

THE STRUCTURE AND VALUE OF THE ESCAPE CENTER FOR TOP-MERCHISE ASSISTANCE

(A comparative study between the ECE and
Trade Shows)

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DOCTRINE

The idea of the creation of an international center in the Arctic region within the limits of ICAO's Economic Commission for Asia and the Far East (ECAFE) was first proposed in 1957 as a project was introduced by the same program of ICAO.

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THE STRUCTURE AND RULES OF THE ECAFE CENTER FOR COMMERCIAL ARBITRATION

(A comparative study between the ECE and
Ecafe Rules)

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The idea of the creation of an arbitration center in the Asian region within the frame of ECAFE (Economic Commission for Asia and the Far East) dates back to the year 1953-54 in which a project was introduced to the work program of ECAFE¹.

As a result of the recommendation of the first working Party of Experts on Commercial Arbitration which was convened at Bangkok in January 1962, an ECAFE Center for the promotion of Commercial Arbitration was established.

A second committee of experts which met in Paris in april 1964 discussed the question of drafting a set of model arbitration rules for ECAFE.

Finally, in january 1966 a Conference was held in Bangkok to which I had the honor to participate and work as an ECAFE consultant for the promotion of those rules².

- 1) Statement by **Mr. U Nyun**, Executive secretary of the UN Economic Commission for Asia and the Far East, 5 January 1966.
- 2) Among those who have also worked in the Conference for those rules and the creation of a Center in ECAFE I must mention the names of **Mr. Martin Domke**, then vice president of the American Arbitration Association, New York, who has played a considerable role as a special consultant of the UN.; Prof. **Pieter Sanders**, then Dean of the Faculty of Law of Rotterdam and

As a result of the Conference, a set of *guiding principles* for the preparation of ECAFE Rules for International Commercial Arbitrations was formulated³.

By the end of 1966 based on the very detailed principles mentioned above, the UN Secretariat Office of Legal Affairs in New York, formulated the final set of Rules of ECAFE for International Commercial Arbitration⁴.

Today these Rules are available for all those who are interested on international commercial arbitration specially in relation with the ECAFE Region⁵.

In this article I would like to point out briefly the essential character of this Center and it's Rules, and to explain how it works and make some suggestions for its promotion.

The big arbitration Centers and their Rules are generally never alike one another. For instance the American Arbitration Association and the International Chamber of Commerce differ from one another from the point of view of the litigations that they deal with. The ICC deals merely with international commercial cases instead the AAA deals mostly with labor cases and these are mostly of a national character, this means that it deals with conflicts rising within the region of the United States of America⁶.

President of the Netherlands Arbitration Institute; **Dr. Oscar Schacter**, then director of the General Legal Division of the Office of Legal Affairs of the United Nations. Other authorities of high international reputation in the field of commercial arbitration also took part in the works. Beneath them **Prof. Eugenio Minoli**, then Dean of the Faculty of Jurisprudence of Modena and ICC representative; finally **Mr. Niel Pearson**, then Solicitor at the Supreme Court in London.

- 3) Doc. ECAFE, Committee on trade, 5 - 8 January 1966 Bangkok.
- 4) **ECAFE Rules**, for International Commercial Arbitration and ECAFE Standards for Conciliation, United Nations, 1966.
- 5) An article has been written by my colleague **Prof. Pieter Sanders** on "ECAFE Rules for International Commercial Arbitration; see Liber Amicorum for Martin Domke The Hague, 1967. This article of P. Sanders has also been reproduced for the 'ECAFE Center for Commercial Arbitration News Bulletin'.
- 6) **Rabi Koral**, The creation of an arbitration Center within the

These Institutions have also common points, namely they are both big centers that essentially *administer* arbitration, they deal and decide the disputes and see to it that the arbitration procedure starts, proceeds and ends in a regular way.

Instead the ECAFE Commercial Arbitration Center in Bangkok *does not administer arbitration*. It merely has adopted and issued Rules for International Commercial Arbitration and standards for conciliation, essentially with the hope that it may serve as a handy reference to governments, legal and business associations, other institutions and all individuals interested in commercial arbitration and conciliation⁷.

But this doesn't mean that the ECAFE Center has only issued rules and is altogether disinterested in the matter of arbitration. In case the parties have included in their trade contracts the ECAFE arbitration clause, this means basically two things⁸:

First of all, for the solution of the dispute arising between the above mentioned persons or bodies the ECAFE commercial arbitration rules will be applied.

Secondly, in case the parties cannot agree on basic questions such as the nomination of the arbitrators or the place of arbitration, then according to the rules of ECAFE, the ECAFE Center will see to it that such nomination or such designation takes place⁹.

Therefore, besides having a complete set of rules for the achievement of the arbitral procedure, the ECAFE Rules, through the ECAFE Center, give the possibility, (once the ECAFE arbitration clause is accepted by the parties) to the diligent party to carry on with the arbitral procedure in spite of the negligence or the opposition of the other party.

As a matter of fact by examining the ECAFE Rules we see that in at least four instances the *special committee* of the ECAFE Center

frame of the World Peace Through Law Center, The Geneva Conference, World Peace Through Law, Geneva, 1969, p. 296.

7) For the ECAFE Rules see Annex I of our article.

8) A resolution in favour of model "Ecafe Arbitration clauses" has been taken in Bangkok.

9) ECAFE Rules, art. II and IV.

gets into action and clears the way for the conduct of the arbitral proceedings.

Namely, when within a certain period the sole or the third arbitrator has not been appointed, or the arbitral institution has not been designated then the special committee established by the Center takes action and makes the necessary appointments and/or designations (Art. II/5).

