

ME
Report Conference

**MODEL RULES FOR INTERNATIONAL COMMERCIAL
ARBITRATION : UNCITRAL ARBITRATION RULES**

INTRODUCTION

Dear Conference Colleagues:

As Chairman of the First Working Party on Model Rules for International Commercial Arbitration, I wish to draw your attention to the attached draft rules which will be the focus of our discussions. In addition, special papers will be presented by experts from different parts of the world on specific issues suggested by these rules.

These rules have been prepared by Professor Pieter Sanders for UNCITRAL with the collaboration of a joint committee composed of representatives of the UNCITRAL staff and the International Committee on Commercial Arbitration. After the Congress, Professor Sanders will have the benefit of our deliberations before preparing a final draft to be presented to UNCITRAL at its next meeting in Geneva in the Spring of 1975.

Donald B. Straus
Chairman
First Working Party

MODEL RULES FOR INTERNATIONAL COMMERCIAL ARBITRATION : UNCITRAL ARBITRATION RULES

In its sixth session (April 1973) the United Nations Commission on International Trade Law (UNCITRAL) required the Secretary General :

"In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;"¹

Since then a draft has been prepared of a complete set of arbitration rules to which parties may refer by inserting into their contract an arbitral clause stating that disputes arising out of or relating to their contract (or the breach thereof) shall be finally settled by arbitration in accordance with the Uncitral Arbitration Rules. This draft has now been circulated for world wide consultation. In this paper I may concentrate on some of the interesting aspects of this draft.

1. Character of the Rules

The Uncitral Rules are optional. It depends on the parties whether they will use them or not by referring to these rules in the arbitral clause contained in their contract. This reference may be pure and simple :

Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), either directly or indirectly, shall be finally settled by arbitration in accordance with the Uncitral Arbitration Rules, which the parties declare to be known to them.

The parties may however go further and prefer to call upon the assistance of one of the many arbitral institutions that exist in the world for the handling of their arbitration. The idea of calling for the assistance of an existing arbitral institution is not new. It can also be found in the ECAFE Rules : parties may designate a specific arbitral institution which will apply the ECAFE Rules in the arbitration of the dispute (Article II, para 3). The parties may also designate an arbitral institution for the appointment of the arbitrators only (Article II, para 3); the arbitral institution then serves as so-called appointing authority. The ECE-Rules (Article 3) go

(1) Report of the United Nations Commission on International Trade Law on the work of its sixth session, 2-13 April 1973, *Official Records of the General Assembly : Twenty-eighth Session, Supplement No. 17 (A/9017)* para 85.

further; the parties may designate a specific arbitral institution which shall be charged with the settlement of the dispute "in accordance with its own rules". The arbitration then switches to institutional arbitration; the arbitration is completely handled by an existing arbitral institution under its own rules.

The draft Uncitral Rules contain as well the possibility to call for the assistance of an arbitral institution as appointing authority only, as the possibility to have the assistance of an arbitral institution also on other occasions, specifically mentioned in the Rules. The arbitral institution then serves as an administering body. The choice can be made by the parties in adding to the arbitration clause just mentioned either :

—The arbitration will be administered by.....

or

—The appointing authority will be.....

In case the first choice has been made, the arbitral institution will be of assistance on the following occasions: for the starting of the arbitration (Articles 3 and 5); for the appointment of the arbitrator (s) if not appointed by the parties themselves (Articles 6 and 7); for the decision whether a challenge of an arbitrator is justified (Article 10); for the fixation of the fees of arbitrators (Article 31); and finally for the collection of deposits for the arbitration costs from both parties (Article 32). In these 7 cases the respective articles of the Rules are divided into two parts: left part applicable in case of non-administered arbitration, the right part applying to administered arbitration. In any case, whether in this way administered or not, it is always the Uncitral Arbitration Rules that apply.

The arbitral institution, selected by the parties, will never apply its own Rules. It may therefore refuse to accept this task or it may for any other reason not be available to exercise its (limited) administrative function. In these cases, the Rules for non-administered arbitration become applicable unless the parties would designate another arbitral institution for the administration of their arbitration (Article 2).

2. The appointment of the Arbitrators

The appointment of arbitrators is always a crucial matter. It is well known saying that the quality of any arbitration depends entirely on the quality of the arbitrators. How do our Rules deal with the appointment of the arbitrators?

