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Ninth session

SUMMARY RECORD OF THE 175th PLENARY MEETING

Held at Headquarters, New York,
on Tuesday, 27 April 1976, at 10 a.m.

Chairman: Mr. KHOO (Singapore)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION - UNCITRAL ARBITRATION RULES: CONSIDERATION OF THE REPORT OF COMMMITTEE OF THE WHOLE II (A/CN.9/IX/CRP.1 and CRP.2)

1. Mr. LOEWE (Austria), speaking as the Chairman of the Committee of the Whole II and in the absence of the Rapporteur of the Committee, introduced the Committee's report (A/CN.9/IX/CRP.1) containing the UNCITRAL Arbitration Rules. Following the introduction, he pointed out that there was an error in article 2, paragraph 2, of the French text of the Rules, which should, like the English and Spanish texts, state that the period would begin to run on the day following the day when a notification was received. He also said that the Committee of the Whole II had decided to leave it to the plenary of the Commission to decide on the possible preparation and publication of a commentary on the Rules reflecting the views of the drafters of the Rules. Such a commentary could be prepared by the Secretariat on its own responsibility, either using its own staff or with the assistance of specialists or of some of the delegates who had helped to prepare the text, or it could be prepared by UNCITRAL itself. In the latter event, the Commission would have to consider the commentary in plenary meetings at its following session or recommend that it should be considered by an ad hoc committee to be established by the Commission itself.

2. Mr. ROGNLIEN (Norway) said that it should be made clear, either in the proposed commentary or in the report of the Commission, whether when the Rules prescribed that something should be notified, communicated or proposed within a specific period, it would be sufficient for the notice, notification, communication or proposal to be sent within that period.

3. Mr. HOLTZMANN (United States of America) recalled that, although the question raised by the representative of Norway had been considered by a drafting committee composed of the Federal Republic of Germany, Norway and the United States, the Committee of the Whole II had subsequently decided to omit the clarification. In any event, the interpretation given by the representative of Norway was correct. If that question was clarified in the commentary or in the report of the Commission, it would be desirable to indicate also that the notice, notification, communication or proposal might be sent not only by mail but also by other means of communication.

4. Mr. ROGNLIEN (Norway) said that the amendment proposed by his delegation in document A/CN.9/IX/CRP.2 to substitute the words "15 days" for the words "14 days" wherever they appeared in the Rules stemmed from the decision to change, in article 2, paragraph 2, the beginning of the period from the day of receipt of the notification to the day following that day. In the previous wording of article 2, paragraph 2, the 15 days had been equivalent to two weeks, so that if they were counted beginning on a Tuesday, for example, the period would also expire on a Tuesday. That was the interpretation given to the expression "15 days" in many legal systems. However, with the new wording of article 2, paragraph 2, that

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interpretation would no longer be possible, and consequently it was necessary to use the term "14 days".

5. With regard to the requirement contained in article 1 to agree "in writing" to such modifications as the parties might wish to make to the UNCITRAL Arbitration Rules, he said that, in many cases, the applicable law would consider as valid oral modifications agreed on by the parties, particularly if they had been agreed on after the proceedings had begun or, for example, during a hearing of the arbitration tribunal. In his view, such oral modifications would be valid in spite of the provisions of article 1, paragraph 1, of the Rules - which had no legal force but only contractual force - but would give rise to doubts as to whether, in making the modifications, the parties had wished to exclude the application of the UNCITRAL Arbitration Rules and to be governed by other rules. To avoid any doubts, it would be advisable to clarify that question of interpretation in the commentary or in the report of the Commission.

6. Mr. LOEWE (Austria) recalled that that question had already been carefully considered and urged the representative of Norway not to reopen the discussion on it.

7. The CHAIRMAN said that, as far as possible, the matter would be clarified in the report of the Commission.

8. Mr. ROGNLIEN (Norway) pointed out that, under article 6, paragraph 2, the Secretary-General of the Permanent Court of Arbitration could designate an appointing authority and recalled that a number of arbitration agreements contained similar clauses providing for the possibility of rejecting the designation.

9. Mr. KRISPIS (Greece) said that article 33, paragraph 1, was a key provision of the draft rules, since, in many jurisdictions, for an arbitration award to be implemented, it was necessary for the arbitrators to have applied to the substance of the dispute the law determined by the conflict of laws rules of the State concerned. In view of the fact that the UNICTRAL Arbitration Rules were not designed to be converted into law in any State, article 33, paragraph 1, could not change the conflict of laws rules of a State. However, according to the first sentence of paragraph 1, the parties could designate, as applicable to their dispute, the law of a State which was in no way connected with the parties or with the dispute; that was unacceptable for many jurisdictions. On the other hand, if the parties did not designate the applicable law, under the terms of the second sentence of paragraph 1, the arbitrators would apply the law determined by the conflict of laws rules which they considered applicable. That gave rise to two possibilities: firstly, the pertinent rules of a designated State, in which case, if that State was distinct from the State in which it was planned to implement the award, there would be a good chance that the award would be declared invalid; secondly, the conflict of laws rules chosen by the arbitrators. He wondered whether, under such circumstances, it was really necessary to provide for two stages, one designed to create conflict of laws rules and the other to implement them with a view to determining the applicable law, instead of having a single-stage procedure whereby the arbitral tribunal designated directly the law to be applied.