In the same manner, the Special Committee intervenes when an obstacle comes forth in designating the place of arbitration (art. IV/2). The same committee is utilized if an objection is made against an arbitrator and rejected by the latter (art. III/2) or although sustained, a substitute arbitrator can't be appointed (art. III/3).

In addition to these two characteristics one being mere arbitral *rules* the other being the establishment of a Center which has some sort of coercive force, the ECAFE Rules have the property of being "*Model*" Rules, that is to say, Rules assigned to be adopted and applied by ECAFE countries, arbitral bodies, Chambers of Commerce and Industry or any Institutions concerned with commercial arbitration, in two words, rules destined to have a wide circulation¹⁰.

In this respect the Bangkok Rules are more alike the Rules of the Economic Commission of Europe¹¹. As a matter of fact the above mentioned rules known as the ECE Rules have been prepared with the contribution of the Economic Commission's Legal Adviser M. Kopelmanas and by the experts of more than twenty countries whose work started in the year 1953 and ended in 1961¹².

10) Sanders, op. cit., p. 18.

11) Arbitration Rules of the Economic Commission for Europe of the United Nation Organisation; see annex II. Also see art. by Peter Benjamin, New Arbitration rules for use in international trade; International Commercial Arbitration, compiled by Pieter Sanders, Vol. III, p. 321.

12) I myself contributed in those years to the work of the group as a Turkish expert; the last and most important session of the group was attended by experts from Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Federal Republic of Germany, France, Hungary, Italy, Netherlands, Norway, Holand, Roumania, Spain, Sweden, Switzerland, Turkey, USSR, United Kingdom and Yougoslavia.

The ECE's model Rules envisage also a *special committee* which comes into action in case of difficulty in the proceedings of arbitration, such as the difficulty to appointing the arbitrators in case of their removal, death or incapacity (Art. 8).

From this point of view the ECAFE Rules are much more like the ECE Rules than the Rules of the great centers such as the ICCis, the AAA's, or the World Bank's. This latter known as the International Center for Settlement of Investment Disputes under the auspices of the International Bank for Reconstruction and Development¹³.

The above mentioned Centers have rules made specially for their own use and they apply them merely to *administrate* arbitration, whereas the ECE Rules are *model rules*, issued for the use of all interested centers or persons, which envisage a *special committee* who has the power in case of difficulty to intervene and make it possible for the arbitral procedure to go on. Such special Committee has been later acknowledged by an international convention on arbitration¹⁴.

The Conference which took place in Bangkok in 1966 aiming to establish the principals of the ECAFE Rules took into consideration mainly two sets of rules: first, the "project" Rules prepared by the office of legal affairs of the United Nations inspired by the suggestions of the working party of Experts which met in Bangkok in 1962, together with the considerations of the "preparatory" Committee of Experts on Commercial Arbitration which met in Paris on april 1964; second, the set of Rules prepared for the use of European Countries, that is, the above mentioned ECE Rules¹⁵.

As for the delegates and experts of the Bangkok Commercial Arbitration Conference of 1966, they gave special importance to the

13) Convention on the Settlement of Investment Disputed between States and Nationals of other States; Pub. International Center of Settlement of Investment disputes, March 18, 1965.

14) European Convention on International Commercial Arbitration, United Nations 1961. (This convention has been prepared practically by the same experts who have prepared the Geneva Rules and was signed in Geneva on the 21st of april 1961).

15) For ECE rules see annx II of our article.

Model Rules of the ECE. As a matter of fact most of the principles adopted in the Bangkok conference are principles contained in the ECE arbitration rules¹⁶.

Although there is a difference in the symmetry and the construction of the Rules of Bangkok and although the Bangkok rules are shorter and most abstract with relation to the ECE rules, the resemblance between the Geneva and the Bangkok rules can always be easily seen. If we compare the Bangkok rules with the Geneva rules, we see two relevant points in the rules of Bangkok. *First*, in case the *arbitrators* cannot be nominated or the *place* of arbitration can not be determined a special committee comes into action and overcomes the difficulty.

Whereas in the ECE Rules the principal aim is to appoint the arbitrators. Thus there is here only one relevant point in these rules: It is essentially for *appointing the arbitrators* that the Special Committee comes into action and once the arbitrators are appointed it is up to them to determine the place of arbitration and this is not a problem. For this reason it has been thought proper in the ECE Rules not to make double use of the Special Committee. This is one difference existing between the two sets of model rules¹⁷.

On the other hand, both in the model Rules of ECE and in those of ECAFE there is a *neutral body* which at last resort appoints the arbitrators¹⁸. This neutral body is the above mentioned special committee. From this point of view both sets of rules are alike.

The real difference between the two sets of rules consist in the manner by which the Special Committee of the ECAFE is constituted with relation to the Special Committee of the ECE. Indeed the ECE model Rules aim to solve conflicts arising mostly between East and West European countries, so the Special Committee system has a

16) Same opinion, **Sanders**, op. cit., p. 18.

17) The only article concerning the place of arbitration in the ECE Rules reads as follows: **Art. 14.** The place of arbitration: "Unless the parties agree on the place where the arbitration is to be held, such place shall be determined by the arbitrators."

18) As I said before in the ECAFE Rules the Special Committee determines also the place of arbitration.

rotative mechanism. As a matter of fact the Eastern and Western European countries, not having a common institution and also (at least until the period the rules were drafted) not trusting the institutions of one another, have agreed on the constitution of a special committee whose President would continually change. The president, who has the last word in the appointing of the arbitrators is chosen alternatively once from the Eastern European Countries and once from the Western ones¹⁹.

