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N O T E S

Fifth International Arbitration Congress

New Delhi 7 - 10 January 1975

These Notes reflect suggestions made at the Congress which are not already incorporated in the Report of the Secretary General.

INTRODUCTION

Para 3. of the Introduction could better be followed by a paragraph explaining the function of the Appointing Authority. This now comes under 5 sub (a).

Para 4 starts with the basic arbitration clause. This is however not recommended. We therefore better put into the foreground the full recommended clause as now dealt with under 5 and 6. Only at the end should be said that the Rules also could be made applicable by simple reference to the Uncitral Arbitration Rules. This however is certainly not recommended (see now para 2 under 4).

The discussions learned that, for clarification and avoiding misunderstandings, the Introduction will need some re-writing from para 4 to the end.

Article 1

a. Broches suggests para 3 to be read simply as follows:

> 3. "Agreement in writing" includes an exchange of letters or of telegramms or telexes.

b. He also suggests to redraft Commentary 3 as follows:

> 3. Para 2 makes it clear that the Uncitral Rules may be made applicable to arbitration clauses or agreements to which a Government, State agency or State organization is a party. Article 11 of the Geneva Convention recognizes etc..

His explanation for the modification is the following:

> "The present text of para 3 (Commentary) gives the mistaken impression that Article 1, para 2 recognizes the right of "legal persons of public law" to conclude valid arbitration agreements. The Rules can of course do no such thing although a Convention may. The word "also" in the second sentence should therefore be deleted and the first sentence be reworded as suggested."

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Article 2

a. It has been suggested to add to para 1

"In the latter case they may nevertheless choose an arbitral institution as appointing authority."

b. It has also been suggested (on several occasions) that Governments should be invited to communicate to Uncitral Secretariat which arbitral institutions of their country are prepared to administer the Uncitral Arbitration Rules or, as the case may be, to function as Appointing Authority. This in order to avoid refusal when it comes to the point. Uncitral should then publish this list.

Note We mentioned this possibility already for the Appointing Authority in Article 6, para 2 under (a). See also Commentary 2 on this Article.

Article 4

The words " and counterclaim" at the end of para 1 should be deleted. This article also applies to a statement of defense without counterclaim.

Article 6

a. It is suggested to read para 1:

If a sole arbitrator is to be appointed by an appointing authority . . . . . .

This, to make it clear that the parties themselves are free. Originally we had here "unless the parties otherwise agree". This has been deemed covered now by our addition to Article 1, para 1 (at the end). Discussions at the Congress showed that this addition is generally overlooked.

b. At the end of para 2 under c (page 17) Broches suggests to add the words "at the request of the claimant":

(c) the appointing authority designated at the request of the claimant by the Secretary General of the Permanent Court of Arbitration at the Hague.

c. Holtzmann suggests to start para 2 under c. with:

the appointing authority from a country other than the country of either party .....

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This would then be a guideline for the Secretary General.
It is however also a restriction on the freedom of the Secretary General of the Permanent Court of Arbitration.

Article 7

The same suggestion as for para 1 of Article 6 is repeated here for para 2, concerning the presiding arbitrator. See comment at Article 6 under b.

Article 8

a. Commentary 1 on para 1 should read:

"Para 1 applies the rule as to the arbitrator's impartiality and independence to every arbitrator, including the arbitrator appointed by the other party when three arbitrators are to be appointed".

It was observed that challenge of your own arbitrator should be excluded.

b. It was also suggested to clarify in the commentary that "past ties" do not matter.

Article 11

It has been asked whether this article should not include the (rather exceptional) case that an arbitrator has been successfully challenged during the course of arbitration proceedings (when circumstances for challenge became only known at a later stage).

Article 14

a. It was suggested to use the term

seat of arbitration

b. It was also suggested to state at the end of para 3:

. . . . at any place they deem appropriate

Note "convenient" might be a sea-side resort!

c. Finally it was suggested that guidelines should be included for arbitrators when they would have to designate the seat of arbitration.

