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DRAFT REPORT

IV. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

1. The decision by the Commission to commence work on the project was taken at its twenty-sixth session in 1993. [1] The first draft prepared by the Secretariat pursuant to that decision was entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission considered at its twenty-seventh session in 1994. [2]

B. Discussion of draft Notes on Organizing Arbitral Proceedings

2. The Commission noted that the project had attracted considerable attention among practitioners and that it had been discussed at several national and international meetings. The Commission expressed particular appreciation to the International Council for Commercial Arbitration (ICCA) for organizing a discussion of the project at the XIIth International Arbitration Congress, held by the Council at Vienna from 3 to 6 November 1994. The critical and favourable comments expressed at the Congress and other meetings were useful in preparing a thoroughly revised draft entitled "Draft Notes on Organizing Arbitral Proceedings" (doc. A/CN.9/410), which the Commission had before it at its current session. (For the conclusion of the Commission, see below, paras. ___).

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[1] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 291-296.

[2] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17),

1. Text as a whole

3. There was wide and strong support in the Commission for the project, and for the purpose of the Notes, which was to serve as a reminder of ~~procedural~~ questions that, if circumstances so warranted, it might be useful to consider in order to facilitate the arbitral process. It was said that, by raising awareness about the need for proper organization of proceedings, the Notes would help avoid surprise and misunderstandings in arbitral proceedings and make the proceedings more efficient. While the advice given in the Notes might be useful in international as well as domestic arbitration, the text would be of particular importance in international cases, in which the participants often had different legal backgrounds and different procedural expectations. Furthermore, the text would provide welcome assistance to less experienced practitioners.

4. There was general approval for the principles that had been borne in mind in preparing the draft, among which were the following: the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular it was necessary to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any ~~procedural~~ principle was violated; the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.

5. However, strong reservations were also expressed about the project. It was said that the experienced arbitrators did not need the advice in the draft Notes while those without sufficient experience could not rely on the Notes for sufficient guidance as to how to conduct arbitrations. Moreover, if the arbitral tribunal would present the Notes to the parties, that might lead to unnecessary discussions about ~~procedural~~ matters; in addition, a party might invoke the Notes in order to insist on holding procedural discussions. Thus, the Notes might make arbitral proceedings more complex, lengthier and costlier.

6. The Commission, convinced of the usefulness of the Notes and desirous of avoiding difficulties or misunderstandings that were feared, embarked on a review of the draft text bearing in mind the purpose of the Notes and the stated underlying principles. It was said in particular that by not leaving any doubt that the Notes did not diminish the ~~procedural~~ prerogatives of the arbitral tribunal, the ability of the arbitral tribunal to conduct the proceedings flexibly and efficiently was undiminished.

2. Introductory part: "Purpose and origin of the Notes"

7. It was observed that the substance of the table of contents of the Notes could serve as a checklist of matters to be borne in mind in organizing arbitral procedure, and that a reference to such a checklist was made in paragraph 11 of the draft Notes; in order to highlight better such use of the table of contents, a suggestion was made to ~~reproduce~~ the checklist after paragraph 11.

8. As regards the introductory part, the following suggestions were made: to mention, possibly in paragraph 1, that the Notes could be used both in arbitrations administered by an institution and in non-administered arbitration; to recast paragraph 2 so as to avoid using the terms "suggestions" and to state positively that the Notes did not establish any binding legal requirement on parties or arbitrators; that in some contexts the expression "administered arbitration" was unclear and that it was preferable to use instead an expression such as "arbitration administered by an institution"; to clarify that the Notes were prepared with a particular view to international arbitrations, while the text could be useful also in domestic arbitration; it was pointed out, however, that some domestic

arbitrations tended to be influenced to a greater degree than international arbitrations by practices and rules used in court proceedings and that therefore the draft Notes were not drafted to be directly relevant to domestic arbitration. While it was suggested to delete the second sentence of paragraph 2 as unnecessary, the opposing view was that the sentence was necessary to stress the non-binding nature of the Notes.

9. As to paragraph 4, it was suggested to delete the reference to "type and complexity of issues of fact and law"; to state expressly that the discretion of the arbitral tribunal in conducting the arbitral proceedings was subject to rules agreed by the parties and the law governing the proceedings, including the fundamental principles of procedure; that expressions such as "decisions on organizing proceedings" were preferable to "procedural decisions", used in paragraph 4 and elsewhere, inasmuch as the latter term might give rise to a controversy as to whether a matter was one of substance or procedure; to use, where appropriate, the term "procedural orders" as a term used in practice; to delete footnote 2 since, in referring to flexibility of proceedings, many other sets of rules, including those of arbitral institutions, could be given as examples; to add the word "just" to the words at the end of paragraph 4 so that they would read "the need for a just and cost-efficient resolution of the dispute".

↑ 9A – See Add 18

10. A view was expressed that the statement in paragraph 6 about decisions made by the presiding arbitrator should be revised so as to express the limits to the prerogatives of the presiding arbitrator to decide alone. It was proposed deleting, in paragraph 6, the text after the first sentence, since it raised questions without answering them and since it dealt with potentially controversial matters. While that suggestion was opposed, it was proposed reconsidering the words "invite the parties to enter into a procedural agreement", which might give rise to controversy and delay, in particular if the invitation referred to agreement to a set of rules.