First of all the number of arbitrators. If the parties have not previously agreed upon their number, they still get an opportunity to do so. In case they do not reach such agreement the Rules state that three arbitrators shall be appointed (Article 5). This corresponds with international practice. In international commercial arbitration three arbitrators are the rule.

If three arbitrators must be appointed, each party shall appoint an arbitrator; the two arbitrators thus appointed will choose the third arbitrator who will act as president of the arbitral tribunal (Article 7, para 1). In international arbitrations this

so-called party-arbitration-system is customary. It presents, in international matters, some advantages. The arbitrator nominated by a party may explain the case against the background of the national rules and customs of the party who nominated him. The presiding arbitrator shall be of a nationality other than the nationality of the parties, unless the parties otherwise agree (Article 7, para 2). This requirement, that also applies to the sole arbitrator, is in the interest of strict neutrality and corresponds with the practice of the International Chamber of Commerce.

The appointment of the arbitrators is primarily left to the parties themselves. If they do not reach agreement on the choice of the sole arbitrator or in case of three arbitrators, if the respondent does not appoint an arbitrator, the assistance of an "appointing authority" is provided in the draft. The question then arises : who will act as appointing authority ?

In case of administered arbitration the answer is rather simple : the arbitral institution serves as appointing body. The matter becomes more complicated in case of non-administered arbitration. According to the draft the parties then get first an opportunity to agree between themselves on an appointing body, which may be an arbitral institution again or any other legal or physical person. If the parties do not reach agreement on the appointing authority, the draft gives, as it stands today, the claimant an option. The claimant may either apply to an appointing authority designated by Government of the country where the respondent has his principal place of business or habitual residence (the idea is to invite the Governments to designate appointing authorities for the sake of the Uncitral Arbitration Rules) or if no such designation has taken place, to an arbitral institution or chamber of commerce in said country that deals with matters similar to those involved in the dispute. The claimant has still another possibility : he may request the Secretary General of the Permanent Court of Arbitration in The Hague to designate the appointing authority. The Secretary General has declared himself, in principle, willing to fulfil this task. In this way the draft guarantees under all circumstances the designation of an appointing authority.

A similar regulation has been provided for the appointment of the presiding arbitrator. The choice of the president is in first instance left to the two arbitrators already appointed. If these arbitrators cannot reach agreement, the parties themselves get a chance to reach agreement on the choice of the presiding arbitrator. In case also the parties cannot reach agreement again the designation of an "appointing authority" is introduced, who will appoint the presiding arbitrator.

Another innovation may be found in the way the appointing authority proceeds. Here the example of the American Arbitration Association is followed : the appointing authority sends to both parties an identical list of candidates; the parties may return the list indicating their order of preference or objections; the appointing authority then appoints the arbitrator from the candidates mentioned on the list, taking into account, as far as possible, any preference and objections that may have been stated by the parties. By this method of appointment the parties still have a

certain influence on the choice of the arbitrators although the appointment is made by a third party and not directly by the parties themselves.

3. Challenge of Arbitrators

Closely connected with the subject of appointment of arbitrators is the possibility to challenge an arbitrator where there may be doubts about his impartiality or independence. No one knows better than the arbitrator himself whether such circumstances exist. The draft Rules contain an innovation, compared with ECE and ECAFE Rules, in so far as they introduce the obligation of the arbitrator to disclose any circumstances that might give rise to doubts about his impartiality or independence. This idea is taken from the Inter-American Rules and the Rules of the American Arbitration Association that both contain such obligation.

The challenge-procedure is also carefully regulated in the Rules. The challenging party has to make the challenge within a short period (8 days) after the appointment or, when the circumstances giving rise to challenge became only known at a later time, within 8 days after this time. After a challenge has been made by a party either the other party or the arbitrator may accept the challenge: in these cases a new appointment must be made pursuant to the procedure applicable to the initial appointment.

What happens when the other party does not agree to the challenge and also the arbitrator involved rejects the challenge? Here several situations had to be taken into account. When the appointment was made by an arbitral institution or appointing authority the decision whether the challenge is justified, will be taken by them. Their decision on the challenge is final.

