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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

SUMMARY RECORD OF THE 177th PLENARY MEETING

Held at Headquarters, New York,
on Wednesday, 28 April 1976, at 10 a.m.

Chairman: Mr. KHOO (Singapore)

CONTENTS

- International commercial arbitration - UNCITRAL Arbitration Rules: consideration of the report of the Committee of the Whole (II) (continued)
- Ratification of or adherence to conventions concerning international trade law
- Training and assistance in the field of international trade law
- Date and place of the tenth session
- Future work
- Other matters

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The meeting was called to order at 10.25 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION - UNCITRAL ARBITRATION RULES: CONSIDERATION
THE REPORT OF THE COMMITTEE OF THE WHOLE (II) (A/CN.9/IX/CRP.1, CRP.2 and CRP.3)
(continued)

1. Mr. DEI-ANANG (Ghana) introduced the amendment to article 1, paragraph 2, of the UNCITRAL Arbitration Rules drafted the previous day by the Working Group composed of the representatives of Ghana, Mexico, the USSR and the United States (A/CN.9/IX/CRP.3). The Working Group had considered, firstly, what relationship there should be between the provisions of the Rules and the mandatory provisions of the applicable national law and, secondly, how cases where no provision was made in the Rules, the agreement between the parties or the non-mandatory provisions of the applicable national law should be settled. With regard to the first question, the problem was that, under some legal systems, the mandatory provisions were considered to be basic principles of public policy while, under others, all compulsory rules were considered to be mandatory whether or not they related to public policy. In order to overcome that difficulty, the text did not refer to "mandatory provisions" but to provisions "from which the parties cannot derogate". The proposed amendment provided that, in the event of a conflict, those provisions of the law applicable to the arbitration should take precedence over the provisions of the Rules.
2. With regard to the problem of lacunae in the laws, the Working Group had felt that the arbitrators who were called upon to resolve the issue would apply the residual rules of the law of the place of the arbitration and, consequently, that there was no need to add a provision on that subject. However, to provide for the possibility that the Commission might deem it necessary to introduce a provision on the question, the Working Group had drafted a new paragraph 3 reading as follows: "The provisions of the law applicable to the arbitration shall also apply in matters not governed by these Rules or where agreed to by the parties."
3. Mr. ROGNLIEN (Norway) said that while he agreed with the substance of the text proposed by the Working Group, he felt that the words "These Rules shall govern the arbitration" gave the false impression that the Rules were part of the law, whereas in fact they could only form part of a contract. Although it was unlikely that a tribunal would make that mistake, it was possible that the parties would be confused as to the nature of the Rules. On the problem of lacunae, he felt that a provision should be included along the lines of the new paragraph 3 read out by the representative of Ghana. On the basis of those two remarks, a provision could be drafted to read: "These Rules are subject to those provisions of the law applicable to the arbitration from which the parties may not derogate by agreement and are to be supplemented by the law applicable to the arbitration."
4. Mr. MALLINSON (United Kingdom) found the text proposed by the Working Group in document A/CN.9/IX/CRP.3 acceptable. While he also would have no problem in accepting the phrase: "These Rules are subject" as proposed by the representative of Norway, he did not believe that the words "These Rules shall govern" could give rise to any misunderstanding if they were read in the light of article 1,

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(Mr. Mallinson, United Kingdom)

paragraph 1. With regard to the new paragraph drafted by the Working Group on the problem of lacunae, there was no call for the Rules to state which law should be applicable in cases that were not governed by them, and he felt that the words "where agreed to by the parties" were not clear. His delegation would therefore prefer that the text of paragraph 2 as prepared by the Working Group should be approved without adding any provision on the problem of lacunae. However, in that case, the Rules would make provision for the problem of mandatory rules of the law applicable to arbitration but would make no reference to the optional rules of that law. Under the English arbitration law of 1950, the optional rules were considered to be included in contracts, unless the parties expressly excluded them. If the situation was the same in other legal systems, there was no need for the Rules to contain a provision on those kind of rules; however if it was different, the fact that there was no provision on the matter in the Rules could lead to lack of uniformity in their application.

