

INTERNATIONAL FEDERATION OF COMMERCIAL
ARBITRATION INSTITUTIONS
INTERIM MEETING
VIENNA, AUSTRIA - NOVEMBER 1, 1994

MINUTES

The Interim Meeting of the International Federation of Commercial Arbitration Institutions was held on Tuesday, November 2, 1994, at the Offices of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna. The following members were represented at the meeting:

American Arbitration Association
Mr. Michael F. Hoellering

Arbitration Institute of the Stockholm Chamber of Commerce
Mr. Ulf Franke

Australian Centre for International Commercial Arbitration
Mr. Anthony de Fina

Cairo Regional Centre for International Commercial Arbitration
Dr. M.I.M. Aboul-Enein

Camara Oficial de Comercio, Industria Y Navegacion de Barcelona
Dr. Antonio De P. Escura

Chartered Institute of Arbitrators
Mr. Geoffrey M. Berensford Hartwell

China International Economic and Trade Arbitration Commission
Prof. Tang Houzhi
Mr. Cheng Dejun

Court of Arbitration at the Polish Chamber of Commerce
Dr. habil. Tadeusz Szurski

Greek Arbitration Association
Dr. Anghelos C. Foustoucos

Hong Kong International Arbitration Center
Mr. Neil Kaplan

International Arbitral Centre of the Austrian Federal Economic Chamber
Dr. Werner Melis

Hungarian Chamber of Commerce (Court of Arbitration)
Dr. Eva Horvath

Israeli Institute of Commercial Arbitration
Prof. Smadar Ottolenghi
Ms. Yonit Ravin

Japan Commercial Arbitration Association
Mr. Hiroshi Hattori

Japan Shipping Exchange, Inc.
Mr. Hironori Tanimoto

Korean Commercial Arbitration Board
Mr. Pai Ki-Min

London Court of International Arbitration
Mr. Bert W. Vigrass

Permanent Court of Arbitration at the Hague
Mr. Hans Jonkman
Ms. Bette E. Shifman

Swiss Arbitration Association
Dr. Marc Blessing

World Intellectual Property Organization
Mr. Francis Gurry

Agenda Item No. 1: Welcome and Introductions

The meeting was opened at 3:00 P.M. by Mr. Michael F. Hoellering, President of the Federation. Dr. M.I.M. Aboul-Enein acted as Secretary.

The President welcomed all present and asked them to introduce themselves and indicate the institution that they represented. He also thanked Dr. Melis and the Austrian Chamber for their hospitality in hosting the meeting.

Agenda Item No. 2: Adoption of Agenda of Meeting

The proposed agenda for the meeting was presented by the President. Upon motion duly made, seconded and carried unanimously, the agenda was adopted as presented.

Agenda Item No. 3: Adoption of Minutes of Vith Assembly

It was moved that the Minutes of the Vith Assembly of the

Federation held in Milan on June 10, 1993 be adopted. The Minutes were adopted unanimously.

Agenda Item No. 4: President's Report

The President reported that since the VIth Assembly held in Milan, the following organizations, listed in their order of joining, have become new members of the Federation:

Bahrain Chamber of Commerce
Permanent Court of Arbitration of the Croatian Chamber of Commerce
The Japan Shipping Exchange
Arbitration Office of the Ministry of Justice of Thailand
Abu Dhabi Chamber of Commerce and Industry
World Intellectual Property Organization
Israeli Institute of Commercial Arbitration
Netherlands Arbitration Institute
China International Economic and Trade Arbitration Commission

With these additions the Federation currently consists of 91 members.

The proceedings of the Milan Arbitration Conference have now been published and were being distributed by the Milan Chamber to the Conference participants, speakers, and all Federation members. Additional copies may be purchased directly from the Chamber.

The tenth issue of the Federation's Newsletter was published in January, 1994. The next issue, to come out in early 1995, is now being prepared. Members were encouraged to send news on recent developments in their respective countries for inclusion in the Newsletter.

Agenda Item No. 5: Interim Financial Report

In the absence of Paul J. Davidson, Secretary-Treasurer, the President reported that the Federation's general fund now totalled approximately \$12,000, which represents an increase from \$4,271.50 since the last Assembly. As noted previously, many institutions continue to experience difficulty in the payment of the \$100 annual dues. Routine costs of administration, such as telephone and fax, stationery, and printing the Newsletter, are currently being absorbed by the American Arbitration Association.

Agenda Item No. 6: Composition of Council

It was agreed at the VIth Assembly that Prof. Tang Houzhi, Vice Chairman of CIETAC, would be invited to serve on the Federation's Council, filling the vacancy existing since the resignation of Darrel Warren. The President reported that Prof. Houzhi has agreed

to serve and, upon motion duly made, seconded and carried unanimously, he was elected Councilman.

The President informed the members that he has received a letter from Dr. Ottoarndt Glossner, a founding member of the Federation and Vice President since its inception, expressing the desire to relinquish his office. This request was accepted with an expression of gratitude to Dr. Glossner for his support of the Federation over the years. Upon motion duly made, seconded and carried unanimously, Mr. Francis Gurry, Director of WIPO Arbitration Center, was elected Vice President.