11. A suggestion was made not to mention in paragraph 7 the possibility of meeting at places other than the place of arbitration, since such freedom might be restricted by the applicable rules or law; there was opposition to that suggestion since the passage highlighted a method that might be necessary for an efficient conduct of proceedings. It was considered that the substance of the first sentence of paragraph 8 should be expressed more clearly.

12. It was considered that paragraph 11, and the use of the word "agenda", might be misunderstood as implying that meetings devoted to procedural matters (referred to in paragraph 8 also as "preparatory conferences") were regularly held, which was not the case; furthermore, the significance of a checklist of procedural matters as set out in the Notes was not limited to preparatory conferences.

3. Procedural matters for possible consideration

"1. Deposits for costs"

13. It was considered that a deposit for costs was often not the very first matter that the arbitral tribunal raised with the parties and that, therefore, it would be more appropriate to place the item later in the Notes, perhaps close to items 4 and 5 ("Place of arbitration" and "Administrative services").

"2. Set of arbitration rules"

14. One suggestion was to delete item 2 since a discussion concerning the choice of arbitration rules might give rise to controversy or lengthy discussions. In addition, an agreement on a set of rules of an arbitral institution without the case being administered by that institution would require some rules to be modified, in particular the rules that gave a function to an organ of the institution (e.g., as regards the challenge of an arbitrator or other functions of supervision by the institution); such a modification presented a complex task; if the rules were left unmodified, problems difficult to solve might arise during the proceedings.

15. The opposite proposal was to keep the item and even to strengthen the effect of the second sentence of paragraph 15 by deleting the words of caution in the third sentence.

16. While there was considerable support for keeping the item, including the third sentence, several suggestions were made for additional clarifications: that an agreement on a set of arbitration rules was not a necessity and that the fact that the parties did not agree on a set of rules did not prevent the arbitral tribunal from proceeding with the case on the basis of the law governing the arbitral procedure; that, because of possible difficulties in cases when the parties agreed on rules of institution (referred to above in paragraph 14), it was better to delete the reference to "another set of rules" in the example within the parentheses, or, alternatively, to state that it was advisable to agree on a set of rules for arbitration that was not administered by an institution.

The last suggestion was objected to on the ground that the modified text would appear to favour holding arbitrations that were not administered by an institution, for which there was no justification.

See Add 4 ~~[to be continued]~~

"3. Language of proceedings"

17. It was observed that paragraph 17 appeared to imply that in principle all documents annexed to the statements of claim and defence had to be translated into the language of the proceedings, and that it required an express decision for a party to be able to present a document without a translation. It was suggested that a more neutral approach, such as the one expressed in article 17(2) of the UNCITRAL Arbitration Rules, should be adopted.

"4. Place of arbitration"

18. It was suggested to delete the first sentence of paragraph 20 as unnecessary. The opposite view was that the sentence should be retained since it clarified the context in which the arbitral tribunal was to determine the place of arbitration. It was suggested that the word "typically" in the second sentence and in particular the corresponding word used in some other language versions were either unclear or indicated that the power of the arbitral tribunal was limited, and that the word should be deleted. It was also suggested to mention that the parties might agree on a place of arbitration either directly or indirectly.

19. As to the list of factors possibly influencing the choice of the place of arbitration in paragraph 21, various suggestions were made: to place factors (a) and (b) (referring to the convenience of the participants and support services) at the end of the list; that factor (c) (the law

on arbitral procedure) was the most important; that factor (d) (legal regime for enforcement of the award) should be placed first; that factor (c) ("perception of a place as being neutral") was unclear, potentially confusing and should be deleted; that the arbitral tribunal, before deciding on the place of arbitration, might wish to discuss that with the parties.

20. Citing the differing suggestions reflected in the preceding paragraph, and the difficulty of properly clarifying the interplay of the factors in the short discussion under item 4, it was suggested to delete the paragraph. The prevailing view, however, was to keep it, since it usefully drew attention to the variety of factual and legal considerations in choosing a place of arbitration.

21. The proposal for deleting the second sentence of paragraph 22 was not adopted, since the sentence highlighted an important aspect of flexibility in the conduct of proceedings (see also above, paragraph 11).

"5. Administrative services"

22. It was said that the references to various types of services were too detailed and might give rise to an impression that an arbitration was a major and expensive administrative exercise. It was pointed out that paragraphs 23 and 24 did not distinguish properly between the essential services that most arbitral institutions regularly provided (e.g., rooms for hearings and meetings) from services that were not always necessary or were often not provided by institutions, but were to be secured by the parties themselves (e.g. travel arrangements).

23. It was suggested to mention in paragraph 26 that the fees for the secretary appointed by an institution administering the case were normally borne by the institution, while in other cases such fees would typically form part of the arbitration costs and would be paid from the amount deposited to cover those costs.

24. It was proposed deleting the phrase "or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", because the presence of the secretary during the deliberations was in some parts of the world not controversial, in particular when the secretary was appointed by the arbitral institution administering the case; furthermore, even where the presence of a secretary raised concerns, they were quite different from the concern, mentioned in paragraph 27, that the secretary's tasks might not be clearly distinguishable from the tasks incumbent on the arbitrators.