5. Mr. DEI-ANANG (Ghana) said that the Working Group had analysed the problem of optional rules and as far as its members had been able to determine, the situation under other legal systems was the same as that described by the representative of the United Kingdom with regard to English law.

6. Mr. LOEWE (Austria) said that the current discussion was superfluous. As he understood it, all the amendments to the Rules were merely intended to clarify the provisions for the laymen who might use them, but not to add to or detract from them.

7. Mr. GUEIROS (Brazil) agreed with the representative of Austria, but felt that it was important to include clarifications for laymen in the Rules because they were not a legal instrument but a series of provisions proposed to businessmen and other interested parties for their adoption. He therefore felt that it was right to amend article 1, paragraph 2, of the Rules as proposed by the Working Group in document A/CN.9/IX/CRP.3). However, the text would be even clearer if the second line were amended to read "... with a provision of the national law applicable ...".

8. Mr. HOLTZMANN (United States of America) said that even if the new paragraph 3 referred to by the representative of Ghana were not included, the arbitrators would in any case be able to take into account the provisions of the law applicable to the arbitration with regard to matters for which no provision was made in the Rules or in the agreement by the parties. Since that had always been the interpretation given to the Rules, it was perhaps unnecessary to continue discussing the choice of specific words which, in the view of the Committee of the Whole (II) and the Working Group, were superfluous.

9. Mr. GUEVARA (Philippines) said that if the current wording of article 1, paragraph 2, was correctly interpreted, its content was the same as that of the new text proposed by the Working Group. However, in order not to prolong the discussion, his delegation was ready to endorse the proposed amendment, but felt that in the English text the words "where a rule" should be replaced by the words "where any of such rules", since the amended text could refer to any rule and not only to the provisions of the Rules.

10. The CHAIRMAN observed that the members of the Commission were not opposed to the amendment proposed by the representative of the Philippines; however, he felt that the drafting should be left to the Secretariat.

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11. Mr. HOLTZMANN (United States of America) said that the amendment proposed by the representative of the Philippines made the scope of article 1, paragraph 2, too broad and pointed out that the Working Group had chosen the wording deliberately.

12. Mr. KRISPIS (Greece) said that the new paragraph 2 did not improve on the original, which he found preferable, because the clarification contained in the new text was superfluous. However, he would be willing to accept it.

13. The CHAIRMAN said that the question raised by the representative of the Philippines concerned form alone and he took it that the majority of the Commission accepted the new article 1, paragraph 2.

14. It was so decided.

15. The CHAIRMAN said that since the Commission appeared to find the proposed paragraph 3 unnecessary, he assumed that it was rejected.

16. It was so decided.

RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW
(A/CN.9/118)

17. Mr. VIS (Secretary of the Commission) said that when the item under discussion had been considered at the seventh session of UNCITRAL, it had been decided to study specific cases, especially the case of the Convention on the Limitation Period in the International Sale of Goods. Nevertheless, in view of the close relationship between that instrument and others that were being prepared, namely, the draft convention on the international sale of goods and the draft convention on international legislation on shipping, he suggested postponing consideration of the question until work on those instruments had been concluded.

18. The CHAIRMAN said that if there were no objections he would take it that the Commission accepted the suggestion made by the Secretary.

19. It was so decided.

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW (A/CN.9/111,
A/CN.9/121)

20. Mr. OKALI (Secretariat) reviewed the work of the Secretariat on the item under consideration, described in documents A/CN.9/111 and A/CN.9/121. With regard to the symposium on international trade law, he pointed out that in the first of the two documents three possible themes were suggested, namely, transport and financing documents used in international trade, the carriage of goods by sea and the international sale of goods.

21. Mr. SWEENEY (United States of America) said that he preferred the first of the three themes proposed, although he was willing to accept either of the other two.

(Mr. Sweeney, United States)

If the first was accepted, he was confident that discussion would be focused on the relationship existing between financial mechanisms and carriage by sea.

22. With regard to the impossibility of obtaining simultaneous interpretation services for the symposium, referred to in paragraph 13 of document A/CN.9/111, he regretted that there would not at least be interpretation into French for the participants from French-speaking Africa.

