

# UNCITRAL Notes on Organizing Arbitral Proceedings A Regional View

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*After a short presentation of the arbitral activities of the UNCITRAL (the United Nations Commission for International Trade Law) this paper sets forth the history of the formulation of the latest arbitral document of this organization, the Notes on Organizing Arbitral Proceedings. From the perspective of arbitral tradition in the countries of Central and Eastern Europe, the author analyzes some of the recommendations given the Notes. In conclusion, the author argues that the Notes will essentially contribute to the process of harmonizing international arbitration law and to defining of the "arbitral due process of law".*

## I. UNCITRAL and arbitration - a success story

Since its inception in 1966<sup>1</sup>, the UNCITRAL was a code name for the unification and harmonization of international trade law. This Vienna-based commission of the United Nations has swiftly developed into the core agency of the UN legal services. Some of the UNCITRAL projects have in the meantime become history:

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<sup>1</sup> United Nations Commission on International Trade Law was created by the Resolution 2205 (XXI) of the General Assembly of December 17, 1966. On UNCITRAL and its history see UN publication no. F.86.V.8.

e.g., Vienna Convention on International Sale of Goods of 1980 has achieved world-wide success and recognition.<sup>2</sup>

Other projects also had widespread success: the Hamburg Rules<sup>3</sup>; a series of documents on bank guarantees, construction contracts, public procurement, electronic commerce, credit transfers and countertrade transactions as well as the recent initiatives on the unification of international bankruptcy rules may all be added to the actions that have raised the significant attention of the international legal and business community and have defined (or are just about to define) standard behavior in international trade.<sup>4</sup>

However, if any of the many areas in which UNCITRAL was active may said to be characteristic and typical for this organization, it would with no doubt be arbitration. External spectators may legitimately have the impression that other initiatives come and go – only one is constant, and that is the lasting focus on the development of the arbitral mechanisms of settlement of international commercial disputes.

There is ample proof for this statement. We may only note the several most important activities in a chronological order.

The first UNCITRAL arbitration initiative was the enactment of the UNCITRAL Arbitration Rules in 1976 (hereinafter: the UAR). The UAR, conceived as one among many sets of autonomous rules of international arbitration proceedings that parties may agree upon, achieved tremendous acceptance and defined not only the standard framework for international ad hoc arbitration, but have also influenced various national laws and the rules of various arbitration institutions.<sup>5</sup>

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<sup>2</sup> United Nation Convention on Contracts for the International Sale of Goods entered into force on January 1, 1988; currently 45 states are parties to the Convention.

<sup>3</sup> United Nations Convention on the Carriage of Goods by Sea (1978) in force since 1992, is currently ratified by some 25 states.

<sup>4</sup> Among other activities, let us mention just a few other major results of the work of UNCITRAL: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Legal Guide on International Transactions (1992); UN Convention on the Liability of Operators of Transport Terminals in International Trade, Model Law on Procurement of Goods, Construction and Services (1994); Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1988); UN Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); Legal Guide on Electronic Funds Transfers (1987); Model Law on International Credit Transfers (1992); UN Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995); Recommendation on the Legal Value of Computer Records (1985); Model Law on Electronic Commerce (1996); Model Law on Cross-Border Insolvency (1997).

<sup>5</sup> The UAR were echoed in various institutional rules especially in the countries in transition. *Zagreb Rules* - The Rules of International Arbitration of the PAC-CCC of 1992 have to a large extent copied the UAR. The same can be said about other new arbitration institutions in former Yugoslavia, but also for the reformed rules of many countries in Central and Eastern Europe. For

Following the success of the UAR, UNCITRAL soon produced another initiative –to influence national legislation on arbitration in a more direct, but non-compulsory way, merely building upon the outstanding international reputation in this field. The product was out in 1985, when the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: UML) was passed by the Commission.<sup>6</sup> The UN General Assembly at that time recommended to all states to consider the possibility of adopting it wholly or in part, in the interest of the uniformity of arbitral proceedings.<sup>7</sup> The result was again beyond expectations: about 25 jurisdictions have adopted the Model Law almost literally<sup>8</sup>, whereas some other recent legislation, though departing to a greater or lesser degree from certain recommendations, have used significant parts of the model provisions.<sup>9</sup> The UML has found proponents in quite diverse settings, from developing countries to the most developed industrial nations. The trend towards its reception still points upwards.<sup>10</sup>

The list of UNCITRAL arbitration activities would certainly be incomplete without noticing that this organization is in charge of studying the ways the national legislations implement the older but immensely influential New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958. To date, the New York Convention has been accepted in 112 countries, which may easily make it the single most successful act of the United Nations after its Charter and the Human Rights Conventions.

Other UNCITRAL projects at least partly dealing with arbitration involve UNCITRAL Conciliation Rules (1980) and the CLOUT (Case Law on UNCITRAL Texts) – an information system for collecting and disseminating

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more detailed presentation *cf.* Sekolec, *The need for a modern and harmonized regime for international arbitration*, 1 CROAT. ARBIT. YEARB. 27-49 (1994); Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 YEARB. COMMERCIAL ARBITRATION 172-218 (1977).

<sup>6</sup> *Cf.* Official Documents of the General Assembly, *supplement no 17 (A/40/17)*, par. 332. *See also* Secretariat Note on UML prepared for 21<sup>st</sup> UNCITRAL Session in 1988, UN Document No. A/CN.9/309. For a voluminous commentary of the UML *cf.* Holtzmann and Neuhaus, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. LEGISLATIVE HISTORY AND COMMENTARY*, Deventer-Boston, 1989.

