

# UNCITRAL ARBITRATION RULES

Ninth Session, April 1976

## Introductory Statement

### 1. The revised draft is based on the thorough discussions at Geneva

- <sup>discussions</sup> ~~Decisions~~ very constructive.
- Revised draft in many aspects an improvement
- Details will be discussed when article by article
- Some general observations only
- Company <sup>firm</sup> Preliminary Draft and Revised Draft.

### 2. Seize of the Rules

From 32 to 34 articles.

New is Article 2

- According to wishes of Geneva meeting.
- Modification must be in writing.  
But 26 (25 Geneva) remained: waiver.

New is Article 32

- Only new in the formal sense.
- Additional Awards ~~were~~ also in first draft (art. 30, para. 3)
- Now clearly distinguished from correction of the award.  
Correction in 31. Additional Award in 32.

### 3. Most striking difference

- No two columns anymore.  
This applies to
  - A. Beginning of the Rules: Appointment and Challenge
  - B. End of the Rules: Costs and Deposit of Costs.
- The two columns disappeared as the difference between administered and non-administered arbitration <sup>was</sup> ~~had~~ deleted,
- This again was according to the wishes of Geneva meeting. The decision was taken in Geneva to exclude administered arbitration from the scope of the Rules but to permit the parties to designate in advance a person or an institution to carry out the function of an appointing authority.  
(See para. 8 of Annex I to Report 8th Session).

#### 4. Appointing authority

Uncitral Arbitration Rules are meant for international comm. arb..

When discussing these Rules take a concrete example: A contract between an American party and an Indian party. The contract contains an arbitration clause: all disputes will be settled by arbitration. Each party has the right to appoint an arbitrator, the two arbitrators will appoint the third arbitrator who will act as chairman. How do we get the arbitral tribunal constituted when one of the parties, the defendant, does not want to collaborate in the appointment procedure?

Every arbitration regulation must contain provisions in order to prevent that the arbitration machinery does not get <sup>4</sup>stuck tight in the beginning. An appointing authority is therefore a must. When the defendant abstains to appoint his arbitrator, the A.A. appoints the arbitrator in his stead. When the two arbitrators cannot agree on the presiding arbitrator, in last resort again the A.A. has to intervene.

The A.A. is therefore indispensable. Best of all he could be designated by the parties themselves. They should do so preferably already at the time when they insert the arbitration clause in their international contract. That is why it is strongly recommended to add to the arbitration clause the designation of the A.A. (See para. 15 of the Introduction Doc.9/112).

First recommended addition to the basic arbitration clause is therefore the designation of an A.A..

The parties may also agree later on, on the designation of the A.A.. But what if they did not agree in the beginning on its designation and cannot agree later on? This is the most delicate point still of our Draft.

In Geneva there was a considerable support for the establishment of one single appointing authority under the aegis of the U.N.. The only other solution, less applicable but still possible, would be the Secretary General of the Permanent Court of Arbitration in The Hague. An A.A. of the U.N. was however largely preferred. This point will be discussed when we come to Art.7, para. 4.

## 5. Rôle of Arbitral Institutions

Although the Uncitral Rules do not contain now anymore the second column for fully administered arbitration, the Rules still leave room for the assistance of arbitral institutions.

First of all an arbitral institution may be designated by the parties as the A.A.. Any physical person or institution may be designated as A.A. It is quite likely that the parties prefer a well established arbitral institution to do the appointing in case of need. Arbitral institutions have their expenses.

It has therefore been provided in article 33 under f. that the arbitrators shall include in the costs of arbitration "any fees charged by the A.A. for its services".

The arbitral institution may also be of assistance, if designated as A.A., when a decision on a challenge has to be made. A rather exceptional case, regulated in article 11. Here again, like in the appointing business, the arbitral institution might charge a fee which will be included into the arbitration costs according to art. 33.

For appointment and challenge an arbitral institution experienced in this field may render very useful services. It is therefore expected that parties will above all designate arbitral institutions as A.A. for assistance, if necessary, in the appointment or challenge procedure.

The parties may even, if they agree to it, enlarge the scope of assistance by the A.A. in case an arbitral institution has been designated as such. This then does not concern anymore assistance in the field of appointing or (closely related with appointment) challenge, but assistance on other subjects.

This enlargement of the task of the A.A. can be achieved by way of modification of the Rules as now has been expressly regulated in the new article 2. I repeat: this enlargement may especially be agreed upon by the parties if an arbitral institution has been designated as A.A..

Example: Assistance of the arbitral institution in connection with the fixation of the fees of the arbitrators (art. 33) and assistance of the arbitral institution with regard to deposits by the parties for the costs of the arbitration (art. 34).

*etc. with an account to be filed*



5. Enlargement of task of A.A.

Especially with regard to the fixation of fees by the arbitrators (art.33) and the deposit for the costs of the arbitration (art. 34) the question has been raised, whether this enlargement should not be incorporated in our Rules.

It then becomes a rule in stead of, what I just mentioned, a possibility to be agreed upon by the parties, when drafting their arbitration agreement or at a later stage.