Instead the Special Committee of the ECAFE is chosen directly by the Executive Secretary of ECAFE among all the representatives of the Economic Commission for Asia and the Far East²⁰. The Asian countries not having a sharp difference of culture, mentality, ideology and law, the difference that exists among the Eastern and Western European Countries does not exist in the Ecafe countries and furthermore those countries being united under a common institution such as the ECAFE, have therefore no difficulty to give competence with full confidence to its executive secretary²¹.

Besides this, as it takes a certain procedure and a lot of formalities for each side to choose its members of the ECE Special Committee, those are elected principally for a term of four years²². Instead in the case of ECAFE rules there is no difficulty existing in the appointment of the special committee, that is why this latter is constituted when required for each case separately²³.

19) See Art. IV and annex to art. IV of the 1961 European Convention on International Commercial Arbitration. Also art. 5 of ECE rules.

20) Article V of the ECAFE Rules.

21) Indeed in the case of the above mentioned art. IV of the European Convention on International Commercial Arbitration the Committee of Experts has worked for years in order to come to the above mentioned solution, that is to come to an agreement on a Special Committee. Instead in the Bangkok Conference it took only twenty days to the representatives of the different countries to adopt the "Special Committee" system.

22) See annex to the European Convention on International Commercial Arbitration the paragraph concerning the composition and procedure of the Special Committee referred to in art. IV of the convention.

23) ECAFE Rules art. V.

Thirdly the Rules of ECAFE having to deal with a more homogenous region both from the economic and the legal point of view envisage also a maintenance of lists of arbitrators and appointing authorities which can easily be realised²⁴. Instead in the case of the ECE Rules arbitrator lists prepared in advance are not envisaged due to the difficulty that arises from the fact that, the arbitration that those rules are concerned with, has to do with peoples of two different economic structures.

The same is true for the appointing authorities. Not everybody can, as it is for the ECAFE case, be designated an appointing authority in the ECE rules. Nor can the appointing authority be always the same person. The system of designation of the appointing authority of the ECE rules is the result of a compromise and it is quite a complicated system. Thus although the paramount principle for determining the appointing authority is the *will* of the parties, if the parties have not determined the appointing authority then other criteria come into function.

If without deciding upon the "appointing authority" the parties have indicated the *place* of arbitration then the appointing authority under the ECE Rules is the *Chamber of Commerce* of the place of *arbitration*. In case this is also not shown, then the appointing authority is the *Chamber of Commerce* of the respondents habitual place of *residence or seat*²⁵.

We can see by these dispositions that in the ECE Rules the system of the appointing authorities is quite complicated, instead there is a great simplicity in the ECAFE Rules; a simple preparation of lists of institutions or persons who would be competent and willing to act as appointing authorities, together with adequate information as to their experience and qualifications, prepared and maintained in the Center, will do²⁶.

24) ECAFE Rules art. II/4.

25) Rules ECE art. 5, European Convention art. IV, and annex to the European Convention. For a very important and relevant article on the ECE rules, see: **Peter Benjamin**, *New Arbitration Rules for use in International Trade, International Commercial Arbitration*, by **Sanders**, book 3, p. 322.

26) ECAFE Rules II/3 and II/5, also ECAFE's Resolution on lists of

The great *desadvantages* existing in the Rules of the ECAFE Center and the ECE is that behind both those systems there is no special organisation which would constitute their, what could be called, 'hinterland'. Whereas behind the International Arbitration Court in Paris there is the International Chamber of Commerce, behind the above mentioned arbitration tribunal in U.S.A. there is the American Arbitration Association, behind the Indian Court of Arbitration there is the Indian Council of Arbitration and the Japanese Court of Arbitration, the Japan Commercial Arbitration Association.

The existence of such organisations, who constitute what we have called the hinterland of the above mentioned bodies, enables such Centers to prosper and to develop. If, as we have pointed out in a Conference of the World Peace Trough Law Center ten years ago, the ECAFE Center of arbitration is to flourish, we are of the opinion that some sort of organisation, for instance an Asian arbitration Association with its Center in Bangkok has to be created and attached to it.

The fact that the ECAFE itself is within the frame of such big an organisation as the United Nations, is not enough, because the United Nations organisation in itself does not have a direct relation with arbitration²⁷.

I was ten years ago and still am of the opinion that much can and should be done for the development of the arbitration Center of Bangkok and I think that within Asian Countries, Bangkok is most appropriate to be an international regional center for arbitration, but as the discussion of this problem is out of the sphere of our present article we will continue with the technical side of our subject and particularly with the problem of the determination of the nature of the ECAFE Rules.

arbitrators and lists of appointing authorities to be maintained at the Center.

27) I think that the fact that from the day it has been established no major activity has taken place with relation to the Bangkok Center Rules, shows with clarity the justness of our argument. I have pointed this out in relation with the first print of this article in the WPTL bulletin.

The Bangkok Rules are drafted specially for international arbitration.

In the first hand this means that the rules are to be applied in disputed arising from international trade of the ECAFE region. (Art. I/a) This includes disputes arising out of "contracts concerning" industrial, financial, engineering services or related subjects involving residents of different countries" (art. I/b).

Also this means that these Rules will apply to disputes arising out of contracts: a) between residents of different countries *within* the ECAFE region, b) between residents of different countries *within and outside* the region, and finally c) between residents of different countries *outside* the region provided the above mentioned contracts involve performance *in the region* of the ECAFE countries (Art. I/c).