<sup>7</sup> Resolution 40/72 of the General Assembly.

<sup>8</sup> According to recent data published by the UNCITRAL Secretariat, legislation based on the UNCITRAL Model Law has been enacted in Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Guatemala, Hong Kong, Hungary, India, Kenya, Malta, Mexico, New Zealand, Nigeria, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, Zimbabwe and in several U.S. jurisdictions (California, Connecticut, Oregon and Texas).

<sup>9</sup> English Arbitration Act of 1996 is a good example; in spite of the traditional conservatism of English legislators and the long and fruitful arbitral tradition, reforms in England have largely followed the UML. The German draft reform of the arbitration law is developed almost exclusively on UML patterns.

<sup>10</sup> The new draft proposal of the Croatian Arbitration Act is to a very great extent influenced by UML. *Cf.* the first draft 3 CROAT. ARBIT. YEARB. 217 (1996).

information on court decisions and arbitral awards relating to UNCITRAL Conventions.

## II. UNCITRAL Notes: a legislative history of a difficult birth

Viewed with such important projects as a backdrop, one may think that the most recent UNCITRAL arbitral document has a relatively low range and ambitions. The UNCITRAL Notes on Organizing Arbitral Proceedings (hereinafter: Notes)<sup>11</sup> are not conceived as a binding international construction; they contain neither model rules, nor model legislation. The authors emphasize that the purpose of the Notes is solely “to assist arbitration practitioners by listing and briefly describing questions on which an appropriately timed decision on organizing arbitral proceedings may be useful.”<sup>12</sup> Therefore, it may come as a surprise to realize that the Notes were passed after a long and difficult enactment process. However, for those who know the unpredictable ways of international organizations that would be only logical. As history has taught us, international projects that seemed almost impossible were sometimes passed smoothly, whereas those with an apparently innocent and technical character were subject to long and exhausting battles.

The very project that resulted in the Notes was significantly changed in the course of extensive discussions. The idea for a guide that would assist inexperienced arbitrators by outlining certain procedural problems that may arise in the course of an international arbitration originated in late 80’s.

During the 1992 Congress of the Commission in New York, the president of the U.S.-Iran Claims Tribunal in the Hague, Judge Howard Holtzmann gave the initiative for the commencement of the work on “a practice guide”. His proposal was presented to the Commission as a contribution to the discussion on the future activities on UNCITRAL:

The project that I suggest would build on UNCITRAL’s strength and reputation and success in this area, and would, I believe, enhance the usefulness of the UNCITRAL Arbitration Rules. As we all know, one of the greatest advantages of the UNCITRAL Arbitration Rules is that while they provide detailed guidance as to some parts of the arbitration proceedings, they permit broad flexibility for the arbitrators to conduct other parts of the proceeding in such manner as they consider appropriate. Now, flexibility is of course desirable at some points in arbitration, because it permits the arbitral tribunal to tailor procedures to meet the circumstances of particular cases, and also to take into account the expectations of parties who enter the arbitration with different legal and cultural backgrounds. [...] However, when rules are flexible as they must be, parties may be uncertain as to the procedures the arbitrators will adopt. [...]

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<sup>11</sup> See the UN edition published in Vienna in 1996; the final version of the notes was published in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 11-54.*

<sup>12</sup> Notes, p. 1.

How can we prevent arbitration from thus being ambushed by arbitrators? The answer may be quite simple. Let us first identify those areas where the UNCITRAL Arbitration Rules permit broad flexibility, and then let us prepare a legal practice guide that would describe one or more procedures that arbitrators successfully use in those parts of the proceedings where the rules permit them to choose the appropriate manner in which to conduct the case. The purpose of such a legal guide would not be to add to the rules or to substitute rigidity for flexibility; the purpose would be to show various ways by which flexibility can be effectively utilized. [...] The UNCITRAL Arbitration Rules do not refer specifically to pre-hearing conferences, but they provide flexibility for the arbitral tribunal to hold such pre-hearing conferences. A legal guide could analyze the benefits of pre-hearing conferences, describe the processes, and provide a check-list of topics for pre-hearing conferences that arbitrators in particular cases might then consider.<sup>13</sup>

This proposal has found fertile ground. The next year, in 1993, an expert group of the most reputable international arbitrators, carefully selected to represent various legal systems, met in the UNCITRAL Secretariat to discuss the “Draft Guidelines for Preparatory Conferences in Arbitral Proceedings”.<sup>14</sup> A member who informally led the group was the proposer, Judge Howard Holtzmann, with coordination provided by Jernej Sekolec, Senior Counsel in the UNCITRAL Secretariat.<sup>15</sup>

In accordance with the initial suggestions, the early work on the Notes was concentrated on the “preparatory conferences”, as a useful stage of arbitration proceedings that would enable arbitrators to settle some procedural and organizational issues before initiating hearings on the merits of the case. As the expert group coordinator states, the idea was that the unpredictability of the arbitral procedure might be avoided or reduced “by holding at an early stage of the arbitral proceedings a meeting (“pre-hearing meeting”) of the arbitrators and the parties to discuss and plan the proceedings.”<sup>16</sup>

The idea of introducing the pre-hearing meetings (“preliminary conferences”, “pre-hearing meetings”, “preparatory meetings”, “pre-trial review”, “preliminary hearing”, as they were called at various stages of the discussion) has its origin in the possible dangers that could arise out of provision of the UAR, Art. 15 (1) on the conduct of arbitration proceedings:

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<sup>13</sup> See UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992, New York, 1995, at 268-269.

