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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

SUMMARY RECORD OF THE 176th PLENARY MEETING

Held at Headquarters, New York,
on Tuesday, 27 April 1976, at 3 p.m.

Chairman: Mr. KHOO (Singapore)

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The meeting was called to order at 3.15 p.m.

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

1. The CHAIRMAN invited the members of the Commission to continue discussing whether a commentary should accompany the Arbitration Rules.

2. Mr. SUMULONG (Philippines) felt that an unofficial commentary would make it easier for those using the Arbitration Rules to understand them. The commentary could be prepared by an expert on the subject, such as Prof. Sanders.

3. Mr. GUERRINI (France) said that he did not consider a commentary indispensable, but that if it was decided to attach one to the Rules, its preparation should be entrusted to the Secretariat, which had followed the work on the subject from the outset. The commentary should be purely unofficial in nature and thus would not have to be approved by the Commission.

4. The CHAIRMAN said that since there was no majority either in favour of or opposed to the preparation of a commentary, he wished to offer the following compromise solution: given the fact that the representatives of several developing countries had indicated that they would find a commentary useful, that the purpose of the Rules was to encourage trade between developed and developing countries, and that it was desirable to help those involved in world trade - particularly businessmen from developing countries - understand the provisions of the Arbitration Rules, the Secretariat might be requested to prepare a brief commentary, with the assistance of Prof. Sanders, which essentially would take the form of a guide. The guide would not be an interpretation of the Rules and should not be considered a precedent. At its next meeting the Commission could decide whether it wished such a text to be issued and in what form.

5. Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that that solution did not appear to correspond to what had been stated during the debate on the question. Even if the votes had been equally divided on the subject, that would not be a reason to conclude that the Commission wished to entrust an expert and the Secretariat with the task of drafting a commentary; in fact, it appeared that the countries opposed to its preparation were in the majority.

6. Mr. DZIKIEWICZ (Poland) said that he fully shared the view of the representative of the Soviet Union.

7. Mr. BYERS (Australia), noting that a number of representatives felt that a commentary was necessary, supported the Chairman's suggestion. It would be good to take a positive step to meet an existing need.

8. Mr. HOLTZMANN (United States of America) said that his delegation was prepared to accept the compromise suggested by the Chairman for the reasons just advanced by the representative of Australia.

9. Mr. HERBER (Federal Republic of Germany) said that the comments by certain representatives from developing countries had helped him realize that they would find an explanation of the text of the Rules useful. He would be prepared to accept the Chairman's suggestion, but on certain conditions: firstly, under no circumstances should the guide set a precedent for future conventions; secondly, the guide should consist of a brief description of the genesis, objectives and context of the Rules, but in nc case should it touch on the problems which had been settled in the provisions of the Rules; thirdly, the guide should not be submitted for the Commission's approval and nothing contained therein should be considered a binding rule. That would be a genuine compromise, for such a guide would make it possible to benefit from knowledge acquired during the preparation of the text, but would in no way constitute an interpretation that would be binding on States.

10. Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that if the Arbitration Rules which had been prepared after many years of effort were so unsatisfactory that a second document had to be drawn up to explain them, it would be better to set to work again and draft rules which were more comprehensible. It also could be asked how much time the Commission would spend adopting a commentary containing the interpretation of the various articles, for each delegation could be expected to interpret the provisions as it saw fit. Furthermore, specialists from countries other than the 36 States represented in UNCITRAL could also have their own interpretation, and a guide prepared by a small group could not be deemed an authoritative document. However, even if it was drafted very carefully, the document nevertheless might be viewed as an official guideline. For those reasons, his delegation continued to object to the drafting of an additional document.

11. The CHAIRMAN said that under no circumstances would the proposed guide be considered authoritative.

12. Mr. GUEIROS (Brazil) said that while his delegation was not in favour of a commentary, it would not object to the idea of an alphabetical index of the questions dealt with in the Rules, accompanied by a series of cross-references to the various articles and, if necessary, to the preparatory work and documents used by the Commission since it had begun its work on the subject. The Secretariat could be requested to prepare the index, which would be purely documentary in nature and could not be cited by the courts or invoked as an official interpretation, but would nevertheless be a useful instrument for those applying the Rules.

13. Mrs. OYEKUNLE (Nigeria) said that the discussion at the preceding meeting had indicated that the Rules would apply essentially to trade between developed and developing countries. However, many of the rules contained therein were the ones applied in the developed countries. If the Rules were to be accepted, a commentary was needed to explain them, although of course the commentary would not be binding.

(Mrs. Oyekunle, Nigeria)

If the Commission proposed to the General Assembly that it should recommend the application of the UNCITRAL Arbitration Rules, it was essential to prepare the guide.