We see here how these rules have given a wide meaning to the term international trade and broadened its ground of application. But the international characteristic of the Bangkok rules contains also another element. I mean that the Bangkok rules are relatively independent with respect of national laws and in this respect the ECAFE Rules are ahead not only of the AAA and ICC Rules but even of the ECE ones.

As a matter of fact the AAA Rules, being also national rules, make often reference to the national law²⁸. The same can be said for the ICC Rules. Although these are meant to be international rules they don't ignore altogether the existence of national laws²⁹.

In the same way the ECE Rules, which are meant to operate most independently from national laws and which are in the same time model rules just like the ECAFE rules, make from time to time reference to the national laws or the national tribunals³⁰.

It is in this respect that the ECAFE Rules look most independent both from national laws and national tribunals. As a matter

28) Commercial Arbitration Rules, American Arbitration Association, see articles 27, 30, 44 ect.

29) ICC Rules, see art. 13/5, 16, 29.

30) ECE Rules, arts. 18, 38, 39. Look also arts. V and IV, IX of the 1961 Geneva Convention on Commercial Arbitration.

of fact given the extreme international character of the ECAFE Rules and ECAFE Center, prerogatives otherwise left to the national courts or the national laws, are given to the Special Committee foreseen in the rules or to the arbitrators themselves.

For instance, in the ECAFE Rules the arbitrators seem completely competent to determine their own competence and jurisdiction (art. VI/3). The arbitrators are entitled to take any interim measures of protection which they deem necessary in respect of the subject matter of the dispute (art. VI/6). In case no majority is obtained in the award the signature of the presiding arbitrator shall suffice (art. VII/5). Failing a majority the decision of the presiding arbitrator shall be the decision of the arbitral tribunal (art. VI/9). The period of the arbitration can be extended by the arbitrators (art. VII/1). The challenges of arbitrators shall be decided on the first instance by the arbitrators themselves and on appeal by the ECAFE's special committee, whose decision shall be final (art. III/2).

By the provisions mentioned above I don't mean that it should be taken for granted that an arbitration which has taken place according to the ECAFE Rules shall be exempt of all sorts of control. This is not possible yet.

An arbitral award given even within the ECAFE countries, and according to the Bangkok Rules, though having to deal with international trade shall either be a *national* award or a *foreign* one: In both cases the award will be more or less exposed to the control of national courts. If it is considered a national award it will have to stand the national causes of setting the award aside. If it is considered a foreign award it will have to be controled according to the causes of recognition and enforcement of foreign awards³¹.

But beside these considerations it is generally admitted that the ECAFE Rules are a set of rules which are most independent from

31) As a matter of fact we cannot say that the ECAFE rules ignore altogether national laws. For instance in article VII/4-b of the rules it is so stated: "The arbitrators shall, however, decide **ex aequo et bono** (amiables compositeurs) if the parties authorize the arbitrators to do so, and if he/they may do so under the law applicable to the arbitration."

national laws and national control, this of course is a merit that works in favor of the above mentioned rules.

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I don't want to end this article without paying a tribute to an important principle lying underneath the Bangkok Rules, namely the fact that the *autonomy of the will* of the parties is paramount in those rules.

As a matter of fact in determining the place of arbitration (art. IV), in appointing the arbitrators (art. II), the will of the parties is taken in consideration at first place. The same is true for the law to be applied to the substance of the dispute, here also the principle of the autonomy of the will of the parties is paramount.

Indeed article VII/4 of the ECAFE Rules, in paragraph a, states that "the award shall be based upon the law determined by the parties", and paragraph b, states that "the arbitrators shall decide ex equo et bono (amiables compositeurs) if the parties authorize the arbitrators to do so". Of course we have to mention here that the principle of the autonomy of the will of the parties, either in appointing the arbitrators or in choosing the place of arbitration and the law applicable to the conflict is not only a principle proper to the ECAFE Rules in fact it is a principle existing already in the ECE Rules.

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With this I come to the end of this article in which I tried to set forth the structure and the characteristic of the Center and the Rules of ECAFE. The relevant character of those rules is in my opinion the fact that they are most liberal and independent with regard to the interference of national laws and courts. This is very encouraging and it renders possible for the ECAFE arbitration to be most flourishing. But as I pointed out only good rules and an appropriate Center are not enough for the Center to flourish. An institution, an association or any organisation should be envisaged to support that Center. This is the reason why to my opinion the Bangkok Arbitration Center has still not given the expected results.

ANNEX I

ECAFE RULES

(Economic Commission for Asia and the Far East Rules
for International Commercial Arbitration)

Article I

GENERAL

1. (a) The ECAFE Rules for International Commercial Arbitration (hereinafter called "the ECAFE Rules") are applicable to the arbitration of disputes arising from the international trade of the ECAFE region.

(b) Disputes arising from international trade would include disputes arising out of contracts concerning industrial, financial, engineering services or related subjects involving residents of different countries.

(c) Disputes arising from the international trade of the ECAFE region would include the following:

- (i) Disputes arising out of contracts between residents of different countries within the region,
- (ii) Disputes arising out of contracts between residents of different countries within and outside the region,
- (iii) Disputes arising out of contracts between residents of different countries outside the region in cases where the contract involved performance in the region or where other factors were related to the region.

2. The ECAFE Rules shall apply in cases where parties have agreed that disputes which have arisen or which may arise out of a contract made between them shall be referred to arbitration under the ECAFE Rules. The agreement of parties to resort to arbitration under the ECAFE Rules may be included in their contract or, if not so included, may be concluded separately by the parties after a dispute has arisen.

3. Disputes referable to arbitration under the ECAFE Rules may include those to which a government or state trading agency is a party.