<sup>14</sup> UN document A/49/17, paras. 111-195 (reprinted in the UNCITRAL Yearbook vol. XXV, part II, chap. IV).

<sup>15</sup> By kind permission of the UNCITRAL Secretariat, the author of this text was allowed to follow the meetings of the Working Group and participate in the discussion.

<sup>16</sup> Sekolec, *Latest initiatives of UNCITRAL in the area of arbitration* (unpublished paper, at display with the author), p. 9.

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.<sup>17</sup>

Although the principle of freedom in shaping the arbitral process has certain limitations<sup>18</sup>, by this “golden rule” very broad discretionary powers are given to arbitrators. Generally, it is considered to be useful because it enables the arbitrator to tailor the proceedings to the case at hand. Such powers may, however, be too challenging if arbitrators are not experienced enough and/or if parties and arbitrators do not share the same expectations and the same cultural and legal tradition. In such situations, proceedings may easily become “surprising, unpredictable and difficult to prepare for” what may lead to “misunderstandings, delays and increased costs of proceedings.”<sup>19</sup>

However, the procedural tools that was the focus of the project in the early stage, the “preparatory conference”, proved to be in itself controversial i.e. subject to evaluation colored by the specific legal background.

From the beginning it was well known that the very practice of holding preparatory meetings was not equally utilized and equally understood in different parts of the world. On the one hand, the practice of holding pre-trial conferences was a customary and very widespread, if not compulsory part of the Anglo-Saxon judicial and arbitration proceedings.<sup>20</sup> Indeed, pretrial conferences are a natural part of the pretrial management typical for the structure of *common law* judicial proceedings. Taking into account three notorious features of Anglo-American judicial process, i.e. the *discovery* in the pretrial phase, the strong preference for out of court settlement, and the concentration of the proceedings in the trial stage (“a-day-in-the-court-doctrine”), the pretrial conferences have a special function determined by the structure of the crucial segments of common

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<sup>17</sup> The same rule may be found in Art. 18 of UML: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” The “flexibility part” that empowers the arbitral tribunal to conduct the arbitration in such manner as it considers appropriate was moved to a separate article (Art. 19). Both rules were described as “the heart of the law’s regulation of arbitral proceedings” and the “Magna Carta of Arbitral Procedure”. Holtzman & Neuhaus, *supra* note 6 at 550, 564. The UML formulation added that “the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.” The Art. 15 (1) UAR was adopted in Art. 20 of Zagreb Rules. They were also echoed in the Art. 20 and 21 of the First Draft Proposal of the Croatian Arbitration Law; *cf.* 3 CROAT. ARBIT. YEARB. 217.

<sup>18</sup> Primarily, arbitrators have to follow some essential provisions of the Rules (e.g. provisions on delivery of communications and delivery, various evidential issues etc.) and the parties’ agreement. In addition, arbitrators have to observe the mandatory rules of the applicable law and consider the public policy limitations.

<sup>19</sup> Sekolec, *supra* note 15, at p. 16.

<sup>20</sup> *Cf.* James/Hazard/Leubsdorf, CIVIL PROCEDURE, Boston etc., 1992 at § 5.19, for American law: “In some state jurisdictions, and in many federal districts by local rule, the holding of such a conference is mandatory unless obviated by court order in a particular phase”.

law process.<sup>21</sup> However, as stated in an influential American textbook on civil procedure, the pretrial conferences do not have a strictly defined content and schedule:

Uses of the pretrial conference vary. Some courts use it primarily as a technique to encourage settlement, usually scheduling the conference after discovery is complete but before the case is put on the trial calendar. Some courts schedule the pretrial conference early in a case to establish guidelines for discovery; others slate it on the eve of trial to organize the issues and presentation of proofs; others use multiple pretrial conferences, especially in "big" cases. Many experienced judges and lawyers believe the conference procedure, judiciously administered, can be effective in all these applications. Strong experimental evidence suggests, however, that requiring a pretrial conference in routine cases is largely a waste of time.<sup>22</sup>

According to the same authors, three main purposes of pretrial conferences in common law system are: achieving *settlement*, *simplification* of issues, and *specification* of claims and defenses, as well as of available evidence and its authenticity and admissibility.<sup>23</sup>

Although the principal idea of pretrial hearings – the idea of preparing in advance to hear the case on substance – might be equally applicable to Civil Law countries, the preliminary conferences are certainly not so widely utilized, and even if they are employed, they may have different content and function. In the typical continental piecemeal trial there is no discovery; parties start to be involved in "hearings" upon the commencement of the case; the judge has broad discretionary powers to shape the proceedings; and the stages of the process are not so sharply divided, especially after the first oral hearing. Therefore, the need for specific pretrial devices diminishes, and this instrument, although not altogether unknown, is definitely not so broadly used and systemically important.<sup>24</sup>

In this respect, arbitral "procedural styles" mirror these systematic differences. A survey made during the 8<sup>th</sup> International Arbitration Congress in New York, 6-9 May 1986 asked how customary would it be to hold a pre-hearing conference in a hypothetical international commercial arbitration case. Results showed

... that in some parts of the world, such as the United States, England and Nigeria, it is customary to hold such conferences; for arbitration under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC) it was said that meetings for the preparations of "terms of reference" which are regularly held, often serve as a pre-hearing conference. [...] For some other parts of the world, such as Arab countries, Eastern

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<sup>21</sup> All three features may be contrasted to the radically different structure of Continental European civil procedure. A fourth distinctive element might play some role as well, i.e. the participation of jury; namely, a very important feature of pretrial conference is to prepare the case for the jury (or to avoid it).

