

II. RECOMMENDATIONS TO ASSIST ARBITRAL INSTITUTIONS AND OTHER INTERESTED BODIES WITH REGARD TO ARBITRATIONS UNDER THE UNCITRAL ARBITRATION RULES ADOPTED AT THE FIFTEENTH SESSION OF THE COMMISSION

INTRODUCTION

1. The UNCITRAL Arbitration Rules* were adopted by the United Nations Commission on International Trade Law in 1976, after extensive consultations with arbitral institutions and arbitral experts. In the same year, the General Assembly of the United Nations, by its resolution 31/98,** recommended the use of these Rules in the settlement of disputes arising in the context of international commercial relations. This recommendation was based on the conviction that the establishment of rules for *ad hoc* arbitration that were acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.

2. Since then, the UNCITRAL Arbitration Rules have become well known and are widely used around the world, not only in *ad hoc* arbitrations. Contracting parties increasingly refer to these Rules in their arbitration clauses or agreements, and a substantial number of arbitral institutions have, in a variety of ways, accepted or adopted these Rules.

3. One way in which the UNCITRAL Arbitration Rules have been accepted is that arbitral bodies have drawn on them in preparing their own institutional arbitration rules. This has taken two different forms. One has been to use the UNCITRAL Arbitration Rules as a drafting model, either in full (e.g., the 1978 Rules of Procedure of the Inter-American Commercial Arbitration Commission) or in part (e.g., the 1980 Procedures for Arbitration and Additional Rules of the International Energy Agency Dispute Settlement Centre).

4. The other form has been to adopt the UNCITRAL Arbitration Rules as such, maintaining their name, and to include in the statutes or administrative rules of an institution a provision that disputes referred to the institution shall be settled in accordance with the UNCITRAL Arbitration Rules, subject to any modifications set forth in those statutes or administrative rules. Prime examples of institutions adopting this approach are the two arbitration centres established under the auspices of the Asian-African Legal Consultative Committee (see Rule I of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration

Centre; articles 4 and 11 of the Statutes of the Cairo Centre for International Commercial Arbitration). In addition, a provision similar to the one described above was included in the "Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran" of 19 January 1981 (article III, paragraph 2).

5. In addition to the above cases, which concern an arbitral body's own and only rules, a great number of institutions which have their own established arbitration rules have accepted, in a variety of ways, the use of the UNCITRAL Arbitration Rules if parties so wished. Some institutions have, for example, embodied that option into their established institutional rules (e.g. London Court of International Arbitration, 1981 International Arbitration Rules; Foreign Trade Arbitration of the Economic Chamber of Yugoslavia, 1981 Rules). Another form of acceptance has been to offer the administrative facilities of an arbitral institution in co-operation agreements between arbitration associations or chambers of commerce and in recommendations or model clauses providing for the use of the UNCITRAL Arbitration Rules. The prime example, which was also the first international agreement to include the UNCITRAL Arbitration Rules, is the "Optional Arbitration Clause for use in contracts in USA-USSR Trade - 1977 (prepared by American Arbitration Association and USSR Chamber of Commerce and Industry)", with the Stockholm Chamber of Commerce acting as appointing authority.

6. Of the many other institutions that have declared their willingness to act as appointing authority and to provide administrative services in arbitration cases under the UNCITRAL Arbitration Rules only one should be mentioned here. The American Arbitration Association (AAA) has adopted a specific set of administrative "Procedures for Cases under the UNCITRAL Arbitration Rules" setting forth in detail how the AAA would perform the functions of an appointing authority and provide administrative services in conformity with the UNCITRAL Arbitration Rules.

7. In view of the promising trend in favour of the use of the UNCITRAL Arbitration Rules, these recommendations are intended to provide information and assistance to arbitral institutions and other relevant bodies, such as

* Yearbook . . . 1976, part one, II, A, para. 57.

** Yearbook . . . 1977, part one, I, C.

chambers of commerce. As the above examples indicate, there are a number of ways in which the UNCITRAL Arbitral Rules and their use in arbitration proceedings may be accepted.