23. Mr. HERBER (Federal Republic of Germany) said that his Government intended to make a financial contribution to the symposium and that he hoped other countries able to do so would do likewise.

24. As to the proposed themes, he expressed his preference for the carriage of goods by sea and the international sale of goods, since the members of UNCITRAL were most prepared to deal with them. Furthermore, if the theme selected was the international sale of goods, participants in the symposium could attend the meetings UNCITRAL would then be holding on that topic.

25. He regretted that the symposium was to be conducted in only one language, and asked if it would not be possible for interpretation to be provided at least into French.

26. Mr. VIS (Secretary of the Commission), after noting the usefulness of the symposium in placing special emphasis on the practical aspects of international trade, enumerated the reasons why the Secretariat had proposed giving priority to the theme of transport and financing documents (A/CN.9/111). He also noted that contacts had been established with various specialized agencies and with the International Chamber of Commerce, and that it was hoped that they would support the symposium.

27. Mr. MALLINSON (United Kingdom) said that he approved the proposals made by the Secretariat on the themes to be discussed at the symposium and that he preferred that the main theme be transport and financing documents.

28. Mr. HOLTZMANN (United States of America) said that he was satisfied with the agenda submitted by the Secretariat and suggested that, in view of the desirability of giving wide distribution to the new UNCITRAL Arbitration Rules, that topic, time permitting, should be considered at the symposium, if only briefly.

29. Mr. ROGNLIEN (Norway) said that his country had made a financial contribution to the first UNCITRAL symposium and that he trusted it would do likewise for the second. Nevertheless, he wished to hear the opinions of the developing countries on the symposia and to know whether they found them useful, since in Europe doubts had been expressed as to the usefulness of the method followed.

30. Mrs. OYEKUNLE (Nigeria) said that she endorsed the United States proposal since it would be very useful, not only for students, but also for government officials participating in the symposium, to familiarize themselves with the new UNCITRAL Arbitration Rules. In her delegation's opinion, the symposia were very useful. Her country had participated in the first symposium and hoped to attend any that would be held in the future.

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31. Mr. SUMULONG (Philippines) said that the symposium should not be limited to considering only the practical aspects of international trade but should also make a comparative study of the trade legislation of different countries in order to help to achieve the main objective of UNCITRAL, which was the international unification of the laws in the field.
32. Mr. KRISPIS (Greece) agreed that in the symposium preference should be given to the topic transport and financing documents, as suggested by the Secretariat, and endorsed the suggestion made by the United States delegation.
33. The CHAIRMAN said that it could be inferred from the debate that the Commission decided to approve the topic relating to transport and financing documents and the UNCITRAL Arbitration Rules for discussion at the second UNCITRAL symposium.
34. It was so decided.
35. Mr. VIS (Secretary of the Commission) said that so far only Austria and Sweden had made specific commitments for voluntary contributions in answer to the Secretary-General's request, and that two other delegations, the Federal Republic of Germany and Norway, had promised they would make contributions. The Secretariat had contacted certain private firms to obtain their financial support for the symposium and it was hoped that some of them would provide such support. Nevertheless, he appealed to Governments to make voluntary contributions, since they were primarily responsible for defraying the cost of the symposium.
36. Mr. KRISPIS (Greece) said that his Government would shortly announce the contribution it would make in support of the second UNCITRAL symposium.
37. Mr. HERBER (Federal Republic of Germany) said that, contingent upon approval by his country's parliament, he could announce that his Government would contribute approximately \$8,000. He expressed his confidence that those States which had contributed to the first symposium would do likewise with regard to the second.
- DATE AND PLACE OF THE TENTH SESSION (A/CN.9/120)
38. The CHAIRMAN informed the Commission that the Austrian delegation, on behalf of its Government, had extended an invitation to the Commission to hold its tenth session in Vienna. He suggested that the invitation should be considered at the same time as the date on which it was to be held.
39. Mr. LOEWE (Austria) extended the invitation to include the second UNCITRAL symposium and said that although he had not yet received specific instructions in that respect, he was confident that his Government would gladly defray the additional costs of interpretation into French.
40. The CHAIRMAN thanked the Government of Austria for the invitation through its delegation and said that since there were no objections he would take it that it was the unanimous wish of the Commission to accept the invitation.
41. It was so decided.