14. Mr. WHITAKER (United Kingdom) said that it would perhaps be easier to take a decision on the Chairman's compromise proposal if it were submitted in writing and specified what should be contained in the document. In any event, persons with an interest in commercial arbitration could be expected to write comments and articles; a commentary prepared by a consultant to UNCITRAL undoubtedly would carry special weight. However, his delegation was opposed to having the Commission approve the document, as that would confer official status on it.

15. Mr. HOLTZMANN (United States of America) agreed that it would be useful to have a written proposal indicating exactly what type of document the Secretariat and Prof. Sanders could be asked to prepare; it could take into account the views expressed in the course of the debate, particularly by the representative of the Federal Republic of Germany, and could be studied at the next plenary meeting. The appeals by the representative of Nigeria and other developing countries suggested that that would be a worthwhile effort.

16. Mr. SIMANI (Kenya) and Mr. ROGNLIEN (Norway) supported the United States proposal and requested that the question be mentioned in the Commission's report to the General Assembly so that the latter could discuss it.

17. The CHAIRMAN asked the delegations which were opposed to the preparation of a commentary whether they would be prepared to follow the suggestion of the United Kingdom representative and consider a document indicating what should be contained in the document which the Secretariat might be requested to prepare.

18. Mr. TAKAKUWA (Japan) said that he would like the United States representative to indicate more clearly what the purpose of the document would be.

19. Mr. HOLTZMANN (United States of America) reiterated that its purpose would be to indicate what should or should not appear in the guide or the commentary and to furnish guidelines to the prospective drafters of the commentary.

20. Mr. KRISPIS (Greece) said he was opposed to the preparation of any kind of commentary and the arguments put forward by certain representatives in favour of drawing up such a document had merely confirmed him in that opinion.

21. Mr. DEI-ANANG (Ghana) did not think the United Kingdom proposal would be of very much use. With regard to the preparation of a commentary properly so-called, the real question was not whether such a commentary would prove useful, but whether each new convention must regularly be accompanied by explanatory notes and a commentary by the Secretariat. He knew from experience that the preparation of such a commentary was difficult and often unsuccessful. His delegation did not think it would be wise to have regular recourse to such a practice.

22. Mr. VAN BRUSSELEN (Belgium) wished, as far as he was concerned, to make no distinction between a report, a commentary and a guide. Nevertheless, he would be ready to accept the United States proposal if he could have a clearer idea of what the proposed document would contain.

23. Mr. TAKAKUWA (Japan) said that the Rules were sufficiently clear and that there was no need to draw up an official commentary, but it was essential that they should be preceded by a short introduction or a brief historical review.

24. Mr. DZIKIEWICZ (Poland) said that every international convention should be an independent instrument. If any commentary seemed necessary, that simply meant that the convention had been badly drafted, and all that need be done was for the Drafting Committee to resume its work. In any case, any legal expert should be able to comment on the Rules if he felt it necessary, and he failed to see why such a commentary should be reserved exclusively for a person appointed by the Commission. Like the representative of the Soviet Union, he made no distinction between a commentary and a guide and could not therefore accept either the proposal of the United States or that of the Federal Republic of Germany.

25. The CHAIRMAN noted that many delegations were strongly opposed to the preparation of a commentary so that it would not be possible to reach a consensus on that question. He therefore suggested that the Commission should abandon the idea of drawing up a commentary.

26. It was so decided.

27. The CHAIRMAN read out a proposal submitted by Norway (A/CN.9/IX/CRP.2) that the words "15 days" should be replaced by the words "14 days" wherever they appeared in the draft rules.

28. Mr. LOEWE (Austria) thought he was expressing the general feeling of the Committee in saying that that proposal seemed neither good nor bad. While the period of two weeks proposed by the Norwegian delegation seemed preferable to a period of two weeks and one day, which was less customary, the figure 15 might be deemed preferable to 14 since the figures 30 and 45 were multiples of 15. The advantages and disadvantages of the proposal therefore cancelled out.

29. Mr. CHAFIK (Egypt) could see no use in the proposal.

30. Mr. ROGNLIEN (Norway) withdrew his proposal.

31. The CHAIRMAN invited the Commission to consider the draft decision (A/CN.9/IX/CRP.1, part IV) and the Arbitration Rules (A/CN.9/IX/CRP.1, part III). He recalled that at the previous meeting, a drafting group had been asked to make certain changes of style in article 1, paragraph 2, of the Arbitration Rules, and in the first operative paragraph of the draft decision.