Where a *party* appointed the arbitrator we have to make a distinction between administered and non-administered arbitration. If the arbitration is an administered one, the arbitral institution that administers the arbitration will make the decision. If the arbitration is non-administered we again fall back on the designation of an appointing authority to be agreed upon by the parties, if not previously agreed. If no agreement between the parties can be reached the challenging party has the same option for the choice of an appointing authority as we just explained in case difficulties arise in connection with the appointment of arbitrators. Again there will be under all circumstances an appointing authority that decides on the challenge. Both the decision of the appointing authority as the decision of the arbitral institution (in case of an administered arbitration) will be final. Where the decision sustains the challenge a substitute arbitrator shall be appointed pursuant to the procedure applicable to the initial appointment (Article 10). It appears from the regulation that the draft Rules are, for the challenge of arbitrators as well as for the appointment of arbitrators, completely self-supporting.

4. Arbitral Proceedings

The main rule as to arbitral proceedings is to be found in Article 13, para 1:

"Subject to these Rules, the arbitrators may conduct the arbitration in such a

manner as they consider appropriate, provided the parties are treated with absolute equality”.

In principle, therefore, the arbitrators are master of the proceedings. It is up to them to decide whether the proceedings shall be conducted solely on the basis of an exchange of written pleadings and all relevant documentary evidence or also on the basis of oral hearings, i.e. oral pleadings by the parties or their counsel. However, oral hearings must be held when one of the parties offers to produce evidence by witnesses. For the production of evidence by witnesses the arbitrators cannot refuse to arrange for a hearing. The situation is different for a hearing for the presentation of oral argument. The arbitrators may refuse such a hearing in case they are of the opinion that they would already be fully informed by the exchange of written pleadings. However, if both parties request such a hearing for the oral presentation of their case, the arbitrators must comply with this request. All this can be found in Article 13.

When reading the draft Rules and especially those which regulate the proceedings, we must always keep in mind that they may apply in cases where the parties are situated in far remote countries. The possibility of having the arbitration conducted solely on the basis of an exchange of written pleadings and other written material should therefore not be excluded.

In case no witnesses have to be heard the arbitral proceedings could therefore either be completely in writing or in writing plus oral hearings for further explanation of the case by parties or their counsel. There is in any case an exchange of two written pleadings; a statement of claim (Article 16) and a statement of defence (Article 17). The arbitrators shall decide whether further written statements will be required from the parties. Here again, like with the oral hearing, exception has been made in case both parties agree on a further exchange of written statements; in that case the arbitrators shall receive such statement (Article 19).

Although the arbitrators are master of the proceedings there still exists a considerable possibility of influencing the course of the proceedings if both parties agree. They can, in common agreement, oblige the arbitrators to receive more written statements although the arbitrators would deem two enough (exceptional case). They can also oblige the arbitrators to arrange an oral hearing for further oral explanation of the case although arbitrators would deem such hearing to be superfluous (less exceptional case).

The arbitrators are instructed to treat the parties with absolute equality (Article 13, para 1). Equal treatment of the parties is a principle of every arbitration like it is a basic principle in Court. The Rules provide also for equal treatment of the parties by the parties themselves: all documents and information supplied by one party to the arbitrators shall be transmitted by that party at the same time to the other party (Article 13, para 3). This Rule also includes equal treatment of the arbitrators by the parties. The parties in their dealings with the arbitrators must

follow the same principle of equal treatment if there is an arbitral tribunal composed of three arbitrators. Each communication sent by one party to one arbitrator must not only be sent to the other party but also to the other arbitrators. The Rules take this for granted but perhaps this could still be stated in more explicit terms. The same applies to each communication by an arbitrator (f.i. the presiding arbitrator) to the parties. These communications should not only be sent to both parties at the same time but also copy of it should be sent to the co-arbitrators. Paragraph 3 could express this more clearly when drafted as follows :

“All communications, documents or information supplied by one party should be transmitted at the same time to all the arbitrators and the other party. The same applies to all communications made by one arbitrator to one of the parties”.

I regard this only as a textual clarification and useful as such. In fact the principle of equal treatment is found in many articles of the Rules, as f.i. in article 16 (the sending of the statement of claim) and in article 17 (the sending of the statement of defence).

The draft Rules have chosen for direct contacts between arbitrators and parties. The written statements are directly sent by the parties to the arbitrators. The same applies to all other documents and communications. In case the arbitration is administered by an arbitral institution it would have been possible to introduce the intermediary of the arbitral institution. An advantage of this solution could be to avoid private contacts between arbitrators and parties. But can these contacts be prevented? If a party wants to get into touch with an arbitrator, and especially with the arbitrator he has appointed directly, he may always find a way to do so. If these contacts are kept secret this is contrary to any code of ethics in commercial arbitration. To express this clearly is another advantage of the clarification of paragraph 3 of Article 13 I just suggested.