4. The ECAFE Centre for Commercial Arbitration (hereinafter called "the ECAFE Centre") shall not itself hear and determine disputes.

Article II

APPOINTMENT OF ARBITRATORS

1. The parties may select an arbitral institution to hear and determine their dispute, or if they so chose, select a sole arbitrator or an arbitral tribunal.

2. The parties shall be free to choose arbitrators of any nationality or any arbitral institution they consider appropriate.

3. Unless the parties have in their original agreement or later by stipulation selected an arbitral institution to hear and determine their dispute or appointed their arbitrator/s or an appointing authority, the party who wishes to resort to arbitration shall notify the other party to that effect and propose:

(a) the appointment of a sole arbitrator, or

(b) the appointment of three arbitrators, each party appointing an arbitrator and the two arbitrators thus appointed choosing the presiding arbitrator, or

(c) the designation of a specific arbitral institution which would apply the ECAFE Rules in the arbitration of the dispute, or

(d) the designation of a specific person or institution who would appoint a sole arbitrator or a presiding arbitrator or such an arbitral institution.

4. For the appointment of the arbitrator/s or, alternatively, for the selection of an appointing authority, consideration may be given to the lists of arbitrators and the lists of appointing authorities maintained by the ECAFE Centre.

5. If within a period of forty-five days, a sole arbitrator has not been appointed or an arbitral institution has not been designated or, in the case of a three-man arbitration, either of the two arbitrators to be appointed by the parties or the presiding arbitrator have not been appointed, the matter shall be referred to the Special Committee established in accordance with Article V below which shall make the necessary appointment or designation. Alternatively, the Special Committee may at its discretion select an authority to make the necessary appointment or designation.

Article III

REMOVAL, DEATH OR INCAPACITY OF THE ARBITRATOR

1. Either party may challenge an arbitrator where circumstances exist that cause justifiable doubts as to his impartiality or independence. Such challenges shall be passed on in the first instance by the arbitrator concerned.
2. Should the challenge be rejected by the arbitrator an appeal may be made to the ECAFE Centre which shall for this purpose utilize the Special Committee established in accordance with Article V below to determine whether or not the challenge is justified. The decision of the Special Committee shall be final.
3. Where a challenge is sustained, a substitute arbitrator shall be appointed by the person or authority originally empowered to appoint the arbitrator. If the appointment is not made within a period of thirty days after the sustaining of the challenge, the matter shall be referred to the Special Committee established in accordance with Article V below which shall make the necessary appointment or designate an authority to make the necessary appointment.
4. In the event of the death or incapacity of an arbitrator, a substitute arbitrator shall be appointed in accordance with the procedure set out in paragraph 3 above.

Article IV

THE PLACE OF ARBITRATION

1. Where the parties have not agreed in their contract or later by stipulation on the place of arbitration or where the arbitrator/s appointed by the partes has/have not determined the place, the parties shall endeavour to reach agreement as to the place of arbitration by taking into consideration the following among other relevant factors:

- (a) the convenience of the parties;
- (b) the location of the goods and relevant documents;
- (c) the availability of witnesses, surveys and of pre-investigation reports;
- (d) the recognition and enforcement of the arbitration agreement and the award; and
- (e) the advantages, if any, of the arbitration being held in the country of the respondent.

2. If the parties are still unable to agree on a place of arbitration or on any other procedure for its determination they shall have recourse for the determination of a place of arbitration to the Special Committee established in accordance with Article V below. In such case the Special Committee shall, in making its determination as to the place of arbitration, take into consideration the factors listed above in paragraph 1.

Article V

THE SPECIAL COMMITTEE OF ECAFE

The Special Committee of ECAFE shall be composed of seven persons selected by the Executive Secretary of ECAFE from among all the representatives on the Economic Commission for Asia and the Far East. The Special Committee will be constituted when required for each case and the Executive Secretary will use his discretion in selecting its members, taking into account all relevant factors in the particular case.

Article VI
THE CONDUCT
OF ARBITRAL PROCEEDINGS

1. The arbitrator/s shall, subject to these rules, conduct the arbitration in such manner as he/they consider appropriate provided that the parties shall have the right to present their cases and shall be treated with absolute equality.
2. All documents submitted or information given by one party to the arbitrator/s shall be transmitted at the same time to the other party.
3. The arbitrator/s shall be entitled to decide on the existence and validity of the arbitration agreement, to determine his/their own competence and jurisdiction and to interpret these Rules.
4. The arbitrator/s shall determine the period within which the respondent shall be required to deliver in writing his defence. The respondent shall be entitled to make within the same period a counterclaim arising out of the same arbitration agreement.
5. Proceedings shall normally be conducted on the basis of documents, in view of the distances that usually separate the places of residence of parties engaged in the international trade of the ECAFE region. However, if the parties so agree or should the arbitrator/s so decide, the arbitrator/s may also have oral hearings.
6. The arbitrator/s shall be entitled to take any interim measure of protection which he/they deems/deem necessary in respect of the subject matter of the dispute.
7. The arbitrator/s shall be entitled to fees and shall be entitled to require security for the costs of the arbitration proceeding and his/their fees.
8. The parties shall have the right to be represented or assisted at the hearing by persons of their choice.
9. In the case of an arbitral tribunal, decisions shall be made by a majority of votes. Failing a majority, the decision of the presiding arbitrator shall be the decision of the tribunal.