4/

Article 18

a. When the arbitrators accept the plea the arbitration proceedings will not be continued. In this case their ruling on the preliminary question is final. Para 3 should further be studied.

b. In the fourth line of the quotation under 1 of the Commentary the word "jurisdiction" should be replaced by "competence". This indeed is a typographical error. The Washington Convention uses the terms jurisdiction and competence as similar. In my opinion this is right, but Dunshee de Abranches seems to be of a different opinion.

c. The Commentary 2 should be read at the end:
However, it did not seem necessary for the present Rules to deal with objections that the arbitrators have exceeded their terms of reference (see Article 17 first sentence after the semicolon). The consequences of exceeding the terms of reference are dealt with by the arbitration law, applicable to the arbitral proceedings and are not a subject to be regulated in the Rules.

Article 19

a. The Heading should read:

Further written statements
Further evidence

b. Para 3 could read:

3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits or to present other relevant evidence within such a period as they shall determine.

5/

Article 21

a. The Heading should read:

Hearing and Evidence

b. Para 2 could read:

2. If witnesses are to be heard, then as a rule at least 15 days before . . . . .

c. It was also suggested to require a brief outline of what a witness could testify. In my opinion this is not advisable.

d. On the other hand it seems advisable to make a separate paragraph of the last sentence of para 4. This would then become:

5. Arbitrators are free to determine the manner in which witnesses are interrogated.

This then should as well be commented separately.

Article 26

a. It has been suggested to add to this Article that the place where the award has been rendered should be stated in the award.

b. On purpose no time limit for the rendering of the award has been provided for. This is left to the prudence of the arbitrators. Under reference to Italian Arbitration Law, under which arbitrators shall render their award within 90 days, after their appointment unless the parties have disposed otherwise, it is suggested that the Rules should contain an express provision on the subject. This could be, under the system adopted by our Rules according to which the arbitrators are masters of the proceedings, something like:

Arbitrators shall render their award in due time, not exceeding as a rule, six months after the constitution of the arbitral tribunal. Arbitrators are authorized to exceed this period if, for a proper conduct of the case, they deem this necessary.

Article 27

a. This article could be clarified when drafted as follows:

1. The arbitrators shall apply the municipal law (in French: la loi interne") expressly designated by the parties as applicable to their contract and, failing such designation by the parties, the municipal law that the arbitrators deem applicable.

2. The arbitrators shall decide ex aequo et bono etc.
(unchanged)

3. In either case the arbitrator shall give effect to the terms of the contract and any applicable usages of trade.

Commentary (p. 50)

2. Para 1 of the present article deals with arbitrations according to the rules of law. Etc., etc..

3. Para 2 (unchanged)

4. Para 3 provides that in either case, whether the arbitrators are to decide according to the rules of law or as "amiables compositeurs", they shall give effect to the terms of the contract and any applicable usage of the trade. In international arbitrations for which these Rules are designed, this corresponds with the intention of the parties.

Article 31

a. It was suggested to extend the enumeration of "costs" in this Article with the costs of

- interpretation
- stenographic record

as mentioned in para 3 of Article 21.

b. To annex to the Rules a schedule of fees, as also suggested, does not seem practicable.

c. It was observed that legal assistance should be regarded as generally acceptable, even in ex parte proceedings. Therefore Article 31 under g. should simply read:

> g. The compensation for legal assistance of the successfull party.

Conclusion

1. These Notes sum up the further remarks made during the New Delhi Congress (not contained in the Report). Some of the participants announced they will come back on a specific point. To give some examples:

   - Broches did not agree with the exclusion of the dissenting opinion in art. 26. He was of opinion this was useful for the quality of the award; the majority of the arbitrators would then be obliged to give better reasons. Personally I do not share this view. In practice an arbitrator, nominated by a party, may feel obliged towards that party in case that party is going to loose, to write such an opinion in order to save his own position. A note from Broches may be expected.

   - Derains (ICC) expressed his intention to write to me on the subject of the amiable compositeur and the applicable law.

2. These Notes will need to be supplemented later on. As comments will gradually come in from our widespread consultations, it may perhaps be advisable to catalogue them pro Article as do these Notes on New Delhi.

Schiedam, January 14, 1975.