32. Mr. LOEWE (Austria) read out the new wording of article 1, paragraph 2, drawn up by the drafting group: "These Rules are subject to those provisions of the law applicable to arbitration from which the parties may not derogate by agreement." There was a slight difference between the English and the French versions. In the French version the words "by agreement" were not translated because in French legal terminology, the verb déroger could not apply to a decision taken unilaterally by one of the two parties, so that there would be no point in rendering the words "by agreement" in the French version.

33. With regard to the first operative paragraph of the preamble of the draft decision, the drafting group proposed that the word "Recommends" should be replaced by the word "Requests" and the word "commend" by the word "recommend".

34. The CHAIRMAN suggested that the Commission should first examine the proposal concerning the first operative paragraph of the draft decision which seemed to cause less difficulties than the proposal concerning article 1, paragraph 2, of the Arbitration Rules.

First operative paragraph of the draft decision

35. Mr. GUERRINI (France) said the new wording gave the impression that UNCITRAL wished the General Assembly to recommend to the parties that they should regularly have recourse to arbitral proceedings, which were only one form of procedure among others, whereas the aim was simply to induce the parties, in the event that they decided to have recourse to arbitration, to comply with the UNCITRAL Arbitration Rules, it being understood that they could choose to have recourse to the law in the normal way.

36. Mr. LOEWE (Austria) considered that the question of the use of arbitration was dealt with in the first paragraph of the preamble and that in the context it was clearly assumed that the parties had chosen that method for the settlement of disputes.

37. Mr. GUERRINI (France) said he would accept the text only if that were clearly specified in the draft decision. He asked whether the Commission intended to reconsider the first preambular paragraph, in which he would like "indispensable" in the French text to be replaced by some other adjective.

38. The CHAIRMAN said that the Secretariat could propose a more suitable adjective to translate the word "valuable" in that paragraph. If there were no objections, he would take it that the draft decision was adopted.

39. It was so decided.

Article 1, paragraph 2

40. Mr. KRISPIS (Greece) thought paragraph 2 should be retained as it stood, as the proposal of the drafting group would merely complicate the text without adding anything to it.

41. Mr. RECZEI (Hungary), Mr. MALLINSON (United Kingdom) and Mr. GUEIROS (Brazil) endorsed the opinion of the representative of Greece.

42. Mr. ROGNLIEN (Norway) thought that paragraph 2 should state two principles, namely that the Rules could not conflict with the mandatory provisions of the applicable law, and that the Rules could be supplemented by the law applicable to the arbitration. Only the first of those principles was stated in the drafting group's proposal. The Norwegian delegation therefore proposed that, for purposes of greater precision, the words "and are to be supplemented by the law applicable to the arbitration" should be added at the end of the text proposed by the working group.

43. Mr. LOEWE (Austria) recalled that the drafting group had endeavoured to work out a text that would be satisfactory to the Soviet delegation, which found it difficult to accept the draft text.

44. Mr. HOLTZMANN (United States of America) supported the drafting group's text which might not add anything to the substance, but which would satisfy certain delegations because of its more specific wording.

45. Mr. BURGUCHEV (Union of Soviet Socialist Republics) confirmed that the Russian version of the draft text was not sufficiently clear and might give rise to difficulties of interpretation in Soviet law. His delegation had simply requested that it should be made clear that the Rules were subject to the mandatory provisions of the applicable law, and the text proposed by the drafting group seemed to him entirely satisfactory. However, if an overwhelming majority of the members wanted the draft text to remain as it stood, his delegation would not insist on amendments, but it would have to specify the interpretation of the text in Soviet law.

46. Mr. SUMULONG (Philippines) said the draft text should be retained.

47. Mr. CHAFIK (Egypt) believed that the wording proposed by the drafting group was not very satisfactory since the Rules were subject not only to provisions from which the parties could not derogate but also to provisions whose application the parties could rule out. However, since the text of the draft created difficulties for certain delegations, a formula that was satisfactory to all should be found.

48. Mr. HERBER (Federal Republic of Germany), noting that he had participated in the work of the drafting group, said he could accept either the text of the draft or the proposed wording.

49. Mr. LOEWE (Austria) proposed the following new wording, which might be acceptable to all delegations: "These Rules are subject to those provisions of the law applicable to the arbitration from which the parties have not derogated by agreement and to those from which they may not do so."

50. Mr. GUEIROS (Brazil) suggested the following formula in order to simplify the wording just proposed by the representative of Austria: "These Rules are subject to the mandatory provisions of law applicable to arbitration."

51. Mr. HOLTZMANN (United States of America) found it difficult to accept the proposal by the representative of Austria in so far as it referred to provisions from which the parties had not derogated. In his opinion, the parties were adopting those provisions as an integral part of their contract and there was no need to refer to optional law. As to the proposal by the representative of Brazil, he was not happy with the expression "mandatory provisions", which was not currently used in United States legal practice. He preferred, in descending order, the text proposed by the drafting group, the proposal by the representative of Brazil, the text of the draft and, finally, the proposal by the representative of Austria.