Article VII
THE AWARD

1. The arbitral award shall be made within a period of nine months after the appointment of the presiding arbitrator or the sole arbitrator as the case may be. This period may be extended by agreement between the parties or by the arbitrator/s should he/they consider such an extension essential.
2. The arbitrator/s may, subject to the provisions of paragraph 1 above, make interim, interlocutory or partial awards.
3. In the case of an arbitral tribunal, the award shall be made by a majority of votes. Failing a majority the presiding arbitrator alone shall make the award.
4. (a) The award shall be based upon the law determined by the parties to be applicable to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrator/s shall apply the law he/they consider/s applicable in accordance with the rules of conflict of laws. In both cases the arbitrator/s shall take account of the terms of the contract and trade usages.

(b) The arbitrator/s shall, however, decide *ex aequo et bono* (*amiables compositeurs*) if the parties authorize the arbitrator/s to do so, and if he/they may do so under the law applicable to the arbitration.
5. The award shall be made in writing and shall be signed by the arbitrator/s. In the case of an arbitral tribunal, the signature of the majority, or if no majority is obtainable, that of the presiding arbitrator shall suffice, provided the award states the reason for the absence of the signatures of the other arbitrators.
6. Authentic copies of the award shall be communicated to the parties by the sole arbitrator or the presiding arbitrator.
7. Unless otherwise agreed between the parties, the costs of the arbitration shall be fixed in the award. In general costs shall be borne

by the unsuccessful party, but the arbitrator/s may, at, his/their discretion, apportion the costs between the parties.

Article VIII

MISCELLANEOUS PROVISIONS

1. *Settlement.* In case the parties agree on a settlement of the dispute during the arbitration proceeding, the settlement shall be recorded by the arbitrator/s in the form of an arbitral award made on agreed terms.
2. *Interpretation of the Award.* Within a period of thirty days after the making of the award either party may, with notice to the other party, request the arbitrator/s for an authentic interpretation of the award. Such interpretation shall be given within one month of the date of the request and shall be communicated to both parties by the arbitrator/s.
3. *Correction of the Award.* Within a period of thirty days after the making of the award, the arbitrator/s shall correct any error in computation, any clerical or typographical error, or any other error of a similar nature in the award.
4. *Circumstances Not Otherwise Provided For.* In circumstances not specifically provided for in the preceding rules, the arbitrator/s shall follow the procedure most in conformity with the spirit of the ECAFE Rules.

ECAFE STANDARDS FOR CONCILIATION

1. ECAFE shall invite each of the main Chambers of Commerce of the region through their respective Governments to set up a panel of businessmen, both nationals and foreign residents, of high standing and good repute, who agree to sit on Conciliation Committees, upon the request of parties.
2. Parties between whom a difference has arisen may agree to try to settle it by conciliation. Then each party is to appoint one con-

ciliator, and the conciliators thus appointed shall appoint another conciliator who will preside over the Conciliation Committee.

3. Each of the parties may choose one conciliator from the nationals of his country included in the panel of the Chamber of Commerce located in the place agreed upon for conciliation. In that case, it is desirable that the chairman of the Conciliation Committee be a national of a country other than those of the parties.

4. The duty of the Conciliation Committee shall be to seek a friendly and speedy solution of the difference. The Committee shall hear the parties or their representatives. The parties or their representatives may be assisted by counsel or solicitors. In the latter case, it is desirable that the party who intends to be so assisted should inform the other party of his intention beforehand.

5. If both parties cannot appear in person or be represented, the Committee shall acquaint itself with the details of the case through the written statements sent by each party.

6. Each party is at liberty to accept or to reject the terms of settlement proposed by the Committee.

7. Should a settlement not result, the parties shall be at liberty to refer their dispute to arbitration or, if they are not bound by an arbitration clause, to bring an action at law.

8. Nothing that has transpired in connexion with the proceedings before the Committee shall in any way affect the legal rights of any of the parties to the dispute, whether in an arbitration or in a court of law.

9. No person having sat on a Conciliation Committee for the settlement of a dispute may be appointed arbitrator for the same dispute, unless the parties agree to the contrary.

10. If the parties agree to choose a single conciliator acceptable to them, there is no objection to their doing so.

ANNEX II

ECE RULES

(Arbitration Rules of the Economic Commission for Europe
of the United Nations Organization)

(I) GENERAL PROVISIONS

Art. 1. Where parties provide that disputes arising or to arise out of a contract made between them shall be referred to arbitration under the Economic Commission for Europe's Arbitration Rules (hereinafter called "the Rules"), then such disputes shall be settled in manner and upon the terms and conditions hereinafter mentioned subject to such modifications as the two parties can by consent make in those terms and conditions.¹⁾

Art. 2. For the purposes of applying the present Rules the "Appointing Authority" of the place of arbitration or of the country where the respondent has his habitual place of residence or seat shall be the Chambers of Commerce or other institutions set out in the Annex.

(II) ARBITRATORS

(A) Designation

Art. 3. The party having recourse to arbitration (called "the claimant") shall, by registered letter, referring to the arbitration agreement, give notice of the dispute to other party (called "the respondent").

1) MODEL FORM OF ARBITRATION CLAUSE.

Any dispute arising out of, or relating to this contract, which the parties have not been able to settle amicably shall be finally settled by arbitration, in accordance with the ECE's Arbitration Rules which the parties declare to be known to them. Recommended additional provisions:

The place of arbitration shall be

The Appointing Authority for the appointment of an arbitrator or arbitrators shall be

Such notice shall also call upon the respondent to reach agreement with the claimant on the appointment of an arbitrator or arbitrators and propose to him either

(a) the appointment of a sole arbitrator, with the name and address of the arbitrator proposed by the claimant, or

(b) the appointment of three arbitrators, each party appointing an arbitrator and the two arbitrators thus appointed choosing the presiding arbitrator, with the name and address of the arbitrator appointed by the claimant, or

(c) the appointment of a specific arbitral institution which shall be charged with the settlement of the dispute in accordance with its own rules.