A. ADOPTION OF UNCITRAL ARBITRATION RULES AS INSTITUTIONAL RULES OF AN ARBITRAL BODY

8. Arbitral institutions, when preparing or revising their institutional rules, may wish to consider the advisability of adopting the UNCITRAL Arbitration Rules. While it would clearly be in the interest of the desired unification of the rules on arbitral procedure that arbitral institutions adopt these Rules in full, some institutions may have reasons for incorporating, at least for the time being, only some of the provisions of these Rules. Even such adoption in part would constitute a step towards the harmonization of the rules on arbitral procedure.

9. However, if an institution intends to adopt such provisions and to maintain the name UNCITRAL Arbitration Rules, special considerations come into play which relate to the interest and expectations of the parties to an arbitration agreement or to a contract including an arbitration clause. Parties, and their lawyers, who have gained familiarity with and confidence in the use of the UNCITRAL Arbitration Rules tend to rely on the uniform and full application of these Rules by any arbitral institution which in its rules provides for the application of the UNCITRAL Arbitration Rules.

10. Therefore, an arbitral institution which intends to refer in its institutional rules to the UNCITRAL Arbitration Rules should take into account this interest of the parties in having certainty about which procedures to expect. Accordingly, it is recommended that institutions, when adopting the UNCITRAL Arbitration Rules and maintaining their name, refrain from modifying them.

11. This appeal to leave the UNCITRAL Arbitration Rules unchanged does not mean, of course, that the particular organizational structure and needs of a given institution should be neglected. Such specific features normally relate to matters not regulated in the UNCITRAL Arbitration Rules. For example, there are no special provisions in these Rules concerning the various facilities and procedures relating to administrative services or on such particular matters as fee schedules. It should, therefore, be possible to adopt institutional rules consisting of the UNCITRAL Arbitration Rules and some administrative rules which are tailored to the particular organizational structure and needs of the institution and are in conformity with the UNCITRAL Arbitration Rules.

12. If, in exceptional circumstances, an institution deems it necessary, for administrative purposes, to adopt a rule which modifies the UNCITRAL Arbitration Rules, it is strongly recommended to clearly indicate that modification. An appropriate way of doing so is to specify the

provision of the UNCITRAL Arbitration Rules involved, as done, for example, in the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre (opening words of Rule 8: "In lieu of the provisions of article 41 of the UNCITRAL Arbitration Rules the following provisions shall apply: . . ."). This indication would be of great help to the reader and potential user who would otherwise have to embark on a comparative analysis of the administrative procedures and all provisions of the UNCITRAL Arbitration Rules in order to discover any disparity between them.

B. ARBITRAL INSTITUTION OR OTHER BODY ACTING AS APPOINTING AUTHORITY OR PROVIDING ADMINISTRATIVE SERVICES IN *AD HOC* ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

1. *Offer of services*

13. *Ad hoc* arbitrations conducted under the UNCITRAL Arbitration Rules may be facilitated by a body acting as appointing authority or providing administrative services of a secretarial, technical nature. These kinds of assistance could be rendered not only by arbitral institutions but also by other bodies, in particular chambers of commerce or trade associations.

14. Such institutions and bodies are invited to consider offering their services in this regard. If they decide to do so, they may wish to make that willingness known to the interested public. It is advisable that they describe in detail the services offered and the relevant administrative procedures.^a

15. In devising these administrative procedures or rules, the institutions should have due regard to the interests of the parties. Since the parties in these cases have agreed that the arbitration is to be conducted under the UNCITRAL Arbitration Rules, their expectations should not be frustrated by an administrative rule which is in conflict with the UNCITRAL Arbitration Rules. Thus, the considerations and the appeal expressed above in the context of adopting these Rules as institutional rules (see paragraphs 9-12) apply here with even greater force.

16. The following remarks and suggestions are intended to assist any interested institution in taking the necessary organizational measures and in devising appropriate

^a In an introductory part, the institution may wish to provide, in addition to the customary description of its aims and traditional activities, some information regarding the UNCITRAL Arbitration Rules. In particular, it may state that these Rules were adopted in 1976, after extensive deliberations, by the United Nations Commission on International Trade Law, that this Commission consists of 36 member States representing the different legal, economic and social systems and geographic regions of the world; that in the preparation of these Rules, various interested international organizations and leading arbitration experts were consulted; that the General Assembly of the United Nations has recommended the use of these Rules for inclusion in international commercial contracts; and that these Rules have become widely known and been accepted around the world.

administrative procedures in conformity with the UNCITRAL Arbitration Rules.