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10. Mr. HOLTZMANN (United States of America) said that, in his view, the problem raised by the representative of Greece was solved in article 1, paragraph 2, since it should be interpreted as referring to the mandatory provisions applicable to the arbitration.

11. Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that, in order to clarify the question, the following words should be inserted at the end of article 1, paragraph 2: "to the extent that the provisions of such law may not be excluded by agreement of the parties".

12. Mr. LOEWE (Austria) supported the Soviet proposal on the ground that it would prevent misunderstandings. He observed that the Committee had always interpreted that paragraph in the way indicated by the Soviet proposal.

13. Mr. KRISPIS (Greece) said that article 1, paragraph 2, and article 33, paragraph 1, referred to one another without indicating how the designation of the applicable law was to be made.

14. Mr. ROGNLIEN (Norway) said that he had doubts with regard to the words "to the extent that", which would limit the effect of the amendment.

15. Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the purpose of the amendment was to stress the necessity of applying rules which could be modified by agreement between the parties.

16. Mr. JENARD (Belgium) said that, in his opinion, the amendment proposed by the representative of the Soviet Union suffered from a certain ambiguity. It might be preferable, therefore, not to introduce changes which could give rise to problems. In any event, if the Commission decided to adopt that amendment, it would have to be carefully drafted.

17. The CHAIRMAN suggested that the amendment should be referred to a small drafting group for consideration.

18. It was so decided.

Part IV. Draft decision

19. Mr. JENARD (Belgium) said that the contents of the penultimate paragraph of the draft decision went too far. There were disputes, such as those arising within regional communities, for which the application of the Rules would not be indicated. Consequently, he proposed that that paragraph should begin: "Requests the General Assembly to commend ...".

20. Mr. HERBER (Federal Republic of Germany) associated himself with the view expressed by the representative of Belgium, since the possibility of recourse to other arbitration rules currently in force should in no way be excluded. He proposed that the words "when appropriate" should be added at the end of the paragraph as amended by the Belgian delegation.

21. Mr. BURGUCHEV (Union of Soviet Socialist Republics) supported the proposals submitted by the delegations of Belgium and the Federal Republic of Germany.

22. Mr. HOLTZMANN (United States of America) said that he was in general agreement with the opinion of the delegations of Belgium and the Federal Republic of Germany, and felt that the text should not give the impression of underrating the usefulness of other rules in force. He believed that the words "when appropriate" were not suitable, because resort to the Arbitration Rules was always appropriate.

23. The CHAIRMAN suggested that the word "invites" should be used instead of "requests", and that the proposals made should be referred to a small group, which would submit a solution satisfactory to the Commission.

24. Mr. GUERRINI (France) supported the proposed amendments to the penultimate paragraph. He pointed out that the word "indispensable" in the French version of the first paragraph did not correspond to the English text.

25. Mr. DZIKIEWICZ (Poland) pointed out that in the Final Act of the Conference on Security and Co-operation in Europe, held at Helsinki in 1975, contained a chapter on arbitration. In view of the contribution the Helsinki Conference had made to peace efforts in Europe and throughout the world, his delegation proposed that the following words should be added at the end of the first paragraph of the draft decision: "and as such has been reflected in the Final Act of the Conference on Security and Co-operation, held at Helsinki in 1975".

26. Mr. ROGNLIEN (Norway) asked whether the disputes referred to in the Final Act of the Helsinki Conference were disputes between States or between natural and juridical persons. If the latter was the case, the Arbitration Rules being considered by UNCITRAL would be applicable.

27. Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that he supported the Polish delegation's proposal, in principle, in view of the importance of the Helsinki Conference. Replying to the question asked by the representative of Norway, he said that in the Final Act recourse to arbitration by both States and individuals was encouraged.

28. Mr. BARRERA GRAF (Mexico) said that, although he supported the view of the representative of Poland on the importance of the Helsinki Conference, he could not support the addition of the words proposed, since it would be improper to allude to a Conference in which all the member States of UNCITRAL had not

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and to an Act with which the majority of them were not familiar. His delegation proposed, instead, that the idea should be used without alluding to a context - in other words, that it should be stated in the draft decision that arbitration contributed to world peace.