Agenda Item No. 7: Site and Theme of Next IFCAI Conference

Dr. Marc Blessing submitted a paper in respect of the topic he recommended for the 1995 IFCAI Conference suggesting to devote the Conference to the following topic: "Globalization and Harmonization of the Basic Notions in International Arbitration." The paper dealt essentially with institutional arbitration. Dr. Blessing stated that in spite of the existence of different views and approaches within the domain of institutional arbitration, legal perceptions, essentially within the Western industrialized sphere, have succeeded to form not only a good way of coexistence but indeed a form of a quite harmonious marriage. However, he observed that in many other highly important parts of the world (for example, civil law countries of the Far East) arbitration laws and underlying notions fundamentally differ from those in Western countries. To enhance mutual understanding and to build bridges for finding new solutions, these different approaches, in Dr. Blessing's opinion, needed further understanding. This actually provided the thesis for the paper wherein Dr. Blessing enumerated the following areas in which differences in approaches most frequently occur:

1. The role and powers of the arbitral institution
2. Selection of arbitrators
3. Independence and impartiality
4. Challenge and replacement of arbitrators
5. The freedom of the parties to select lawyers
6. Multiparty situations
7. The arbitral procedure
8. The carrying of arbitral procedure within short time windows
9. The choice of language
10. Interim measures of protection
11. Objective arbitrability
12. Assistance by local courts
13. Total or partial default of a party
14. Bankruptcy
15. The freedom of the parties to choose the applicable law
16. The authority of the arbitrators to determine the applicable law
17. The authority of arbitrators to decide ex aequo et bono or as

- amiables compositeurs
18. Evidentiary proceedings
 19. The arbitrators' deliberations, majority requirements
 20. Truncated tribunals
 21. Dissenting opinions
 22. The challenge of an arbitral award
 23. The correction and interpretation of arbitral awards and requests for an additional award
 24. Revision of the arbitral award
 25. The challenge procedures in some countries
 26. Exclusion agreements
 27. The interrelation between institutional arbitration rules and the provisions of the local Arbitration Act.

The general theme proposed by Dr. Blessing for the 1995 IFCAI Conference was adopted subject to refinement of topics and designation of speakers. The meeting then turned to a discussion of the venue for the Conference. Mr. Francis Gurry suggested that the Conference might be held in Geneva where WIPO facilities and location would facilitate the organisation of the Conference leading to its success. Mr. Neil Kaplan submitted a second proposal suggesting that since the last Conferences were held in Egypt and Italy respectively, Hong Kong would also be a suitable and desirable venue. The members accepted the latter proposal setting the second week of November as a provisional date for holding the Conference in Hong Kong.

Following this, Mr. Geoffrey M. Berensford Hartwell advised that the Chartered Institute of Arbitrators of London has scheduled two Conferences for 1996, one on September 25, 26 and 27 in England - the Annual Conference of the Institute - and the other - the Home Conference - at a venue still to be selected, probably in Kent in the South-East of Britain, in July. The Theme of each Conference is "Arbitration - the Commercial Way to Justice."

Agenda Item No. 8: New Constitution

The President provided a brief status report on the Federation's Governance. From its inception, the Federation has been operating under a Statement of Aims, which provide for a Council and the organisation's sphere of activity. At the Stockholm Assembly the suggestion was made to expand the governing document, and a draft was prepared by Messrs de Fina and Weir. This proposal was subsequently modified at the Cairo Assembly on the basis of proposals by Mr. Vigrass and resulted in the establishment of the Federation's three sections. While further work on a Constitution was deferred pending activation of the sections, it now seems useful to resume work on the project. Mr. Vigrass has agreed to chair, and Mr. de Fina, Dr. Aboul-Enein, and Dr. Horvath to collaborate in preparing the draft of a proposed new Constitution.

Agenda Item No. 9: Other Business

The remainder of the session was devoted to a discussion of the announced topics dealing with specific institutional concerns:

FEEES, COSTS AND FINANCIAL MATTERS

The subject was presented by Mr. Bert W. Vigrass, Director and Registrar of the London Court of International Arbitration. In discussing the financial issues facing the members of the Federation, Mr. Vigrass stated that the impact these issues have is greater on some members of the Federation than on others. In this respect, he examined the financial structures within member organizations classifying them into three different categories, i.e., organization totally dependent on earned income (LCIA-AAA), others which started with a substantial government grant and, finally, others which are virtually departments of larger organizations having main functions which are not arbitration (Chambers of Commerce, Trade Associations, Professional Bodies). Mr. Vigrass considered the organizations totally dependent on earned income, from a financial point of view, the most vulnerable category. After providing a brief history of the LCIA and setting the differences between arbitration and ADR, Mr. Vigrass discussed cash flow problems with arbitrations with special reference to the LCIA. In this regard, he stated that, traditionally, many arbitrators do not receive payment until the award is issued. Conversely, some organizations require "up front" payment. As for the LCIA, it fixed small "up front" payment, stage payments and charge by time spent on the arbitration. Mr. Vigrass then discussed and questioned the various methods of establishing arbitrator's fees and those of applying taxes to arbitrations worldwide stating that the LCIA has set up a "client" account through which payments are made.