<sup>22</sup> James/Hazard/Leubsdorf, *supra* note 19, *id.*

<sup>23</sup> *Id.* at 284-286.

<sup>24</sup> For a general discussion on procedural differences of common and civil law justice and its organizational and functional background *cf.* Damaška, *FACES OF JUSTICE AND THE STATE AUTHORITY*, Yale, 1986.

Europe or Japan it was indicated that such conferences were unusual or not customary; [...].<sup>25</sup>

The same conclusion may be inferred from the analysis of arbitral provisions of various international arbitration institutions. Undertaking an analysis of various arbitration rules, Sekolec distinguishes among the (more numerous) sets of rules that do not refer to a pre-hearing meeting (such as: UNCITRAL Arbitration Rules, Rules of the LCIA, International Arbitration Rules of the AAA etc.), and those that do so (e.g. Rules of Procedure for Arbitration of the ICSID).<sup>26</sup> As already cited, the ICC arbitration rules are something different, because the arbitrators' meeting for the purpose of drafting of "terms of reference" have certain similarities to pre-hearing meetings, although it would be very far from the truth to say that these meetings have identical functions: whereas terms of reference determine a precisely defined stage in the course of the peculiar ICC procedural scheme of arbitration, pre-hearing conferences are less formal and less keenly profiled.

But, what *exactly* are the pre-hearing conferences? The preceding arguments demonstrate that it is hard to make determinate statements about them, except perhaps about their controversial essence, and the varying practices in the international arbitration community. It should therefore not be surprising that the idea of introducing an UNCITRAL document that would be focused on "pre-hearing conferences" immediately found adversaries in some Continental European arbitration circles. The criticism went, however, even further than the preparatory conferences.

The fiercest opponents of the "Guidelines for Preparatory Conferences in Arbitral Proceedings" were the members of the French *Comité Français de l'Arbitrage*<sup>27</sup>, and its president, Professor Pierre Lalive. Though some critical reviews of the UNCITRAL's initiative have been published even before<sup>28</sup>, the main battlefield for those who favored the UNCITRAL project and those who were against it was the XII<sup>th</sup> International Arbitration Congress of the International Council for Commercial Arbitration (hereinafter: ICCA Congress) held in Vienna, from 3 to 6 November 1994. During the ICCA Congress, the French Committee distributed a paper evaluating the draft Guidelines that contained some sharp criticisms of the project.

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<sup>25</sup> Sekolec, *supra* note 15 at p. 21 (citing Sanders (ed.), *Comparative arbitration practice and public policy in arbitration*, ICCA CONGRESS SERIES NO. 3, Deventer, 1987, at 63-66.

<sup>26</sup> Sekolec, *supra* note 15 at p. 18.

<sup>27</sup> The French Committee for Arbitration is a non-governmental body for promotion of arbitration. It does not act in arbitration proceedings in any way, but concentrates on the development of the culture of arbitration. Since 1955 the Committee publishes the *Revue de l'Arbitrage*.

<sup>28</sup> Cf. Lalive, *De la fureur réglementaire*, 12 ASA BULLETIN 213 (1994). Fouchard, *Ein bestreiter Anstoß von der CNUDCI*, REVUE DE L'ARBITRAGE 461 (1994).

Starting with the statement that “certain initiatives, even if motivated by good intentions, may in the end turn to be disastrous”, the French arbitrators emphasized that even the cautiously drafted recommendations of UNCITRAL may, due to the huge international reputation of this institution, have a damaging effect on the flexibility of the arbitral proceedings. The principal advantage of arbitration is adaptability; some authoritative *guidelines for preparatory conferences* would, in fact, lead to unneeded rigidity and would persuade arbitrators to conduct “preparatory conferences” whether it make sense or not.<sup>29</sup> New suggestions would, in effect, invoke “unnecessary disputes and bring about additional difficulties”.<sup>30</sup>

Explaining these general objections, two additional points were raised: first, the insurmountable differences between the common and civil law systems of proof; second, the alleged “departure from the spirit of arbitration”. It is dangerous, so the French Committee, to even think of “codification” (may it be only in terms of weak recommendations) because “the simple wish to propose *guidelines* that would supplement the will of the parties carries in the long run the great risk that these would become wide-spread law [...]”.<sup>31</sup>

A part of the unwillingness of the French critics to accept this project might be caused by terminological issues, even by unfortunate translation. So, e.g., the English version was called *guidelines*, whereas the French translation was *directives*, which is a word that is very much familiar to the French audience in the form of *mandatory* regulation enacted by the European Union.<sup>32</sup> This instrument, obviously raising unpleasant memories in those who were (and are) subject to it, really did not share more than a name with the UNCITRAL draft, but the choice was misleading. In a typical overstatement, Lalive spoke of *directives internationalement harmonisées* that almost in a comical way attempt to regulate totally casuistic and contingent issues.<sup>33</sup>

These and similar criticisms expressed at the ICCA Congress and on other occasions did not prevent the UNCITRAL project from proceeding further. However, the target of the document has slightly changed. As expressed by the representatives of the UNCITRAL in the aftermath of the ICCA Congress:

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<sup>29</sup> This argument was expressed in a literary way by Lalive, who quoted Montesquieu’s *Persian Briefs*: “Il se sont jetés dans des détails inutiles; ils ont donné dans les cas particuliers, ce qui marque un esprit étroit, qui ne vaut les choses que par parties, et n’embrasse rien d’une vue générale.” Lalive, *id.* at 217.