17. It is recommended that the administrative procedures of the institution distinguish clearly between the functions of an appointing authority as envisaged under the UNCITRAL Arbitration Rules and other administrative assistance of a technical, secretarial nature. The institution should declare whether it is offering both or only one of these types of service. When offering both types the institution may declare its willingness to provide only one of these services in a given case, if so requested.

18. The distinction between these two types of services is also of relevance to the question of which party may request these services. On the one hand, an institution may act as appointing authority under the UNCITRAL Arbitration Rules only if it has been so designated by the parties, whether in the arbitral clause or in a separate agreement. An institution should so state in its administrative procedures, possibly with the additional provision (as a rule of interpretation) that it would also act as appointing authority if the parties submit a dispute to it under the UNCITRAL Arbitration Rules without specifically designating it as the appointing authority. On the other hand, administrative services of a technical, secretarial nature might be requested not only by the parties, but also by the arbitral tribunal (cf. article 15, paragraph (1) and article 38, paragraph (c) of the UNCITRAL Arbitration Rules).

19. In order to assist parties, the institution may wish to set forth in its administrative procedures model arbitration clauses covering the above services. The first part of any such model clause should be identical with the model clause of the UNCITRAL Arbitration Rules:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force”.

The agreement as to the services which are requested should follow. For example:

“The appointing authority shall be the XYZ-Institution”.
or:

“The XYZ-Institution shall act as appointing authority and provide administrative services in accordance with its administrative procedures for cases under the UNCITRAL Arbitration Rules”.

As suggested in the UNCITRAL Model Arbitration Clause, the following note may be added:

“Note—Parties may wish to consider adding:

“(a) The number of arbitrators shall be . . . (one or three);

“(b) The place of arbitration shall be . . . (town or country);

“(c) The language(s) to be used in the arbitral proceedings shall be . . .”

20. In view of the considerations and concerns expressed above in paragraphs 12 and 15, if the administrative procedures of the institution are such as to lead to a modification in substance of the UNCITRAL Arbitration Rules, it may be advisable that this modification be reflected in the model clause.

2. *Functions as appointing authority*

21. An institution which is willing to act as appointing authority under the UNCITRAL Arbitration Rules should specify in its administrative procedures the various functions of an appointing authority envisaged by these Rules which it will perform. It might also describe the manner in which it intends to perform these functions.

(a) *Appointment of arbitrators*

22. The UNCITRAL Arbitration Rules envisage various possibilities concerning the appointment of an arbitrator by an appointing authority. Under article 6, paragraph 2, the appointing authority may be requested to appoint a sole arbitrator, in accordance with certain procedures and criteria set forth in article 6, paragraphs 3 and 4. Further, it may be requested, under article 7, paragraph 2, to appoint the second of three arbitrators. Finally, it may be called upon to appoint a substitute arbitrator under articles 11, 12 or 13 (successful challenge and other reasons for replacement).

23. For each of these cases, the institution may indicate details as to how it would select the arbitrator in accordance with the UNCITRAL Arbitration Rules. In particular, it may state whether it maintains a panel or list of arbitrators, from which it would select appropriate candidates, and may provide information on the composition of such panel. It may also specify which person or organ within the institution would in fact make the appointment (e.g. president, director, secretary or a committee).

(b) *Decision on challenge of arbitrator*

24. Under article 10 of the UNCITRAL Arbitration Rules, any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. When such a challenge is contested (e.g. if the other party does not agree to the challenge or the challenged arbitrator does not withdraw), the decision on the challenge is to be made by the appointing authority according to article 12, paragraph 1. If the appointing authority sustains the challenge, it may also be called upon to appoint the substitute arbitrator.

25. The institution may indicate details as to how it would make the decision on such a challenge in accordance

with the UNCITRAL Arbitration Rules. In particular, it may state which person or organ within the institution would make the decision. The institution may also wish to identify any code of ethics or other written principles which it would apply in ascertaining the independence and impartiality of arbitrators.