In my opinion the intermediary of an arbitral institution for the exchange of written statements etc. will not prevent private contacts between arbitrators and parties; on the other hand it will certainly cause delays. Again we have to keep in mind the types of cases we are dealing with. Suppose a dispute between a Rumanian and Indian firm is handled by arbitrators in Rumania, India and (as presiding arbitrator from a third country) in France. Why should the exchange of documents be channeled through Moscow in case the arbitration is administered there? The Rules, in my opinion, rightly restrict the administrative services of the arbitral institution chosen as “administrator” to where its intermediary is absolutely necessary, like in the cases of appointment and challenge we already dealt with.

5. Place of Arbitration

“Unless the parties have agreed on the place where the arbitration is to be held, such place shall be determined by the arbitrators” (Article 14). This rule is in

conformity with Article 14 of the ECE-Rules. In itself this rule seems quite in conformity with the spirit of arbitration: the will of the parties is predominant (*autonomie de la volonté*); only when the parties do not agree on the place of arbitration, the arbitrators determine this place. Should we however go further and recommend (in international commercial arbitration!) that parties fix the place of arbitration at the time of making their contract, i.e. at a time when nobody knows what kind of dispute, if any, might arise under the arbitral clause of their contract? I rather doubt this. What might be advisable in national arbitrations, may not be recommendable in international arbitration.

The question should above all be approached from a practical point of view. Under an international sales contract it cannot be foreseen whether the Japanese seller or the American buyer will be in default, neither where at that time the goods will be or where the witnesses will be available. In international arbitrations a great flexibility as to the choice of the place of arbitration seems preferable. This would lead, in my opinion, to leaving the choice of the place of arbitration to the arbitrators. I would not go so far as to exclude the possibility of having the place of arbitration fixed by the parties beforehand. The only thing I suggest here is; not to recommend, in international arbitration, the addition to the recommended arbitral clause (like ECE does) of the words: the place of arbitration shall be

There is another aspect to the question: it is often argued, in international commercial arbitration, that the choice of the place of arbitration by the parties constitutes an indication of the choice of law, not only of arbitral procedural law but also of the material law to be applied by the arbitrators. The question seems less important under the draft Rules we discuss here as Article 27 states that in any case the arbitrators shall take into account the terms of the contract and (unless the contract itself would provide otherwise) the usages of the trade. This gives arbitrators a wider latitude for generally acceptable decisions, divorced from any specific system of municipal law.

The most important consequence of the choice of the place of arbitration, from a practical point of view, is its influence on the validity of the arbitral award and the enforceability of the award. The parties want a valid award that will not be set aside in the country where the award was made and that may be enforced, if necessary, in any country where enforcement is sought (most likely the country of the losing party). This may be illustrated by a recent case. The french Professor Georges Ripert and the swiss President of the Federal Tribunal André Panchaud rendered an award between the french *Sociétés d'Etudes et d'Entreprises* and the Yugoslav Government in the swiss canton of Vaud. In this canton an award, rendered by two arbitrators is null and void. In another canton of Switzerland it would have been valid. In a case like this, where parties accepted arbitration by two arbitrators, these arbitrators should have freedom to choose a place for rendering the award where there would be no such ground for setting aside the award as

happened in this instance. This again pleads for freedom of the arbitrators, in international commercial arbitration, to fix the place of arbitration.

Of course, under the draft Uncitral Arbitration Rules, a case like this could not happen: the number of arbitrators is always uneven. The arbitrators should however, for all practical purposes, have above all in view the enforceability of their award. In this respect international conventions, and in the first place the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, ratified today by 40 States, have come to the rescue of international commercial arbitration. It is only when arbitrators have made their decision that it becomes predictable where the award possibly may need to be enforced. The validity of the award which, according to international conventions like New York 1958, is to be judged according to the law of the country where the award was made, and the enforceability of their award should then be taken into account by the arbitrators when determining the place where the award is made.