<sup>30</sup> Comité Français de l’arbitrage, unpublished paper distributed during ICCA Conference, at p. 3.

<sup>31</sup> *Id.*

<sup>32</sup> Cf. Ceccon, Roberto, *UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence: a New Approach To International Arbitration*, 14 JOURNAL OF INTERNATIONAL ARBITRATION 68, at 68, n. 3.

<sup>33</sup> Cf. Lalive, *supra* note 27 at 213.

“[v]arious suggestions have been made to the effect that the Guidelines should not appear to promote the preparatory conference as the principal method of planning arbitral proceedings. Rather, the Guidelines should discuss the need for planning arbitral proceedings in general, explain the issues on which early procedural decisions might be useful, and, where appropriate, give some illustrations of possible procedural solutions.”<sup>34</sup>

In consequence, in the final document the *guidelines* became “*notes*”, and the *preparatory conferences* became “*planning arbitral proceedings*”. However, comparing initial drafts and the final product, there were no major changes. The core of the initial project, the “short list of items for consideration” – the *annotated checklist* of topics that might be put on the agenda (either in a formal “preparatory conference”, or in less formal meetings and consultations among arbitrators) remained largely intact.

### III. The contents of the Notes: an overview

The final document has 90 “Articles” (notes), and is divided into two parts, the introduction and the annotated checklist of “matters for possible consideration in organizing arbitral proceedings”. The checklist is available also as a separate printout to emphasize its practical purpose and value: at any moment in the process arbitrators may have it in sight as a sort of reminder.

The outlined criticism contributed to the extremely careful drafting of the introductory parts of the Notes. The 13 introductory notes insist on the non-binding character of the Notes<sup>35</sup>, stress their facilitating function<sup>36</sup>, and argue that arbitrators (still) have broad discretion and flexibility in the conduct of the arbitral proceedings,<sup>37</sup> that may be limited only by “arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure.”<sup>38</sup> As the background of the project, the Notes in several instances point to differing procedural styles<sup>39</sup> that increase the desirability of a timely decision on procedural issues. The initial focus, the “pre-hearing conferences” is now only mentioned *en passant* in the p. 9:

“9. In some arbitration a special meeting may be devoted exclusively to [...] procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as “preliminary meeting”, “pre-hearing conference”, “preparatory conference”, “pre-hearing

<sup>34</sup> Sekolec, *supra* note 5 at 47 (p. 85).

<sup>35</sup> “No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them” (n. 2); “The notes are not suitable to be used as arbitration rules [...]” (n. 3).

<sup>36</sup> “The purpose of the Notes is to assist arbitration practitioners [...]” (n. 1).

<sup>37</sup> *Cf.* n. 4.

<sup>38</sup> *Cf.* n. 13.

<sup>39</sup> *E.g.* n. 5, n. 9, n. 11.

review”, or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

The final version of the draft was in that respect a compromise with the critics. Softening the language and modifying (although not giving up) the initial approach, the UNCITRAL has managed to achieve consensus and satisfy the critics.<sup>40</sup>

An additional question is the “scope of application” of the Notes (*i.e.* the issue in what types of arbitration might the Notes be useful). At the very beginning of the Notes, it is said that “[t]he text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.”<sup>41</sup> Browsing through the topics addressed in the checklist part, it may be easily confirmed: the natural environment in which they can be applied on the full scale is *international* and *ad hoc* arbitration.

However, the Notes are in no way useless in institutional (administered) arbitrations. They may even cast a new light on certain issues in a purely domestic arbitration (especially if “domestic” or “internal” is conceived in a technical sense, since a foreign element – *e.g.* foreign consultants, domestic subsidiaries of foreign companies, foreign entrepreneurs – may participate in disputes that are legally considered to be “national”). Rather than rephrasing them, in the final part of my paper, some of the notes that may be especially useful (or at least unusual and provocative) in the regional (Central and Eastern European) context – particularly within the ex-Yugoslav “procedural style” of arbitration, will be extracted.

#### IV. Selected issues covered by the Notes

Two points have to be borne in mind when discussing the Notes in the regional context. The first is the prevailing type of arbitration, and second would be the professional formation of the arbitrators, who are – at least to a certain extent – likely to come from the region as well. The opportunities for the application of the Notes in an arbitration proceeding conducted in the region (whereby Croatia would be taken as the point of reference). To a lesser degree, the arbitration

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<sup>40</sup> See *e.g.* Tell, *L'aide-mémoire de la CNUDCI sur l'organisation des procédures arbitrales*, RDAI/IBLJ, 6/1997. This most recent text written from the angle of the French arbitral circles finally gives a relatively positive evaluation (“modest but useful”) of the Notes (“*L'aide-mémoire recèle en effet un certain contenu normatif puisqu'il pose des principes et traite des procédures arbitrales. En outre, ce texte correspond, dans une certaine mesure à un besoin exprimé par la pratique. Il peut donc se révéler être un instrument utile en matière d'arbitrage. Ce nouveau texte de la CNUDCI, de part sa valeur essentiellement non contraignante et ses caractéristique, trouvera donc naturellement sa place, modeste mais utile, au dernier rang sur le plan de la valeur juridique, dans la hiérarchie des normes applicables à l'arbitrage international [...]*” (*id.* at 749.)

<sup>41</sup> N. 1 *in fine*.

proceedings conducted in countries of different procedural traditions in which parties and/or arbitrators from the region participate will be examined.