29. Mrs. OYEKUNLE (Nigeria) said that her delegation could not support the Polish delegation's proposal because it had no knowledge of the content of the Final Act of the Helsinki Conference.

30. Mr. DEI-ANANG (Ghana) said that he was not opposed in principle to referring to an international instrument in which resort to arbitration was encouraged, but that there were many regional instruments which contained similar statements. In his view, therefore, a reference to the Final Act of the Helsinki Conference would make that instrument pre-eminent and might give the impression that other efforts to the same end were less important.

31. Mr. HERBER (Federal Republic of Germany) supported the opinions expressed by the delegations of Ghana, Mexico and Nigeria; he felt that it was inappropriate for UNCITRAL to refer to the Helsinki Conference in the context of its current work.

32. Mr. GUEIROS (Brazil) said that since several international instruments existed which encouraged the use of arbitration to settle disputes, it would be inappropriate to mention only the Final Act of the Helsinki Conference, as the representative of Poland had proposed. Nevertheless, the idea reflected in the relevant part of that document could be expressed in the Commission's report without explicitly referring to its source. In any case, his delegation considered the proposals made by Mexico, Ghana and the Federal Republic of Germany acceptable.

33. Mr. RECZEI (Hungary) said that he thought the Commission should conduct its work in accordance with principles of universality. He therefore felt that the penultimate paragraph of the draft decision, which had been criticized by the Belgian delegation, should be retained as it stood. He supported the Polish proposal with regard to the first paragraph of the draft decision because, although participation in the Helsinki Conference had not been universal, the spirit of its Final Act was definitely universal and could be supported by the delegations of countries that had not participated in the Conference.

34. Mr. BYERS (Australia) said that he agreed with the observations of the representative of Hungary concerning the Belgian proposal and therefore found the existing wording of the paragraph acceptable. The Polish proposal, in his view, had not secured the Commission's agreement, and his delegation could therefore not support it, although it understood the reasons for it.

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35. The CHAIRMAN observed that there was no consensus among the members of the Commission concerning the proposal of the representative of Poland.

Preparation and publication of the commentary on the rules

36. Mr. VIS (Secretary) said with regard to the proposal that a commentary should be prepared on UNCITRAL's Arbitration Rules, that the Commission should bear in mind that the influence of such a commentary would vary from country to country, inasmuch as some countries attached great importance to the travaux préparatoires on the instruments they applied, whereas others attached no particular importance to them. If the Commission decided to publish the commentary, it might choose one of the following three methods: first, the commentary could be written and published by a private person, as had been done in the case of the Convention relating to a Uniform Law on the International Sale of Goods, for which Professor André Tunc of France had prepared a commentary after the Conference on the subject. The value of a commentary of that type would depend on the merits of the author, and there was always the possibility that other authors might write commentaries of more or less equal value. Second, the commentary could be prepared and published by the Secretariat. It might thereby acquire a certain weight by virtue of having been published by the United Nations, in which case it would be desirable for the Commission to devote a few days to considering it and approving the final text. Third, the commentary could be published by UNCITRAL itself.

37. If the Commission wished the Secretariat to prepare the commentary, it should so request, so that the Secretariat could prepare it in consultation with Professor Sanders, as appropriate, and submit it to the Commission at the following session, when the Commission could decide whether it was to be published as a document of the Commission or of the Secretariat.

38. Mr. ROGNLIEN (Norway) said that the Commission had also requested the preparation of a commentary on the Convention on the Limitation Period in the International Sale of Goods and that he understood that something similar was to be done with regard to the Convention on the International Sale of Goods. At the time when the question had been discussed, the Commission had considered that for various reasons it was not appropriate for it either to approve or to review that commentary. In his delegation's opinion, the same action should be taken in the case under discussion. The document, which might be prepared in consultation with Professor Sanders, should not be of an official nature and should be published on the Secretariat's responsibility.

39. Mr. VIS (Secretary) said that in the past the Secretariat had prepared commentaries on draft instruments but never on final texts. The only exception had been the commentary prepared on the Convention on the Limitation Period in the International Sale of Goods. Nevertheless, it should be mentioned that the preparation of that commentary had given rise to many problems, largely because in many cases it had been impossible to determine why some provisions had been drafted in a particular way. As disagreements had arisen within the Secretariat on certain fundamental aspects of the commentary consideration was being given to having it published by the officer who had drafted it, but not as a Secretariat

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document. In view of that precedent, he felt it necessary to urge that if a commentary was to be prepared for publication as a Secretariat or Commission document, the Commission should devote a few days to considering it.