All these considerations lead me to the conclusion that it is preferable to leave the choice of the place of arbitration, i.e. the place where the award is made, to the arbitrators. Even when parties have determined this place beforehand, for some reason or other, it is still possible to introduce in the Rules a freedom for the arbitrators to decide where they shall hold interim meetings for consultation amongst themselves. Why should arbitrators not be free to determine the place where they will meet f.i. for their internal consultation whether they should nominate an expert and on which subjects exactly they want his opinion? Why should they not be free to determine the most suitable place for hearing of witnesses? In my opinion the determination by the parties of the place of arbitration only instructs the arbitrators as far as the oral hearings (for further oral explanation by the parties or their counsel) and the rendering of their award is concerned. So, even when the parties have determined the place of arbitration, much freedom is left to the arbitrators to choose suitable places for meetings. In my opinion they should have this freedom as well for the most important choice to be made; the place where they render their award.

6. Pleas as to the Arbitrators' Jurisdiction

Article 18 deals with pleas as to the arbitrator's jurisdiction. Every arbitration must be based on a valid arbitration agreement. If such an agreement has been concluded the Courts have to abstain from dealing with the dispute. If nevertheless a Court would be seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, the Court has to refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed". These are the words used by the New York Convention 1958 in Article II, para 3. Therefore, when an arbitration agreement is invoked before the Courts this means for them a "hands off" unless this agreement is found to be "null and void, inoperative or incapable of being performed".

Arbitration Rules do not deal with this side of the picture. In practice however arbitrators may be confronted with the objection that they are not competent

to deal with the matter as there does not exist a valid arbitration agreement and therefore matter should be dealt with by the Courts and not by arbitrators. Such an objection should not be raised later than the delivery of the statement of defence or, with respect to a counter-claim, in reply to this counter-claim. This has been provided in para 2 of Article 18.

The next question is then, what attitude the arbitrators should take when such objection has been raised. The draft Rules leave, in paragraph 3, the arbitrators a choice : they may determine such an objection as a preliminary question and render an interim award on this point or they may go on with the arbitration and determine the objection in their final award. Most likely they will follow the first method. They will however postpone their decision on the objection where the facts on which the objection is based are closely connected with the substance matter of the dispute and a decision on the objection might prejudice the decision on the merits of the case. In most cases an interim award seems indicated.

The main point is of course what has been stated in paragraph 1 of Article 18 : the arbitrators shall be the judge of their own competence. This we find as well in Article 41 of the Convention on the Settlement of Investment Disputes (Washington 1965) : "The tribunal shall be the judge of its own competence". This is a bold statement. Does it exclude the jurisdiction of the Courts on this crucial matter? I have my doubts on this point. When the subject matter of the dispute was not capable of settlement by arbitration under the law of the country where the award was made, this certainly constitutes a ground for setting aside of the award in that country. It also constitutes a ground for refusal of enforcement in the country where recognition and enforcement of the award is sought, when under the law of that country the subject matter of the difference was not capable of settlement by arbitration (Article V, para 2, under *a* of the New York Convention 1958). This is a clear example, but would not the same apply to other reasons of invalidity of the arbitration agreement? Consequence of a valid arbitration agreement is that the Courts have to abstain from dealing with the dispute, the Courts become incompetent. Exclusion of Court's jurisdiction is a matter of public policy (*ordre public*). The last word of the courts on a matter like this can not be excluded. It cannot be left to the decision of private persons acting as arbitrators, to have the final say on the competence of the Courts.

Nevertheless a provision as contained in paragraph 1 of the draft Rules is very useful. Arbitrators are instructed to give their opinion on the validity of the arbitration agreement. They cannot suspend the proceedings and refer parties to Court in case an objection as to their competence has been raised. This would be a too easy way for a recalcitrant party to frustrate arbitral proceedings. They have to express their opinion on the objection and to judge on their own competence.

If the objection is overruled by the arbitrators, a party may thereafter still bring a Court-action to get a final decision on this matter. In practice, the Courts will be rather reluctant to throw over the arbitral proceedings. In case the arbitra-

tors have carefully motivated why they came to the conclusion that the objection was not justified, the Courts will be inclined to follow the opinion of arbitrators even when still some doubts might exist. They will, as I see it, only overrule the arbitrators in clear-cut cases. In those cases we cannot do without the control of the Courts.

In a case like *Prima Paint* the arbitrators' decision is in my opinion final; there is no control of the Courts afterwards on the validity of the main contract. This may be different when questions arise like whether the parties did conclude a contract at all or when it is argued the contract was null and void from the beginning as concluded under undue influence. In those cases the arbitral clause can, in my opinion, not be separated from the main contract in which it is embedded. Arbitrators can and, in my opinion, must express their opinion on these questions when raised by one of the parties. They will do so, not in an interim award but in a final award. Their decision, as regarding their competence, may however later be submitted to the Courts for final decision. But, here again applies what has been remarked before: only in clear-cut cases the Courts will overrule the decision of the arbitrators.