*(a) Institutional or ad hoc? Multiple practices with regard to a fluid divide*

Having in mind that *ad hoc* arbitration is in the Central and Eastern European post-socialist countries still barely tolerated and rarely employed, the UNCITRAL Notes would apparently not often have the opportunity to prove their usefulness in the most appropriate framework. However, this statement has to be somewhat softened: the winds of liberalization have already reached these countries and the climate is increasing arbitration-friendly, also for *ad hoc* arbitration. More and more parties and arbitrators from Central and Eastern Europe gain experience with *ad hoc* arbitrations, even in their mutual relations, although more frequently in third countries.

Still, the Central and Eastern European countries – and to a certain degree, all of Continental Europe – have principally a strong tradition of institutional arbitration. In this sense two arguments are possible: first, the very fact that experience with *ad hoc* arbitration is not abundant may give more weight to the Notes as a set of educational tools for arbitrators in *ad hoc* arbitrations. The second argument, however, would be that it is still more likely that arbitrators would end up using the Notes in a basically administered situation, concurrently with a certain set of arbitration rules. The latter situation will be closely examined, highlighting the issues that are less likely to be covered by such rules.

In connection with this, it is important to realize that the very concepts of *ad hoc* arbitration and *institutional arbitration* are not two distinct and hostile categories, intolerant of intermediate forms. If we sometimes have such an impression, the UNCITRAL Notes provide ample materials to dissuade us. The first issue on the checklist deals with the possibility that parties, though in an *ad hoc* setting, decide on a set of rules, *including* the rules of an arbitral institution. Since parties and/or the arbitrator may opt for a part of the institutional rules, we may in some cases even argue that a *semi-administered* arbitration would be conducted. The Notes however suggest a cautious approach: consideration of a set of arbitration rules may cause delays and unnecessary controversies, and in some cases, if parties wish to employ a part of some institutional rules, “it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.”<sup>42</sup>

This is a useful note both for parties, arbitrators and the arbitral institutions: parties sometimes tend to miss the fact that by their agreements they may bind themselves, but not necessarily the third party (institution); arbitrators have to be aware of the multiple procedural regimes created by such arrangements and their

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<sup>42</sup> N. 14.

potential dangers, whereas the arbitral institutions should consider announcing in advance the limits of acceptable and unacceptable discretion in “picking” some parts of their standard rules.

Another interesting aspect connected to this question (although appearing only later in the Notes) is the one of the administrative services that may be needed for the arbitral tribunal.<sup>43</sup> Once again, the elaborate description of practices and possible recommendations show how fluid the *ad hoc/institutional* divide may be. Various administrative services (from hearing rooms, means of communication, technical equipment and secretarial services) usually already available in institutional arbitration may be arranged by an *ad hoc* arbitration in many ways: either by parties, by arbitral tribunal or the presiding arbitrator, or through other arrangements. The Notes argue that “[e]ven in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution.”<sup>44</sup> The latter may have special weight in the Central and Eastern European context, because of the lack of specialized providers of services – the possibility to procure satisfactory services “from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services” is usually not available. Unfortunately, the arbitral institutions in the region still have scarce rules on servicing such “external” arbitrations, but this opportunity to extend the spectrum of services has to be considered seriously. Within the agreements on mutual cooperation concluded by some arbitral institutions there are already provisions on mutual assistance that may be used as a precedent.<sup>45</sup>

The Notes also raise the rarely debated but important issue of the extent of secretarial tasks in arbitration. In some jurisdictions (particularly in common law countries) the shifting of some substantial tasks to secretarial staff is quite a standard feature, whereas (at least in theory) some civil law countries regard any transfer of the powers of arbitrators as inappropriate. So the Notes:

Differences in views [...] may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional function of the arbitrators. Such a role of the secretary is in the view of some

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<sup>43</sup> N. 24-27.

<sup>44</sup> N. 25.

<sup>45</sup> E.g. the Permanent Arbitration Court at the Croatian Chamber of Commerce has concluded such agreements in recent years with the AAA, ASA, DIS, CIETAC, Austrian Arbitral Center (Vienna) and with arbitration courts in Ljubljana, Skopje and Bucharest. See the Appendix to this issue of the Croatian Arbitration Yearbook.

commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making functions of the arbitral tribunal.<sup>46</sup>

*(b) Preliminary issues in international arbitration proceedings: language and place of arbitration*

Rules on the language and the place of arbitration are extremely important in an international setting. They are usually settled by the rules of arbitral institutions, and a series of model clauses list them among optional provisions in an arbitral agreement. However, if they are not determined in advance, the arbitrators will have to decide on them. The UNCITRAL Notes<sup>47</sup> certainly have here several useful suggestions. Particularly useful may be the list of the most prominent factors when deciding on the choice of the place of arbitration, since arbitrators and parties in the region often tend to overlook some of them:

- (a) suitability of the law on arbitral procedure of the place of arbitration;
- (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced;
- (c) convenience of the parties and the arbitrators, including the travel distances;
- (d) availability and cost of support services needed; and
- (e) location of the subject-matter in dispute and proximity of evidence.

*(c) Other preliminary issues: costs, confidentiality*

Three notes are dedicated to the costs of the arbitral procedure. Those notes deal only with the deposits for the future costs; they are applicable in principle only to *ad hoc* arbitrations, since institutional rules usually set out detailed provisions with this respect. Interesting is, however, that the Notes do not deal at all with the process of contracting arbitrator's fees and their height.<sup>48</sup> The reason for this lack of provisions was certainly not their uncontroversial nature; on the contrary, the working group that has prepared the initial draft has discussed this issue in chambers, but has come to the conclusion that this issue is too unsettled and difficult to be dealt with in the Notes. In the Central and Eastern European context, this is interesting mainly when arbitrators and/or parties from the region participate in *ad hoc* proceedings, where they have to think in advance of these matters.