Art. 4. Where the parties have not within thirty days agreed on the choice of a sole arbitrator or an arbitral institution or if within forty-five days arbitrators or a presiding arbitrator have not been appointed, the claimant shall have the right to apply to the Appointing Authority designated in the arbitration agreement and where none is so designated then to the Appointing Authority of the place of arbitration if that is fixed by such agreement.

The Appointing Authority shall, if the parties confirm their agreement thereto in writing, appoint

(a) a sole arbitrator, or

(b) an arbitral institution, which shall be charged with the settlement of the dispute in accordance with its own rules.

Failing agreement by the parties on the appointment of a sole arbitrator or an arbitral institution, the Appointing Authority shall invite the parties each to appoint an arbitrator, the arbitrators so appointed choosing another arbitrator as presiding arbitrator.

If within a period of thirty days one of the parties fails to appoint an arbitrator or should the arbitrators appointed by the parties fail within a period of fortyfive days to agree on the choice of the presiding arbitrator, the Appointing Authority will *ex officio* proceed to such appointment.

Art. 5. If the arbitration agreement does not fix either the Appointing Authority or the place of arbitration then, for the effective performance of the acts referred to in Article 4, the claimant shall have the option of applying EITHER to the Appointing Authority of the country where the respondent has his habitual residence or his seat OR to the Special Committee set up under Article IV of the European Convention on International Commercial Arbitration of 21 April 1961. If the parties have their habitual residence or seat in countries where there exist National Committees of the International Chamber of Commerce the claimant can also apply to the court or arbitration of the International Chamber of Commerce.

(B) *Removal*

Art. 6. Either party may challenge an arbitrator, presiding arbitrator, or a sole arbitrator where any circumstance exists capable of casting justifiable doubts on his impartiality or independence. Any such challenge must be made to the Arbitral Tribunal as soon as the party desiring to challenge is aware of the existence of such circumstance, and in any case before the award is made. Should the challenge be sustained or the Arbitrator retire, a substitute arbitrator, a substitute presiding arbitrator, or a substitute sole arbitrator as the case may be, shall be appointed by the person(s) originally empowered under the Rules to appoint the arbitrator, presiding arbitrator or sole arbitrator.

Art. 7. The person(s) appointing a substitute arbitrator, a substitute presiding arbitrator, or a substitute sole arbitrator shall give notice in writing to the arbitrators, and to the other party, or to the parties alone where the substitute sole arbitrator is appointed by the Appointing Authority, as to the substitute arbitrator's, the substitute presiding arbitrator's or the substitute sole arbitrator's appointment, name and address, within a period of thirty days of the sustaining of the challenge or the retirement of the Arbitrator.

Art. 8. Should the person, or persons, required to appoint a substitute arbitrator, a substitute presiding arbitrator or a substitute sole arbitrator fail to give notice in the manner and within the time-limit above referred to, the appointment shall be made by the Appointing Authority. The Appointing Authority in this Article and in

Articles 10, 11 and 12 shall be the Appointing Authority referred to in Article 4 or the institution specified under Article 5.

(C) *Death or Incapacity of the arbitrator*

Art. 9. Should an arbitrator appointed by either party, or on behalf of such party, die or become incapable of acting, the other arbitrators shall give notice to the person originally empowered to appoint an arbitrator under the Rules, requiring him within a period of thirty days to appoint a substitute arbitrator, and to give notice in writing to the arbitrators and to the other party of the appointment, name and address of the substitute arbitrator.

Art. 10. Should a sole arbitrator die or become incapable of acting, then at the request of either party the Appointing Authority shall call upon the parties to appoint within a period of thirty days a substitute sole arbitrator.

Art. 11. Should a presiding arbitrator die or become incapable of acting, the other arbitrators shall within a period of thirty days appoint a substitute presiding arbitrator, and give notice in writing to the parties and the Appointing Authority, of his appointment, name and address.

Art. 12. Should the person(s) called upon to appoint a substitute arbitrator, a substitute presiding arbitrator or a substitute sole arbitrator, as the case may be, under the provisions of Articles 9, 10 or 11 of the Rules, fail to carry out in such manner and within the period mentioned in Articles 9, 10 or 11 of the Rules, as the case may be, the steps laid down in those Articles, then the arbitrators in the case of Article 9, or either party in the case of Articles 10 and 11, shall request the Appointing Authority to appoint a substitute arbitrator, a substitute presiding arbitrator or a substitute sole arbitrator, as the case may be.

Art. 13. Where a substitute arbitrator, or a substitute presiding arbitrator is appointed under the provisions of Articles 6-9 and 11-12 of the Rules, after the hearing has commenced, it shall be the duty of the arbitrators at the request of the substitute to recommence such hearing *ab initio*.

(III) THE PLACE OF ARBITRATION

Art. 14. Unless the parties agree on the place where the arbitration is to be held, such place shall be determined by the arbitrators.

(IV) THE PROCEDURE OF ARBITRATION

(A) *Statement of claims and documents*

Art. 15. Within such period as shall be determined by the arbitrators, the claimant shall supply with them such number of copies of the written statement of claim as they may require containing the following particulars:

- (a) the names, addresses, and occupations of the parties;
- (b) a summary statement of facts;
- (c) the points in issue and what is claimed;
- (d) particulars of witnesses (if any) whom it is desired to call upon to give evidence; it being understood that other witnesses can be called upon during the proceedings.