7. Evidence

The draft *Uncitral Arbitration Rules* contain, in Article 21, some provisions concerning evidence and in particular some provisions regarding the hearing of witnesses. Here again it should be taken into account that the Rules are destined world-wide and that the rules of evidence differ from country to country. Especially with regard to evidence by witnesses, different systems exist in different parts of the world. The only possible solution therefore seemed to leave the arbitrators the greatest possible freedom. We find this in para 4: Arbitrators are free to determine the manner in which witnesses are interrogated" and in para 5: "Conformity to legal rules of evidence shall not be necessary".

The freedom of the rules of evidence not only concerns the formal rules of evidence but also includes the evaluation of the evidence: "Arbitrators shall determine the relevancy and materiality of the evidence offered" (para 5, first sentence). This freedom of evaluation of evidence applies as well to testimonies from witnesses as to documentary evidence. Because of this special provision contained in paragraph 5 the heading of Article 21 could perhaps read: Hearing and Evidence.

Article 21 may, as far as the hearing of witnesses is concerned, be regarded as an application of the principle expressed in the first Article of Section III on *Arbitral Proceedings*: "The arbitrators may conduct the arbitration in such a manner as they consider appropriate" (Article 13 of the draft; see under no. 4 above). To give a practical example: arbitrators may permit cross-examination. If however parties (or only one of them) are not acquainted with this technique, as in an international arbitration may very well be the case, the arbitrators may find it

inappropriate to impose this technique on the parties or their counsels. Whether arbitrators, under other systems than cross-examination, will do the interrogation themselves or will leave it, entirely or partially, to the parties to put questions to the witness is a matter to be decided freely by the arbitrators. The greatest "souplesse" possible has been introduced in the Rules by the provision, that "arbitrators are free to determine the manner in which witnesses are interrogated". What could be regulated and in fact has been regulated in the Rules are practical matters like the communication to the arbitrators and the other party of the names and addresses of the witnesses and the language they will use. On the basis of the last mentioned information previous arrangements for translation may be deemed necessary.

In case of administered arbitration the arbitrators may fall back for this purpose on the arbitral institution like they may do for the arrangement of a stenographic record, if required. Arbitrators are free to call for the assistance of the arbitral institution but this will only be helpful in case the hearing takes place in the country where this institution is situate. Otherwise, like in the case of non-administered arbitration, the arbitrators have to take care of the arrangements themselves. No general rule, introducing the obligation for intermediary of an arbitral institution (in case of an administered arbitration) could therefore be provided. Arbitrators are free to decide on the place of hearings (see under no. 5). Introducing the obligatory assistance of an arbitral institution in country A when the hearing would take place, for all practical reasons, in a far remote country B would only lead to complications and would present no practical solution.

In conformity with the principle of privacy that is customary to arbitration, Article 21 states in para 4 that the hearing shall be held *in camera*, unless parties agree otherwise. The arbitrators may decide whether persons, other than parties and their counsels, may be present at the hearing and, more specifically, they may require the retirement of any witness during the testimony of other witnesses. It are these practical points that are regulated in the Rules. For the rest, the conduct of the hearing is left entirely to the prudence of the arbitrators.

8. Applicable Law

The applicable law, in international arbitration, is a favourite topic for all arbitration experts. What do we mean by "applicable law"? The law to be applied to the arbitration agreement? The law applicable to the arbitral proceedings? Or the law to be applied to the substance matter of the dispute? Article 27 deals with the last question only. The law applicable to the arbitration agreement is not a matter that could be dealt with in arbitration rules. As far as the law applicable to the arbitral proceedings is concerned, the draft Uncitral Arbitration Rules are based on the principle of leaving the greatest possible freedom to the will of the parties (*autonomie de la volonté*) who in the Rules have authorized the arbitrators to conduct the arbitral proceedings in such a manner as they consider appropriate. What

this in practice means has been discussed under no. 4 (Arbitral Proceedings), no. 5 (Place of Arbitration) and no. 7 (Evidence).

