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Prof. Dr. Pieter Sanders
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Dear Pieter:

As requested, I am returning those pages on which I made comments in the margin. I hope you will find them useful.

I hope you will give special consideration to my strongly held view that in most cases the place of arbitration and the place of the appointing authority will be the same. I believe that most of the considerations for selecting the AA will also apply to the place of arbitration. It is also probable that an effective AA will be available in most places selected for arbitration. The services of the AA will also be more easily provided if the arbitration is held in or near its offices. It will certainly be our advice at the AAA to make the locale of arbitration and the place of the AA coincide unless there are strong reasons to do otherwise.

While the few pages that are enclosed contain some critical suggestions, let me close this letter by complimenting you on the commentary as a whole. It is a most useful document. My only worry is that it is too personal a document and undoubtedly contains interpretations on which others will differ. For this reason,, perhaps the second paragraph of Section 24 should be placed up front as the first paragraph.

With best regards,

Donald B. Straus

DBS:mt

C O M M E N T A R Y

on

UNCITRAL ARBITRATION RULES

Prof. Pieter Sanders *

1. History

- 1.1. The United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Arbitration Rules on April 28, 1976 after nineteen sessions of debate in a Committee of the whole and three Plenary sessions. A first draft of these Rules has been prepared by the Secretariat in consultation with the author in 1974. This first draft has been reproduced in U.N. Document A/CN.9/97 of November 4, 1974 and was circulated as preliminary draft to the regional commissions of the United Nations and to some 75 centres of international commercial arbitration. This first draft was also considered at the Fifth International Arbitration Congress held at New Delhi from 7 to 10 January 1975 (1). The Congress also adopted a resolution by which it encouraged UNCITRAL to finalize the rules and to make them available for use at the earliest possible date. The preliminary draft has then, together with the comments and replies received, been placed before the Eight Session of UNCITRAL, held in Geneva from 1 - 17 April 1975, for consideration. It was a general debate on the preliminary draft as a whole. The Secretariat was requested to prepare, in the light of this debate, a revised draft.

First draft
was prepared
by author
in consultation
with
Committee of
ICCA at
request of
Secretariat.

* This Commentary has been written in consultation with the following members of ICCA (International Council for Commercial Arbitration) who participated in the Ninth Session of UNCITRAL (United Nations Commission on International Trade Law) held in New York from April 12 to April 28, 1976 at U.N. Headquarters:

Martin Domke (ICC)

Howard M. Holtzmann (USA)

Sergei Lebedev (USSR)

Werner Melis (Austria)

Donald B. Straus (ICCA and I-ACAC)

Heinz Strohbach (G.D.R.)

(1) See the report of this Congress by N.Krishnamurthi in Yearbook 1976, p.229

For this reason the Rules introduce the assistance of an "appointing authority", an institution or person, who takes care of the failing appointment. This invention of the appointing authority has also been used by the Rules on two other occasions: the challenge of an arbitrator and in connection with the fixation of the arbitrators' fees. The "appointing authority" constitutes an essential element in the functioning of the UNCITRAL Arbitration Rules. It is therefore, ^{and could, if desired by the parties, undertake even more administrative functions} in my opinion, highly advisable ^{to} designate the appointing authority already at the time they conclude their arbitration agreement. For all practical reasons the name of the institution or the person, who will function as appointing authority, should already be contained in the arbitration clause or separate arbitration agreement.

∴ that the parties

2.3. Previous drafts of the Rules mentioned that the Rules were prepared for optional use in ad hoc arbitrations relating to international trade. The Rules, in their final version, are still optional. It entirely depends on the parties whether they want the disputes, arising out of their contract, to be settled in accordance with the UNCITRAL Arbitration Rules. However, the reference to "ad hoc" arbitrations and the limitation to arbitrations relating to international trade have disappeared. There were good reasons for doing so.

2.4. The words "ad hoc" are confusing and certainly not readily understood by the business world for which the Rules are destined. "Ad hoc arbitration" is normally used as opposed to "institutional arbitration". The UNCITRAL arbitration can indeed not be regarded as institutional. As just explained no central administration of the Rules has been provided for. On the other hand the Rules do not exclude the assistance of existing arbitration institutes. On the contrary it is expected that in most cases these institutions will be designated as appointing authority although the parties may appoint any other institution or person instead. It was therefore deemed advisable to make no reference at all to "ad hoc" in order to avoid any impression as if arbitration institutes would be excluded and would play no rôle in the functioning of UNCITRAL arbitrations.