40. Mr. HERBER (Federal Republic of Germany) vigorously opposed the preparation of a commentary on the draft convention; while he recognized that the situation might be different in the present case, since a model convention rather than an international agreement was involved, he believed that it was undesirable to set a precedent for the future work of UNCITRAL. Moreover, commentaries generally did not promote unity of interpretation, and, in any event, enough material was already available for the interpretation of the various conventions; thus, for example, in the UNCITRAL Yearbook reference was made to the preparatory work and basic documents in relation to the various texts approved by the Commission.

41. With regard to the possibility that the commentary might be prepared by one person acting as an individual, he recalled that commentaries on earlier texts had not dispelled all doubts and might, on the contrary, mislead the reader, who might suppose that the commentary was the only correct interpretation. It was also inappropriate to entrust the preparation of the commentary to the United Nations Secretariat, since the Secretariat could not issue a firm opinion concerning questions that had not been analysed by the Commission or on which no decision had been taken.

42. Mr. DEI-ANANG (Ghana) recalled that although his delegation had proposed the preparation of a commentary relating to the Convention on the Limitation Period in the International Sale of Goods, it recognized that the document involved was of a special nature. It regretted the problems that had resulted from its proposal and recognized that, both in the case now under consideration and in connexion with texts to be prepared by the Commission in the future, commentaries would probably do more harm than good.

43. Mrs. OYEKUNLE (Nigeria) said that in her delegation's view, it might be useful to prepare a commentary on the draft convention but that once the commentary had been prepared, the final decision concerning it would rest with the Commission.

44. Mr. KRISPIS (Greece) fully agreed with the observations made by the representatives of the Federal Republic of Germany and Ghana. It was not clear to him what was to be meant by the term "commentary"; if it was an interpretation, it would necessarily reflect the opinion of the author of the commentary. Concerning the possibility that a commentary should be prepared by the Secretariat, he observed that it was impossible to dissociate a document prepared by the United Nations from the Organization as such. He suggested, as a third possibility, that the United Nations should agree to finance the preparation of a commentary by a private person, if it considered that necessary.

45. Mr. LOEWE (Austria) felt that it was necessary and useful to prepare a commentary; that was, moreoever, the customary practice of various international organizations which concerned themselves with the preparation of international

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instruments. Furthermore, commentaries had the great advantage of accumulating all the available material relating to the preparatory work and greatly facilitated future investigation.

46. Mr. WHITAKER (United Kingdom) opposed the publication of an official commentary. Since the importance attached to the preparatory documentation was very different in different countries, the commentary would not serve to clarify the questions that might arise.

47. Mr. HOLTZMANN (United States of America) agreed with the opinion expressed by the representative of Austria. During the debates there had arisen many questions of a practical nature whose clarification had been left to the commentary. Perhaps there was a misunderstanding concerning what that commentary should be. In his view, it should be a practical guide for the use of the Rules, useful to merchants, arbitrators and jurists but not to be used bfore tribunals. Naturally, it should not include anything that would lend itself to controversy. The work was difficult, but it was worth trying.

48. Mr. GUEIROS (Brazil) said that an official commentary prepared by the Secretariat would have to be returned to the Commission for approval and publication, and in that case the controversies would be renewed and intensified. Furthermore, any official commentary would be regarded as practically preceptive, especially since it would be published by UNCITRAL itself, and that would be dangerous. The preparatory work, on the other hand, could solve many problems of interpretation. It would be best for the Secretariat to prepare a table in which the text of each article was referred to the corresponding preparatory work.

49. Mr. SIMANI (Kenya) said that he favoured the publication of a commentary because the information contained in that type of document was extremely useful to the developing countries, inasmuch as it made clear the origin of the legal norms in question.

50. Mr. JENARD (Belgium) said that, in principle, he supported the publication of commentaries but that in the case under consideration he opposed such publication, in view of the special character of the Arbitration Rules and its close relation to national legislation, the diversity of which could not be reflected in the commentary.

51. Mr. CHAFIK (Egypt) supported the publication of a commentary provided that it was of the type described by the representative of the United States. As a precedent, he cited the rules of the International Chamber of Commerce and the guide to those rules, which had proved very useful to merchants and jurists.

52. Mr. TAKAKUWA (Japan), after examining the various systems for the preparation of a commentary, rejected the idea of issuing one but suggested that the Secretariat should prepare a brief list of legislation.

53. Mr. GORBANOV (Bulgaria) said that vigorous efforts must be made for the

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adoption and application of the Rules, and a pre-condition to that was a thorough knowledge and study of those Rules. It was not likely that the commentary would give rise to errors of interpretation, since it would be only a reference source and there would be no obligation to agree with its conclusions. Accordingly, he favoured the preparation of that commentary and believed that the work should be done by the Secretariat.

The meeting rose at 1 p.m.