The statement of claim shall be accompanied in original or copies by the agreement in writing and all relevant documents. A schedule of documents shall also be supplied.

Art. 16. A copy of every document (including the statement of claim) sent to the arbitrators by the claimant shall be sent to the respondent at the same time.

(B) *Pleas as to the arbitrators jurisdiction*

Art. 17. The party which intends to raise a plea as to the arbitrators jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that arbitrators have exceeded their terms of reference shall be raised as soon as the question on which the arbitrators are alleged to have no jurisdiction is raised. Where the delay in raising the plea is due to a cause which the arbitrators deem justified, the arbitrators shall declare the plea admissible.

Art. 18. Subject to any control provided for under the law applicable to the arbitral proceedings the arbitrators whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on their own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

(C) *The defence counterclaim and rejoinder*

Art. 19. The arbitrators shall determine the period within which the respondent shall be required to deliver in writing his defence. The respondent shall be entitled to make within the same period a counterclaim arising out of the same arbitration agreement.

Art. 20. The provisions of Articles 15 and 16 of the Rules apply *mutatis mutandis* to any defence or counterclaim.

Art. 21. Should the claimant intend to make a rejoinder to the defence or the counterclaim, the arbitrators shall determine the period within which such rejoinder shall be made. The same provision shall apply to any reply to the rejoinder that the respondent may wish to make.

(D) *General procedural provisions*

Art. 22. In the absence of a contrary provision in the Rules, the arbitrators shall be entitled to conduct the arbitration in such manner as they think fit. The arbitrators shall in every case give the parties a fair hearing on the basis of absolute equality.

Art. 23. Provided that the parties agree, the arbitrators shall be entitled to render an award on documentary evidence without an oral hearing.

Art. 24. The arbitrators shall be entitled to assess the evidence by all means at their disposal and to decide upon what proof they intend to admit and to appoint experts. At any time during the arbitral procedure the arbitrators shall be entitled to require the parties to produce supplementary documents or exhibits within such period as they shall determine.

Art. 25. The parties may agree to extend the various time-limits laid down in the Rules for the various acts that they are required to

perform. In the absence of such agreement the arbitrators shall be entitled to extend the time-limits provided that the delay of the party in question is justified.

Art. 26. The language of the proceedings shall be determined by the arbitrators. They will take the steps necessary to provide for the translation of documents and the interpretation at the hearing into languages understood by the parties.

(E) Measures of conservation and security for costs

Art. 27. Subject to any legal provisions to the contrary the arbitrators are authorized by the parties to take any measure of conservation of the goods forming the subject matter in dispute, such as the ordering of their deposit with a third party, the opening of a banker's credit or the sale of perishable goods.

Art. 28. The arbitrators shall be entitled to require security for the costs of the arbitration proceedings.

(F) The hearing

Art. 29. The proceedings shall be held in camera unless both parties request that they be held in public.

Art. 30. Either party shall be entitled to appear in the arbitration by a duly accredited agent. Either party shall also be entitled to be assisted by persons of his choice.

Art. 31. Should either party fail without sufficient cause to appear at a hearing properly convened the arbitrators shall be entitled to proceed with the arbitration in his absence.

Should either party without sufficient cause fail to submit documentary evidence when the arbitrators have been requested to render their award on the basis of such evidence without an oral hearing, then the arbitrators shall be entitled to render their award on the evidence before them.

Art. 32. New claims or counter-claims submitted to the arbitrators must be formulated by the parties in writing. Unless the party against which such new claim or counter-claim has been submitted agrees, the arbitrators may only take cognizance of it if it is within

the limits of their terms of reference. To such new claims or counter-claims the provisions of Articles 15, 16 and 19 shall *mutatis mutandis* apply.

(G) *The Award*

Art. 33. Where the arbitral tribunal consists of two arbitrators and a presiding arbitrator the awards shall be made by a majority of votes. Failing a majority, the presiding arbitrator alone shall make the award.

Art. 34. The arbitral award shall be made within nine months of the appointment of the presiding arbitrator of the sole arbitrator, as the case may be.

Art. 35. The time-limit within which the arbitral award must be made may be extended by agreement between the parties. The time-limit in question may also be extended by the arbitrators to the extent that such extension is justified by reason of the replacement of an arbitrator, the necessity of hearing witnesses the taking of expert opinion or any other valid reason.

Art. 36. The arbitrators shall be entitled to make interim, interlocutory or partial awards, and they shall also be entitled to make an award on agreed terms.

Art. 37. The arbitrators shall be entitled to render their award in a country other than that where the arbitral proceedings preceding the issue of an award have taken place in conformity with the provisions of Article 14.

Art. 38. Subject to the provisions of Article 39 of the Rules, the arbitrators' award shall be based upon the law as determined by the parties for the substance of the dispute. Failing any indication by the parties as to applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

Art. 39. The arbitrators shall act as "*amiables compositeurs*" if the parties so decide and if they may do so under the law applicable to the arbitration.

Art. 40. The parties shall be presumed to have agreed that reasons shall be given for the award unless they:

- (a) either expressly declare that reasons shall not be given; or
- (b) have assented to an arbitration under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

Art. 41. Awards shall be communicated to the parties by registered letter.

Art. 42. By submitting to these Rules the parties undertake to carry out the award without delay and, subject to any legal provisions to the contrary, renounce any right of appeal either before another arbitral institution or before a court of law unless otherwise expressly stipulated.

(H) *Costs*

Art. 43. The arbitrators shall determine in every case the costs payable.

In general, costs shall be borne by the unsuccessful party. However, the arbitrators shall be entitled to apportion the costs.