In case the parties have ^{not} agreed^d on the number of arbitrators, according to Article 5, three arbitrators shall be appointed unless within 15 days after receipt by the respondent of the notice of arbitration the parties agree that there shall only be one arbitrator.

4.7. Also the place of arbitration (town or country) may be added. Different opinions exist about the usefulness of such a fixation already in the arbitral clause, without knowing what the dispute is alike. It may at that time be difficult to decide where the arbitration, in view of the circumstances of the case, could best be held*. The Rules are careful in their wording. All four additions are preceded by the words "Parties may wish to consider adding". This is more a reminder than a recommendation.

Article 16 provides that, unless the parties have agreed upon the place where the arbitration is to be held (which they may also do when the dispute has arisen) such place shall be determined by the arbitrators "having regard to the circumstances of the case".

I will deal with the place of arbitration in greater detail later on. The remarks made here, in connection with a possible addition to the arbitral clause, are only of a preliminary character.

4.8. A decision about the language(s) to be used in arbitral proceedings is seldom found in arbitration agreements. It may however be a useful data to be known when arbitrators must be appointed.

When the parties have not settled this point the arbitral tribunal "promptly after its appointment" determines the language(s) to be used in the arbitral proceedings (Article 17). In arbitration practice this may give rise to rather delicate discussions between the arbitrators which could be avoided when the parties themselves have settled this question beforehand.

* There may be advantages in having the ^{place of arbitration in the same town as the} appointing authority. This is particularly so if the parties expect assistance from the appointing authority beyond the designation of arbitrators. Many of the same considerations for selecting the appointing authority may also apply to the place most suitable for a hearing.

para 10.3

9.2. The arbitrators may combine their communication to the parties of the time periods, dealt with under 9.1, with a request for a deposit for costs. However, they may also do this at a later stage when they are better informed about the case.

Article 41, para. 1, the last article of the Rules, entitles the arbitral tribunal to request, on its establishment already, from each party an equal amount as an advance for the fees of arbitrators and their expected travel and other expenses. They may also request a deposit for "expert advice and other assistance". The latter may include secretariat help. A deposit for expert advice will rarely be requested already at the beginning of arbitral proceedings. At this stage it can hardly be foreseen whether expert advice is needed. So initially the deposit may be confined to the element of costs mentioned under a and b of Article 38. A request for a deposit for expert advice, mentioned under c, may come later. Paragraph 2 of Article 41 provides that, during the course of arbitral proceedings supplementary deposits may be requested (see for an example 13.3).

According to Paragraph 3 the arbitrators should, when fixing the amount for deposits, consult with the A.A. if such an appointing authority has been agreed upon by the parties or has been designated by the Secretary General of the Permanent Court of Arbitration. This consultation is however subject to a request by one of the parties and to the consent of the A.A. to perform this function. If so, the arbitrators submit the amount they intend to request for deposit to the A.A. "which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits". The final decision therefore remains with the arbitral tribunal. However, the Rules provided for this intervention of the A.A., in consultative capacity, as a certain safety-valve against excessive demands. A similar regulation we will find with regard to the final fixation of the arbitrator's fees (see 23.3).

Peter: It is of utmost importance to put this in the commentary. That the AA could require such a fee before commencing the case was recognized during the N.Y. meeting, even though it was not put into the rules.

The AA may also require ^{that} a filing fee ^{be paid} for its services before proceedings with the case.

Vermont

A third and perhaps the most important consequence of the determination of the place of arbitration according to the New York Convention 1958 we find under e: refusal of recognition and enforcement may take place when the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which the award was made. The binding force of the arbitral award will be decided under the law of the place of arbitration. The setting aside procedure should take place in the country where the award was made and under the arbitration law of that country.