This freedom as to the arbitral procedure is in conformity with the New York Convention 1958. Contrary to the previous Geneva Convention 1927, under which the award has to be made not only in accordance with the agreement of the parties but also in conformity with the law governing the arbitration procedure, the New York Convention formulates as ground for refusal of enforcement that "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place". The will of the parties as to the arbitral procedure is therefore paramount.

Turning now to the law applicable to the substance of the dispute, the arbitrators, in case the parties would have designated in their contract a law applicable to the contract, shall have to apply that law. The law applicable to the contract is, in international business relations, a delicate subject on which, at the end of lengthy negotiations, it may be difficult to reach agreement. Each party will prefer to have its own law be declared applicable, afraid of surprises the law of the other party may present. The question remains therefore often outstanding. It may even be a stimulant for insertion of an arbitration clause into the contract as the parties, not without good reasons, expect from arbitrators that they will above all base their decision on the wording and history of the contract and the usages of trade.

It may also be a reason why parties authorize the arbitrators to decide as "amisables compositeurs" (*ex aequo et bono*). In fact the parties expect often more from this clause than it really means. Also with this special authorization arbitrators are not free to deviate from rules of imperative law (*ius cogens*). The extra freedom this clause permits should not be overestimated especially as also the rules of law in our time more and more refer to general notions like good faith and equity. This allows as well a great margin of freedom to arrive at equitable solutions. Anyhow the "amiable composition" is not a solution that seems generally acceptable. In large parts of the world it is unknown and, if ever heard of, largely misunderstood.

Taking these considerations into account Article 27 contains with regard to the law applicable to the substance of the matter the following regulations: First of all the arbitrators will have to apply the law expressly designated by the parties as applicable to their contract. For the reasons just explained there will often be no such designation. In that case the applicable law has, under the situation of today: to be found by application of the rules of conflict of laws. Rules of international private law will therefore guide the arbitrators in determining which law is applicable in the light of the circumstances of the case. Arbitrators will decide as "amisables compositeurs" only when the parties have expressly authorized them to do so and provided that the arbitration law of the country where the award is rendered permits this type of arbitration.

Perhaps the most important part of Article 27 is to be found in paragraph 4: In any case (i.e. regardless whether the arbitrators decide according to the rules of law or as "amisables compositeurs") the arbitrators shall take into account the terms of the contract and the usages of the trade. This formula we find as well in Article VII of the Geneva Convention 1961 and in the ECE Rules.

It gives the arbitrators a wider latitude for general acceptable decisions, divorced from any specific system of municipal law. In fact, this is what parties, in international arbitration, are looking for. When the terms of the contract and usages of the (international) trade come first, the applicable law may only play a secondary role. Decisions of arbitrators, based on these factors, may, when published (see below under no. 9), set the pattern for a universal commercial law (*lex mercatoria*): not restricted to the boundaries of specific national systems.

In the situation of today, where no uniform commercial law exists governing international business transactions, the regulation of Article 27 contains the maximum of freedom that could be given to arbitrators with regard to the law applicable to the substance of the dispute.

9. The Award

Section IV of the draft, dealing with the award, contains several interesting aspects of which one, the applicable law, has already been discussed in the previous paragraph. I may deal with some of them in this paragraph.

A. Publication of the Award

This topic has been often discussed at arbitral conferences. Already at the second International Arbitration Conference, Rotterdam 1966, a cautious resolution has been accepted in favour of publication, on the one hand the privacy of arbitration speaks against publication; on the other hand however publication is desirable for the development of generally accepted rules that govern international trade. The International Chamber of Commerce, the Arbitration Rules of which are also under revision, has proposed a new article for introduction of its Rules reading:

"When certain points of an award appear likely to be of general interest, the Court (here is meant the Court of Arbitration of I.C.C. that functions as administrator of the arbitration and not, as the wording would suggest, as arbitrator) may, provided that the confidential character of the award shall not be affected, authorise the publication of extracts from it".

Such a solution is possible in case of an administered arbitration. Under the Uncitral-draft the arbitration may be administered or not.

This draft therefore requires in any case the consent of the parties. Normally this consent will only be given when the secrecy of the arbitration is respected: no names of the parties and further precautions to prevent disclosure of their identity. It is however also possible that parties have no objection to consent to a complete

publication of the award. Examples of this, in international arbitration, can be given. When consent of the parties is required both publication in full and in some way or other camouflaged publication are possible. It all depends on the consent of the parties. This has been expressed in the Uncitral draft in one simple sentence in Article 26, para 4:

“The award may only be published with consent of the parties”.