(c) *Replacement of arbitrator*

26. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the appointing authority may, under article 13, paragraph 2, be called upon to decide on whether such a reason for replacement exists, and it may be involved in appointing a substitute arbitrator. What has been said above in regard to the challenge of an arbitrator applies also to such cases of replacement of an arbitrator.

27. The situation is different with regard to those cases of replacement covered by paragraph 1 of article 13. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, the only task which may be entrusted to an appointing authority is to appoint a substitute arbitrator.

(d) *Assistance in fixing fees of arbitrators*

28. Under the UNCITRAL Arbitration Rules, the arbitral tribunal fixes its fees, which shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. In this task, the arbitral tribunal may be assisted by an appointing authority in three different ways:

(i) If the appointing authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case (article 39, paragraph 2);

(ii) In the absence of such a schedule of fees, the appointing authority may provide, upon a party's request, a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators (article 39, paragraph 3);

(iii) In cases referred to under (i) and (ii), when a party so requests and the appointing authority consents, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees (article 39, paragraph 4).

29. An institution willing to act as appointing authority may indicate, in its administrative procedures, any relevant details in respect of these three possible ways of

assistance in fixing fees. In particular, it may state whether it has issued a schedule of fees as envisaged under (i). The institution might also declare its willingness to perform the function envisaged under (ii), if it has not issued a fee schedule, and to perform the function under (iii).

(e) *Advisory comments regarding deposits*

30. Under article 41, paragraph 3, of the UNCITRAL Arbitration Rules, the arbitral tribunal shall fix the amounts of any initial or supplementary deposits only after consultation with the appointing authority, which may make any pertinent comment it deems appropriate, if a party so requests and the appointing authority consents to perform this function. The institution may wish to indicate in its administrative procedures its general willingness to do so.

31. It should be noted that, under the UNCITRAL Arbitration Rules, this kind of advice is the only task relating to deposits which an appointing authority may be requested to fulfil. Thus, if an institution offers to perform any other function (e.g. to hold deposits, to render an accounting thereof), it should be pointed out that this is a modification of article 41 of the UNCITRAL Arbitration Rules.

3. *Administrative services*

32. An institution which is prepared to provide administrative services of a technical, secretarial nature may describe in its administrative procedures the various services offered. Such services may be rendered upon request of the parties or the arbitral tribunal.

33. In describing the various services, the institution should specify those services which would not be covered by its general administrative fee and which, therefore, would be billed separately (e.g. interpretation services). The institution may also wish to indicate which of the services it can provide itself, with its own facilities, and which it might merely arrange to be rendered by others.

34. The following list of possible administrative services, which is not intended to be exhaustive, may assist institutions in considering and publicizing which services it may offer:

(a) Forwarding of written communications of a party or the arbitrators;

(b) Assisting the arbitral tribunal in establishing the date, time and place of hearings, and giving advance notice to the parties (cf. article 25, paragraph 1 of UNCITRAL Arbitration Rules);

(c) Providing, or arranging for, meeting rooms for hearings or deliberations of the arbitral tribunal;

(d) Arranging for stenographic transcripts or hearings;

(e) Assisting in filing or registering arbitral awards in those countries where such filing or registration is required by law;

(f) Providing secretarial or clerical assistance in other respects.

4. *Administrative fee schedule*

35. The institution may wish to state the fees which it charges for its services. It might reproduce its administrative fee schedule or, in the absence thereof, indicate the basis for calculating its administrative fees.

36. In view of the two possible categories of services an institution may offer, it is recommended that the fee for each category be stated separately. Thus, if an institution offers both categories of service, it may indicate its fees for the following three functions:

(a) Acting as appointing authority and providing administrative services;

(b) Acting as appointing authority only;

(c) Providing administrative services without acting as appointing authority.

(In addition to the information and suggestions set forth herein, assistance may be obtained from the secretariat of the Commission (International Trade Law Branch, Office of Legal Affairs, United Nations, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria). The secretariat could, for example, provide any interested institution with copies of the institutional rules or administrative procedures of a given other institution. It may also, if so requested, assist in the drafting of an administrative provision or make suggestions in this regard.)