The members took note of Mr. Vigrass' ideas to be studied in the following meetings.

TRAINING AND ACCREDITATION OF ARBITRATORS

The subject was presented by Dr. M.I.M. Aboul-Enein, Director of the Cairo Regional Centre for International Commercial Arbitration. Dr. Aboul-Enein outlined the experience of the Cairo Centre in holding thirteen training programs in the last five years. He added that the Centre will hold the 14th and the 15th training programs provisionally in the first half of 1995. He hoped that one of these programs might be held under the umbrella of the IFCAI. He stated that the most crucial problem facing these programs is the costly fees. However, this, it seemed, is irrevocable due to the simultaneous increase in expenses (travel expenses, accommodations in hotels and the like). The Cairo Centre had to fix the fees on four different levels according to the per

capita income of the countries of the participants. Finally, Dr. Aboul-Enein provided certain suggestions for the improvement of future programs, these implied widening the scope of study to include conciliation, mediation and ADR besides arbitration and viewing the possibility of issuing certificates for the participants who complete the training programs.

The members took note of the subject and it was expressed that it might be early now to have some training programs under the umbrella of the Federation. Instead, joint programs between more than one institution might be a good substitute at this stage.

APPOINTMENT OF ARBITRATORS BY INSTITUTIONS

Professor Tang Houzhi advised that a great percentage of the cases in his country are settled by conciliation. He then presented to the members the experience of the China International Economic and Trade Arbitration Commission in the appointment of arbitrators in ad hoc and institutional arbitrations.

Following this, Mr. Eric Schwartz, Secretary General of the ICC International Court of Arbitration, discussed institutional concerns relating to the appointment of arbitrators for ad hoc arbitrations. Mr. Schwartz divided his presentation into three parts, each discussing an issue or set of related issues.

The first issue is whether an institution accepts, as a matter of principle, to make ad hoc appointments. He reported that this is a political issue every institution has to answer for itself. An institution, or person, cannot have any obligation to do so unless it has held itself out, or previously indicated its consent in some manner to make such appointments. In his experience, parties will rarely come to the ICC when drafting an arbitration clause to ask whether it is prepared to serve as an appointing authority. However, the ICC holds itself out as being prepared to do so in a brief provision at the end of schedule of costs and the UNCITRAL appointment brochure.

Mr. Schwartz pointed out that this is fine so far as it goes. But, having gotten over this initial issue, the institution may nevertheless have to decide in a given case whether it should make an appointment.

The second set of issues concerns how an institution goes about deciding whether it should make an appointment and does it make an appointment whenever it is asked to do so? Further, does it have any obligation to verify, first, any matters, such as (1) whether there is an arbitration agreement; (2) does the agreement, in fact, name the institution as an appointing authority; (3) does the clause contain any conditions that must be satisfied before the appointing authority acts; and (4) have those conditions been satisfied?

If the institutions should verify any of such matters, how should it go about doing so? Should it be concerned with possible allegations that the clause is invalid?

The following are examples of such situations which cases include: (1) Appointment of arbitrators on behalf of a party; (2) Challenge to validity of clause -- jurisdictional issues pending before courts in Kuwait -- Bermuda; (3) Allegations that it is "Premature, inappropriate" to appoint an arbitrator; (4) A case where Notice of Arbitration included claims against parties, some of whom alleged not to be parties to the arbitration agreement; (5) A matter in which Defendant argued that: "Until Claimant submits proper demand their request is premature"; (6) Finland/Dutco situation:

Multiple Defendants -- only one of whom made an appointment/others objected; (7) A case where the clause provided that ICC would appoint chairman if 2 co-arbitrators appointed could not agree within 30 days and an issue arose whether the second co-arbitrator had been validly appointed.

The third set of issues includes, if the institution is prepared to appoint, how to go about it. Things to be concerned with are the statement of independence, whether there should always be a neutral nationality when appointing the sole or third arbitrator, time limits, and the problems of challenges and whether the appointing authority has to entertain same.

Mr. Schwartz concluded his remarks by suggesting the need of clear guidelines in this area and need for initiatives with regard to same.

In the ensuing discussion Mr. Hans Jonkman noted that, as the UNCITRAL Arbitration Rules empower the Secretary-General of the Permanent Court of Arbitration at The Hague (PCA), in certain circumstances, to designate an appointing authority, the Court has had many occasions to fulfill this function. The problems the Court has encountered in this respect include: dealing with doubts about the prima facie existence or validity of the arbitration agreement (keeping in mind that the final determination will be made by the arbitral tribunal), having to take into account that the task of any given appointing authority may at some point involve deciding on challenges, and being responsive to the appointing authority's occasional need to seek guidance, for example, when the Respondent suddenly decides to appoint its arbitrator after the Claimant has already made a request to that effect to the appointing authority.

It is interesting to note that when acting as appointing authority, some of the institutions represented at the meeting seek input from the other party, while others do not. It is the practice of the Court, when faced with a request to designate an appointing authority, to solicit the comments of the other party, prior to making the designation.

There being no further business, the meeting was adjourned at 6:00 P.M.