This is another matter upon which our meeting should take a decision. The Rules as they stand now, leave the fixation of the fee to the arbitrators themselves. The reasons for it were the following:

- as a rule arbitrators are appointed by the parties and enjoy confidence of the parties. Abuse of confidence by arbitrators in fixing excessive fees is hardly known. If really abuse would be made court remedies could be available. *Very occasional.*
- Inserting consultation with the A.A. before arbitrators determine their fee would cause considerable delay. This consultation then becomes obligatory and the files should be sent to the A.A., otherwise the A.A. could never express an opinion whether the suggested fee is justified or not.
- The A.A. could not only be an arbitral institution but also a Chamber of Commerce or a physical person etc.. Do parties want details of their case becoming known to every A.A.?
- If parties want previous consultation on the fees they can ad hoc stipulate that this should be done (modification of the rules).

I gave these reasons only because the commentary on article 33 does not go into details on this subject. It is up to the meeting to decide whether the task of the A.A., if one has been designated by the parties, should also include a consultation on the fees.

Collecting Deposits

As far as article 34 is concerned a designated A.A., if it is an arbitral institution, could serve a useful purpose in collecting and administering deposits. Other A.A.'s would perhaps be less equipped to do so.

When inserting in article 34 the assistance of the A.A. (arbitral institution only, in my opinion) for the collecting of deposits this would need some further drafting:

- <sup>Who is to decide on?</sup> Is the amount of the deposit in question? to be decided by the arbitrators alone or after consultation with the A.A.?
- same question with regard to additional deposits.
- the A.A. should inform the arbitrators on payment or non-payment of deposits. *Continue to arbitral institution only*
- the arbitrators will receive their fee and expenses from the A.A.. The balance will be returned by the A.A. to the parties.

When the system of article 34 would be maintained (arbitrators collect and administer deposits) perhaps the article could require that arbitrators open a special bank-account for the case. In ad hoc arbitration this is in practice mostly done even without special <sup>vision</sup> ~~promise~~ to this effect.

#### 6. Summing up

I may limit myself to these few observations, concentrating myself on the main difference between the Preliminary Draft of last year and the Revised Draft laying now before us.

This main difference is the deletion of the two column system and the choice for administered arbitration connected with it. The Rules have gained in clarity. They are drafted not for legal experts but for the business world involved in international trade.

The businessman will readily understand the rôle of the appointing authority, maintained in the Draft and indispensable as guarantee against non-cooperation of a party once a dispute has arisen. Notwithstanding such non-cooperation an arbitral tribunal will nevertheless be constituted, thanks to the assistance of the A.A..

This A.A. will, as I expect, normally be an arbitral institution. These institutions are in the best position to make suggestions for the choice of arbitrators on the lists sent to both parties or to make the appointment on their own if no list is returned. It does not seem unrealistic to expect the arbitral institutions to be willing to assist the parties in this respect and to make the Uncitral Arbitration Rules function.



— The <sup>task</sup> ~~list~~ of the arbitral institutions, once designated as A.A., will normally be limited to appointments and this only in case parties do not appoint themselves. Party autonomy in the choice of arbitrators comes in the first place. The assistance of the A.A. is only in case of need. The same applies for the rather exceptional situation of a challenge.

— The task of the A.A. add in my opinion only the task of an arbitral institution appointed as A.A., may be enlarged either by agreement of the parties (modification of the Rules according to article 2) or by incorporating its assistance in article 33 and <sup>for</sup> ~~for~~ 34 of the Rules themselves.

— This is a question still to be decided by the Ninth Session of Uncitral. Another question still to be decided and in my opinion a <sup>crucial</sup> ~~critical~~ one is the designation of the A.A. In case the parties cannot agree on its choice. Is U.N. prepared to <sup>a</sup>ssume this task?

— The designation of an A.A. should well be distinguished from the appointment of arbitrators itself. The designating authority has only to designate an appointing authority. It is this A.A. who actually will give its assistance to the parties in constituting the arbitral tribunal. As A.A. I again expect that the designator will designate normally an arbitral institution, experienced in handling these matters.

— In drafting the Uncitral Arbitration Rules the existing arbitral institutions have been largely taken into account. Although - I repeat - only in cases where the arbitration machinery as developed in the Rules needs some oil in the engine in order to function properly, the A.A. will intervene. How much oil is needed is a question we will see when coming to the last articles 33 and 34.

— In concluding permit me still to make one remark. Compared with ~~the~~ <sup>the</sup> April 1975 the Rules have been improved considerably. We would still go on improving. We should however abstain from going too much into details and be aware of perfectionism.

I am the last to deny that the Rules could still be improved further. We will experience this during this meeting. But we cannot go on for ever. Rules will never be perfect in the absolute sense. What however really counts is, whether they are understandable for the ordinary businessman, whom we want to serve with this additional <sup>set</sup> ~~step~~ of ad hoc arbitration rules and whether the machinery we provide may run smoothly in practice.

We all are lawyers and love ~~arbitration~~ our metier. I only hope that, when discussing the articles in detail, we will above all keep in mind that we are also practi<sup>ci</sup> ~~ans~~ <sup>ans</sup>. As the French so nicely say "Le mieux est l'ennemi du bien". Well, let us try to make really good rules and leave the better ones to those who will certainly criticize our work ~~when~~ it has been finished.