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<sup>46</sup> N. 27.

<sup>47</sup> See n. 17-23.

<sup>48</sup> Except for a very general and vague note that the estimate of advances that have to be deposited "typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators." See n. 28.

Another issue dealt with in the Notes is the issue of confidentiality. The Notes here give an important warning, stating that in spite of the general understanding that confidentiality is advantageous and helpful in arbitration

“...there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of the information relating to the case.”<sup>49</sup>

A different understanding of this problem might lead, according to the Notes, to the desirability of discussing the issue of confidentiality in advance, and recording the agreed principles in an appropriate agreement on confidentiality. The Notes list a large number of issues that might be covered by such an agreement.<sup>50</sup> For the regional arbitral audience this topic may seem to be addressed in an overly meticulous way, since the painstaking description of particular matters that have to be regarded as confidential is, in our experience, not a frequent occurrence in the regional practice. This note may therefore be particularly useful for the regional readers, because it may contribute to a more serious approach to these issues.<sup>51</sup>

*(d) Routing of documents*

Among all the issues covered, the Notes deal most extensively with two: the routing of written communications and the taking of evidence, and with good reason. The practices of exchanging documents among the parties and the arbitrators are often a vulnerable part of any arbitration. Many aspects of such practices are subject to different understanding in different legal cultures, but attitudes also vary within the same cultural circle.

The Notes describe two systems of routing – the transmittal of documents to the other party through the arbitral tribunal (or the arbitral institution), and the direct exchange of documents between the parties (whereby a copy is sent to the

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<sup>49</sup> N. 31.

<sup>50</sup> See the extensive enumeration of the matters that may be agreed to be confidential in n. 32: “the material or information that is to be kept confidential (e.g., pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g., because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole, (e.g., in the context of disclosures of information in the public domain, or if required by law or a regulatory body).”

<sup>51</sup> On some aspects of confidentiality *cf.* in more detail Sikirić, *Publication of Arbitral Awards*, in this issue of the CROATIAN ARBITRATION YEARBOOK.

arbitrators).<sup>52</sup> The latter method is less accepted in the European practice, and therefore it would be desirable to agree on it in advance. The Notes do not give any particular preference to any of those methods, but suggest that for the communications on organizational matters more direct ways be implemented, even if other communications are routed through the tribunal as an intermediary.

Since arbitration, due to its flexible nature, may adopt the most modern means of communications, the Notes pay special attention to “telefax and other electronic means of sending documents”. The “other means” here mentioned are various electronic forms: e-mail, magnetic or optical disk etc. Since the telefax has already become standard in business communication (even the Notes have no doubt on its “many advantages over traditional means of communication), it is generally recommended (especially for certain types of written evidence), but with certain precautionary measures: “... it would be preferable not to rely only on a telefacsimile...”.

Other means raise even more questions. For example, in electronic traffic the differences between the original and the copy disappear: it is simply impossible to distinguish between the electronic “copy” and the “original”. Therefore, it is very useful to agree in advance on the standardized procedures with regard to a series of apparently technical questions, such as:

“...data carriers (e.g., computer disks or electronic mail) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g., the names of the originator and recipient, computer program, titles of the electronic files, and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identifying persons who can be contacted if a problem occurs.”

The Notes also describe different practices with regard to varying systems of exchanging documents – the consecutive and simultaneous submissions. These two types are distinguished by whether a period of time is given to a party to react (a practice usual in Continental jurisdictions) or every party may submit documents within the same period.<sup>53</sup> Other details on submissions are listed as well, such as those on the scheduling of written submissions, their type (paper and/or electronic), number of copies, systems of numbering and filing of the documents etc.<sup>54</sup> Such matters may sometimes decisively facilitate the arbitral proceedings, especially in cases where voluminous documents and numerous files have to be reviewed.

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<sup>52</sup> Cf. n. 33: (“... a party transmits the appropriate number of copies to the arbitral tribunal or arbitral institution [...] which than forwards them as appropriate” v. “a party [sends] copies simultaneously to the arbitrators and the other party or the parties”.)

<sup>53</sup> Cf. n. 41.

<sup>54</sup> See n. 42.

*(e) Evidence*

Evidentiary issues are the subject of almost a third of the total number of Notes.<sup>55</sup> Generally, it seems that international arbitral experts agree that the taking of evidence in an international arbitral setting perhaps offers the most opportunities for misunderstandings.<sup>56</sup> Comparative differences in this very practical matter are notorious: *e.g.* evidentiary techniques such as discovery are unknown in civil law countries, treatment of parties' testimonies differ, experts may be either appointed by parties or by arbitrators etc. The extensive listing of particularities of different evidentiary practices would not make a lot of sense here; we advise the readers to turn to the appropriate sections of the Notes for more details.<sup>57</sup>

Set forth below are features that may seem fresh and new in the Notes. In our opinion, remarks that are otherwise difficult or impossible to find in arbitration rules and scholarly articles may be found in the following notes:

- *Note 52 on presumptions of authenticity and receipt*: This note suggests that arbitrators may find it helpful to agree in advance that the lack of any objection to the origin, receipt, and the correctness of photocopies within a specified period of time allows the tribunal to conclude that the documents are correct or that they are received by the addressee. This may be particularly useful if communication is partly conducted by fax, e-mail or other electronic media and if photocopies and other transcripts of original documents are used; in any case, the Notes argue (and we agree) that such arrangements may "simplify the introduction of documentary evidence and discourage unfounded and dilatory objections";
- *Note 53 on the "agreed bundle"*: If voluminous documentary evidence is presented, and if the arbitration is not administered in the way that there is a single file with documents that are regarded to be the authentic evidence in the case, arbitrators might consider facilitating the agreement of the parties on "a single set of documentary evidence whose authenticity is not disputed" (this set, in the English arbitral practice is referred to as "the agreed bundle"). If such a set would be difficult to manage, a selection of "working" documents may be extracted, and some of it may be summarized in

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<sup>55</sup> Importance of the part of the Notes that deal with evidence is also emphasized in Ceccon, *supra* note 31, at 68. However, some of the evidential topics were treated in more detail in the *Draft Guidelines for Preparatory Conferences*; see *id.* at 73.

<sup>56</sup> Cf. de Boissesson *et al.* (eds.), *TAKING OF EVIDENCE IN THE ARBITRAL PROCEEDINGS* (ICC Publishing), Paris, 1990.

<sup>57</sup> Notes provide relatively detailed report on arbitral practices with regard to different means of proof. See notes 48-54 (for documentary evidence), notes 55-58 (physical evidence other than documents), notes 59-68 (witnesses), 69- 73 (experts and expert witnesses).

appropriate tabulations, charts, extracts or samples and presented by an expert/competent person<sup>58</sup>;

- *Note 60-61 on witnesses (selection of witnesses and witness depositions)*: A detail that could contribute tremendously to the speed of the proceedings is “to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present”; in European procedural style, witnesses are often introduced only gradually, and the “revealing” of new witnesses is often used as a dilatory tactic. On the other hand, the Notes also deal with the validity of the common law practice that is generally less known in Europe, to introduce witness depositions (“signed witness’s statement containing testimony itself”). The Notes correctly warn that “such practice, which implies interviewing the witnesses by the party presenting the testimony, is not known in all parts of the world and, moreover that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper”<sup>59</sup>.
- *Notes 69-73 on experts and expert witnesses*: Those notes are certainly useful to anyone who is not familiar with the two distinct systems of appointing experts and presenting their testimony.

*(f) Hearings*

Among the several notes dedicated to the hearings<sup>60</sup> we would like to point out two practical details of interest to the regional audience. The one deals with the arrangements on recording the hearings. It should be noted that arbitration in Central and Eastern Europe (and, to a lesser degree, on the whole European continent) traditionally emulates court proceedings in conducting the hearings. So, in many arbitration proceedings, it is natural to have a “court recorder” who registers the actions undertaken during the hearings. It is thus surprising that, in listing the possible methods of preparing records of oral statements and testimonies, the Notes place the “personal notes of the arbitral tribunal” first. Only in the second place is the “normal” method<sup>61</sup> listed, whereas the third is again an “unusual” method, “possible when a secretary of the arbitral tribunal has been appointed, [...i.e.] to leave to that person the preparation of a summary

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<sup>58</sup> This is the essence of the note 54; this note also emphasizes the importance that such presentations should allow the opportunity to object to the underlying data and the methodology of the reports.

<sup>59</sup> Note 54.

<sup>60</sup> Cf. notes 74-85.

<sup>61</sup> “[T]hat the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony”. See n. 82.

record”.<sup>62</sup> Verbatim transcripts and tape-recording are mentioned, too, to round out the picture of various (legitimate!) methods that are utilized in the practice of international arbitration.

Another unusual detail deals with the parties’ notes that summarize their oral arguments. If oral hearings are held, in some arbitration hearings – mostly in those where no official transcript or summary record of the hearings exist – counsels are accustomed to give written notes summarizing their oral arguments after<sup>63</sup> the hearing. If such notes differ from the oral hearings, problems may arise and the other party may be put in an unequal position or be surprised and unprepared. Therefore, an advance clarification is recommended by the Notes.<sup>64</sup>

## V. Conclusion

The latest UNCITRAL document in the field of international commercial arbitration, the UNCITRAL Notes on Organizing Arbitral Proceedings, will most likely have a destiny similar to other arbitral documents produced or administered by this organization: it will become an indispensable tool for those who seriously deal with international commercial arbitration. Although its scope and purpose is not – at least in the eyes of “black letter” positivist legal theorists educated in the civil law tradition – equal to those of the renowned UNCITRAL Model Law (UML) and UAR, the Notes already have achieved more than just “finding a modest but useful place”. Their long-term goal – promoting arbitration, educating arbitrators and the users of their services, and contributing to harmonization of international arbitral law and practices – is the same as the UML and UAR. Calling to mind the complexity of comparative arbitral practices, the Notes have a chance to play an essential role in an on-going project of formation of international standards of “due arbitral process of law”. This project inevitably leads us from harmonization of rules to harmonization of practices, from “arbitration in books” to “arbitration in action”. The soft but persuasive language of the Notes may in the end achieve more for this goal than dozens of mandatory documents “with binding force”. In the context of Central and Eastern Europe, the Notes will certainly open new horizons in the process of understanding the spectrum of different arbitral practices, and contribute to the better utilization of current ones.

*Author:*

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<sup>62</sup> This ordering may be explained by another criterion: the authors of the Notes perhaps listed the methods according to the degree of the “third person” involvement (and the amount of costs incurred thereby).

<sup>63</sup> Less often such notes are presented during or before the hearings.

<sup>64</sup> See note 84.

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