to issue a list of arbitral and other institutions that have declared their willingness to serve, if so requested, as appointing authorities under the UNCITRAL Arbitration Rules.¹¹ In the course of the consultations held by the Secretariat (*supra*, para. 3), the unanimous view was expressed that the expected advantages of issuing such a list would probably be outweighed by serious disadvantages.

17. While it was felt that such a list could assist parties in their search for appointing authorities, the following short-comings were regarded as decisive. A compilation of institutions willing to act as appointing authority could never be complete and fully accurate. Neither the Commission nor the Secretariat, even if assisted by other bodies such as the International Council for Commercial Arbitration, was in a position to judge whether an institution which applied for inclusion in the list was genuine and qualified. This was seen as particularly important in view of the fact that inclusion in a list published by the United Nations might be interpreted as carrying with it a stamp of approval or recommendation. Such implication could not be avoided by a disclaimer since lesser qualified institutions might advertise their services "as approved by UNCITRAL". In this context it was also pointed out that under the UNCITRAL Arbitration Rules not only arbitral institutions could act as appointing authorities but also private persons.

18. In the light of these considerations, it was generally felt that it should be left to arbitral institutions themselves to declare that they are prepared to act as appointing authority. Such a course would meet the information needs of interested parties without the disadvantages inherent in a United Nations list.

19. The Commission may wish to accept this suggestion which would be in harmony with the proposals noted above concerning administrative guidelines. As proposed there (*supra*, para. 15), arbitral institutions would be invited to declare whether they are prepared to act as appointing authority and to indicate the applicable procedures.

⁹ E.g. Rule 3 of the Kuala Lumpur Centre, and section on "Services as appointing authority" in the AAA Procedures.

¹⁰ See e.g. Rules 4 and 6 of the Kuala Lumpur Centre, and the section on "Administrative Services" of the AAA Procedures.

¹¹ 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. 67-70 (Yearbook . . . 1979, part one, II, A).