The meeting was suspended at 1 p.m. and resumed at 3.15 p.m.

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42. Following a debate, the Commission decided to hold its tenth session in Vienna for a period of four weeks, from 23 May to 17 June 1977. It also decided to discuss the international sale of goods in plenary session and to establish a committee of the whole to deal with security interests in goods and liability for damage caused by products intended for or involved in international trade.

FUTURE WORK (A/CN.9/120)

(a) Sessions of working groups

(i) Working Group on the International Sale of Goods

43. The CHAIRMAN said that if there were no objections he would take it that the Commission decided that the Working Group on the International Sale of Goods should hold its eighth session in New York from 4 to 14 January 1977.

44. It was so decided.

(ii) Working Group on International Negotiable Instruments

45. Mr. VIS (Secretary of the Commission) said that the fifth session of the Working Group on International Negotiable Instruments was scheduled for Geneva in 1977, but that there were problems concerning the exact period when the session would be held owing to the dates chosen by the Working Group on the International Sale of Goods for its eighth session. The Working Group on International Negotiable Instruments had authorized him to suggest to the Working Group on International Sale of Goods that it should occasionally relinquish the period in question to the Working Group on International Negotiable Instruments for its session, and specifically for its 1978 session. With regard to the fifth session, account should be taken of the fact that a number of the members were university professors who, because of their professional duties, were not free in February or March. Although the Working Group on International Negotiable Instruments would not be able to submit a report to the Commission if it met after the latter's session, it should be remembered that at the two forthcoming sessions the Working Group would not be making a final report to the Commission. The Commission might accordingly authorize the Working Group to meet, as an exceptional measure, after its own session.

46. Mr. MALLINSON (United Kingdom) said that it would be best for the Working Group on International Negotiable Instruments to hold its fifth session after the tenth session of the Commission so as to avoid overlapping with the university academic year. He did not see any problem in the fact that the Working Group would not then submit a report to the Commission.

47. Mr. CHARIK (Egypt) said that he agreed in principle that the Working Group might meet after the tenth session of the Commission. He proposed, however, that further debate should be postponed.

48. The CHAIRMAN said that if there were no objections, he would take it that the Commission decided to postpone its discussion of the matter.

49. It was so decided.

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50. The CHAIRMAN referred to the possibility that States which were not members of UNCITRAL might attend its sessions as observers, and pointed out that General Assembly resolution 2205 (XXI), under which UNCITRAL had been established, contained no provision on the subject. If there were no objections, he would take it that the Commission decided to include in its report to the General Assembly a reference to the need to have the attendance of such States authorized.

51. It was so decided.

52. Mr. VIS (Secretary of the Commission), referring to the composition of the working groups, pointed out that the terms of office of several members would expire in 1976, a fact which might affect the work of the groups. He said that the Czechoslovak delegation, whose term of office as member of the Working Group on the International Sale of Goods would expire in 1976, was interested in continuing to participate in its work.

53. The CHAIRMAN suggested that the Commission should decide to request the General Assembly to amend resolution 2205 (XXI) so that the term of office of each member would commence with the first plenary meeting of the session following its election. In addition, if there were no objections, he would take it that the Commission decided to allow Czechoslovakia to continue its membership of the Working Group on the International Sale of Goods.

54. It was so decided.

55. Mr. VIS (Secretary of the Commission) drew the attention of the members of the Commission to the need to take a long-term approach in reviewing its programme, since the International Trade Law Branch of the Secretariat generally required two or three years to prepare the documentation for each item.

56. The CHAIRMAN said that if there were no objections, he would take it that the Commission decided to request the Secretariat to submit a document setting forth suggestions regarding its long-term programme.

57. It was so decided.

OTHER MATTERS

58. The Commission decided to take note of subparagraphs (a), (b), (c) and (d) of the section relating to item 11 in the note by the Secretary-General (A/CN.9/120) and to request the Secretariat to continue its study to determine which provisions in the resolutions adopted by the General Assembly at its sixth and seventh special sessions might be considered by the Commission.

The meeting rose at 4.50 p.m.