On the example of I.C.C.'s proposal it could be considered whether, also under the Uncitral Rules one step further could be made by adding to this article something like:

“In case of an administered arbitration, the arbitral institution may even without consent of the parties and provided that the confidential character of the award shall not be affected, publish extracts from the award, when certain points of the award appear likely to be of general interest”.

B. Settlement

During the course of arbitration proceedings the possibility of a settlement may become apparent. An equitable settlement between the parties may always be preferred to a judicial or arbitral decision. The Uncitral draft takes this into account like ECAFE Rules, the Rules of the International Centre for Settlement of Investment Disputes and the Inter-American Rules also do.

Article 28 opens the possibility that, on request of both parties and on acceptance by the arbitrators, the settlement is recorded in the form of an award. The obvious advantage of this procedure is the enforceability of the settlement in the same way as if a full dress award would have been rendered.

It is also possible that parties simply inform the arbitrators that they have reached an agreement and that there is therefore no need to continue arbitral proceedings. In that case the arbitrators will make a simple order for the discontinuance of the proceedings and fix the costs of arbitrators. These costs will be borne equally by both parties unless otherwise agreed by the parties. The same applies in case the arbitrators record the settlement in the form of an arbitral award on agreed terms.

C. Interpretation and Correction

The draft Rules also contain provisions for an official interpretation of the award (Article 29) and a correction of the award (Article 30) in case there are errors in computation, clerical or typographical errors and the like. Although rather exceptional, it seems useful to regulate these matters. Both are limited to a short period: within 30 days after communication of the award to the parties.

D. Costs

Arbitrators do not function without remuneration. Especially international arbitrations may be time consuming and also in other aspects demand the utmost

from the arbitrators. Although it is generally regarded as an honour to be asked as arbitrator it would go too far to demand that the work should be done *pro deo*. On the contrary the remuneration of the arbitrators should be guaranteed from the the beginning: and advance deposit for the costs of arbitration may be required from each of the parties for an equal amount (Article 32). During the course of the arbitration even supplementary deposits may be required.

What happens, when one of the parties (e.g. the respondent) does not fulfill its obligation to make an advance payment for the arbitration costs? In that case the claimant, who might have every interest to go on with the arbitration, will get an opportunity to make the required payment instead of the defaulting party (Article 32, para 3). In this context I may refer also to Article 24. In this article the absence of a party has been regulated. This neither prevents arbitrators from rendering an award. If the respondent fails to submit a statement of defence or fails to appear at a hearing, which might be the case when he is convinced of losing the arbitration and the arbitration was simply an *ultimum remedium* for the claimant to get payment of sums that are clearly due, the arbitrators may go on with the arbitration and may render an award as if all parties were present. This payment of the arbitration costs is then secured by virtue of Article 32, para 3.

The costs of arbitration include also compensation of legal assistance of the successful party "if the arbitrators deem legal assistance appropriate under the circumstances of the case". Although, in international arbitration, legal assistance may be generally deemed appropriate, there could be circumstances (e.g. *ex parte* proceedings, the case we just mentioned) that this would not be the case. In any case arbitrators can only award compensation for legal assistance if a claim to this effect has been made. The arbitrators must then not only decide whether legal assistance was necessary, but also whether the compensation required is deemed reasonable (Article 31 at the end of para 1).

10. In this paper I have concentrated on what I regarded as the most important features of the proposed Uncitral Arbitration Rules:

1. Character of the Rules
2. Appointment of the Arbitrators *No objection*
3. Challenge of the Arbitrators
4. Arbitral Proceedings *Open Hearing, written & oral*
5. Place of Arbitration *Stockholm*
6. Pleas as to the Arbitrator's Jurisdiction *Arbitration*
7. Evidence *Interim award*
8. Applicable Law *UNCITRAL*
9. The Award
 - A. Publication of the Award
 - B. Settlement
 - C. Interpretation and Correction
 - D. Costs

In doing so, I had in view that perhaps in this order our discussions at the Vth International Arbitration Congress could best take place.

The Uncitral draft gives an abundance of material to be discussed. There are technical points of arbitration-organisation which I certainly do not under-estimate. They may come up at any time during our discussions. The points mentioned above need however, as I see it, in any case our attention. May our discussions lead to still further improvement of the draft Uncitral Arbitration Rules to which already many arbitration experts from all parts of the world have contributed their knowledge and experience.