52. Mr. MANTILLA-MOLINA (Mexico) said that his delegation had the greatest difficulty in accepting the Spanish version of the text of the draft since an entire treaty would be needed to explain its scope to Spanish-speaking jurists. He did not agree with the objection of the representative of Egypt which had led the representative of Austria to refer to provisions from which the parties had not derogated; that could lead to complications. All that was required was to determine the cases where the provisions of the Rules would apply in preference to the optional national law, and when there were gaps in the Rules, to attempt to fill them by referring to the provisions of the Rules rather than to national law. He did not consider the proposal by the representative of Brazil to be satisfactory either and strongly supported the wording proposed by the drafting group.

53. Mr. MALLINSON (United Kingdom) noted that, in referring to provisions from which the parties could not derogate, the proposal by the drafting group did not seem to take account of optional law. However, as pointed out by the representative of the United States, that did not cause any real problem since it could be considered that the parties incorporated that optional law into their contract. Nevertheless, in order to resolve those difficulties, he proposed the following text: "These Rules are subject to those provisions of the law applicable to the arbitration from which national law prohibits any derogation by the parties."

54. Mr. GUERRINI (France) proposed the following wording, which would cover the two cases referred to by the representative of Egypt: "These Rules are subject to the provisions of the law applicable to the arbitration from which no derogation has been valid."

55. Mr. ROGNLIEN (Norway) said that the problem being discussed was not a simple question of drafting and that the Commission did not seem to agree as to whether the Rules were subject only to the mandatory provisions of the law applicable to the arbitration or whether they might also be subject to optional provisions from which the parties had not derogated. His delegation was satisfied with the present wording of article 1, paragraph 2, and could not accept the proposals by the representatives of Brazil, the United Kingdom or France, which covered only the first of the two cases envisaged. If it was absolutely necessary to adopt an alternative solution, his delegation would be prepared to support the last formula proposed by the representative of Austria, which referred both to the mandatory provisions and to "those from which the parties had not derogated by agreement".

56. Mr. LOEWE (Austria), supported by Mr. HERBER (Federal Republic of Germany), said that all the texts which had been proposed were clear and sought the same result. The only differences lay in unimportant nuances.

57. Mr. MALLINSON (United Kingdom) said that his delegation was fully satisfied with the present text of article 1, paragraph 2. It had proposed an amendment only in the hope that it would meet with the Commission's support and that the problem would thus be solved. His delegation would be prepared to support any solution which mentioned all provisions of the law applicable to the arbitration without drawing a distinction between mandatory provisions and optional provisions.

58. Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he had had the impression that only a drafting problem was involved and that everyone saw the situation in the same way, namely, that only mandatory provisions of national law took precedence over the Rules. If all the provisions of national law took precedence over the Rules, he could no longer see what would be the usefulness of the latter.

59. Mrs. OYEKUNLE (Nigeria) said that article 1, paragraph 2, represented a compromise solution which satisfied her delegation.

60. Mr. HOLTZMANN (United States of America) proposed a new text which might solve the problem referred to by the representative of Norway: "These Rules are subject to the mandatory provisions of the law applicable to the arbitration and other provisions of law with respect to matters not covered by these Rules or otherwise agreed to by the parties."

61. The CHAIRMAN proposed that a special working group composed of the representatives of Ghana, Mexico, the USSR, the United Kingdom and the United States should be given the task of revising the wording of article 1, paragraph 2.

62. It was so decided.

Article 14

63. Mr. LOEWE (Austria) pointed out that an error had no doubt crept into the text of article 14, which did not mention article 11. He proposed that text of the article should be reworded as follows: "If under articles 11 to 13 the sole or presiding arbitrator is replaced ...", the rest remaining unchanged.

64. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved the amendment proposed by the representative of Austria.

65. It was so decided.

Article 13, paragraph 1

66. Mr. ST. JOHN (Australia) said that an amendment which Committee II had decided to make to article 13, paragraph 1, did not appear in the text of the Rules in

(Mr. St. John, Australia)

document A/CN.9/IX/CRP.1. That paragraph should read as follows: "... pursuant to the procedure that was applicable to the appointment or choice of the arbitrator being replaced".

67. Mr. MALLINSON (United Kingdom) said that Committee II had indeed decided to amend article 13, paragraph 1, but that it had adopted the following text: "... pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced".

68. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved the amendment read out by the United Kingdom representative.

69. It was so decided.

The meeting rose at 6 p.m.