- 10.3. When determining the place of arbitration and in doing so, determining the place where the award must be made, the arbitrators should take into account "the circumstances of the case". This not only refers to practical considerations in connection with the arbitral proceedings like least possible displacement of parties, witnesses and arbitrators, but also, in my opinion, the legal consequences just mentioned under 10.2 and more especially the recognition and enforcement of the award. If the parties do not want to leave this to the arbitrators, they should determine the place of arbitration themselves taking into account the same considerations. *Again, it should be in most cases, the place of the AA and of the arbitration will normally be the same.*
- 10.4. Article 16, in its paras 2 and 3, regulates some details. It is up to the arbitrators to determine the locale of arbitration, within the country or town agreed upon by the parties, where the hearings will be held. A neutral locale is to be preferred in spite of a perhaps more convenient offer to hold hearings at the office of one of the parties or one of the party-appointed arbitrators. *The offices of the AA may also be a suitable place.* The arbitral tribunal may however hear witnesses at any place, if it is more ¹practical to have the mountain coming to Mohammed than to make a considerable number of witnesses travel to the place of arbitration and make their appearance more uncertain. The arbitral tribunal may also hold meetings for consultation amongst its members at any place it deems appropriate. The words "having regard to the circumstances of the arbitration" have been added to avoid choice of nice meeting places like the Riviera or the Bahamas having no relationship whatsoever with the arbitration or the domicile of arbitrators. For the inspection of goods, other property or documents the arbitrators may meet at any appropriate place. The parties should however be given sufficient notice in order to enable them to be present at such inspection.

When we compare this with Article VII of the Geneva Convention 1961 we find a slight but not insignificant difference. At the end of para. 1 of this article it is stated that

"the arbitrators shall take account of the terms of the contract and trade usages"

Here contract and trade usages are placed on the same footing.

Paragraph 3 makes a distinction. The decision must be made "in accordance with" the contract, whilst trade usages must be "taken into account". This distinction, after long discussions, has been made on purpose. It underlines the importance of the contract and the provisions stipulated therein. If the contract is clear, trade usages cannot justify a deviation from the contract. The contract ranks first. This, in my experience, corresponds with arbitration practice. Arbitrators let the contract, if clear, prevail even when they deal with an arbitration under Rules - like those of the International Chamber of Commerce - which repeat the clause of the Geneva Convention (see article 13, para 5 of the ICC-Rules, Yearbook 1976 p. 162). In arbitral practice the difference between the two formulas, analysed here, may therefore hardly exist.

The actual wording has been also supported by reference to the different nature of contract and trade usages. Evidentiary proof of the contract is often uncontested, while proof of trade usages, if not codified, may be more complex. On the other hand it was also observed that the different phrasing did not intend to interfere with national laws which give contract and usage equal importance.

19.

Award on agreed terms

19.1.

Before the award is made and in fact during several stages of the arbitral proceedings the parties may agree on a settlement of the dispute. According to Article 34, para. 1 this may lead to two different happy ends. Either the arbitral tribunal issues an order for the termination of the proceedings or the arbitral tribunal records the settlement in the form of an arbitral award on agreed terms. In this no. 19 I will only deal with the latter solution.

I don't agree with this comment. I believe the long debate made it clear that the intent was to give the contract the primary

force over law and trade usage unless there is a provision in the law which the parties cannot derogate. This debate was not confined to, or even focused upon, procedural matters.

23.3. Paragraph 4 of Article 39 introduces the possibility of consultation with an A.A. on the subject of the arbitrators' fees, if such an authority has been agreed upon by the parties or has been designated by the Secretary General during the course of arbitral proceedings. A party may request the arbitrators to consult this A.A. and, if the A.A. consents to perform this function, the arbitrators should fix their fees only "after consultation with the appointing authority".

This means that the arbitrators should first of all consult among themselves which fee they deem appropriate under the circumstances of the case. This amount and in view of Article 38 under a also its appropriation to each arbitrator individually, should then be submitted as proposal to the A.A., "which may make any comment it deems appropriate to the arbitrators concerning the fees".

The proposal should therefore be motivated and explain the reasons which lead to the proposed amounts. The A.A. may even, in my opinion, request the arbitrators to submit to it the whole file of the case in order to enable the A.A. to make sensible comments. Upon receipt of these comments the arbitrators may have to consult among themselves again before finally fixing the amount of their fees if some critical comments have been made.

All this seems a rather cumbersome procedure, which may cause a considerable loss of time before the arbitrators can render their award. It should be noted that this procedure has been made subject to the "cases referred to in paragraphs 2 and 3". The procedure therefore only applies when (1) a party so requests and (2) an A.A. has been agreed upon by the parties or has been designated by the Secretary General and (3) this A.A. has issued a schedule of fees or, on request of a party, has furnished a statement setting forth the basis for establishing fees it customarily follows and (4) this A.A. accepts to function in a consultative capacity with regard to the fees of arbitrators.

I disagree with this comment. All that is necessary is that a party request and the A.A. agrees. Nor need the procedure be cumbersome. An equally valid comment would be: "This procedure provides a safeguard to the parties against excessive fees being charged by arbitrator."

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