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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 10th MEETING

Held at Headquarters, New York,
on Monday, 19 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

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The meeting was called to order at 10.05 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION (A/CN.9/112 and Add.1, A/CN.9/113, A/CN.9/114) (continued)

Draft UNCITRAL Arbitration Rules

Article 25, paragraph 1

1. Mr. GUEVARA (Philippines) suggested that the word "discontinuance" should be replaced by the word "termination" or "dismissal", in order to avoid implying that the proceedings could be resumed.

2. Mr. MANTILLA-MOLINA (Mexico) said that the paragraph seemed to be redundant in the light of article 21. However, if the paragraph was to be retained, it should be made clear whether or not the proceedings could be resumed. There were differences in meaning between the terms used in the English, French and Spanish texts.

3. The CHAIRMAN said that the paragraph was intended to indicate that proceedings could not be resumed. That intention was expressed quite clearly in the French text. He assumed that, if the arbitrators decided to terminate the proceedings in the absence of a claim, the claimant would be responsible for any costs incurred. Neither article 25 nor article 29 contained any provision to that effect.

Article 25, paragraph 2

4. Mr. TSEGAH (Ghana) noted that the paragraph made no provision for the granting of a further period of time in which the respondent could communicate his statement of defence. He proposed, therefore, that paragraph 2 should be redrafted along the lines of paragraph 1 to afford the respondent the same rights as the claimant.

5. Mr. MANTILLA-MOLINA (Mexico) agreed with the views expressed by the representative of Ghana. There should be a harmony between article 21 and paragraphs 1 and 2 of article 25. Furthermore, it should be made clear in paragraph 2 that failure to communicate a statement of defence within the appropriate period of time would be taken as an admission of the allegations contained in the statement of claim.

6. Mrs. OYEKUNLE (Nigeria) said that the existing text was sufficiently flexible in that it allowed the arbitrators to exercise their discretion. The existing wording should therefore be retained.

7. Mr. DEY (India) said that paragraph 2 was superfluous in the light of the provisions of paragraphs 3 and 4, and should therefore be deleted.

8. Mr. SZASZ (Hungary) said that, although there might be grounds for deleting paragraph 2 in the light of other provisions of the draft rules, the Committee

(Mr. Szasz, Hungary)

should adhere to the policy of maintaining a balance between the rights of the claimant and the rights of the respondent. Consequently, paragraphs 1 and 2 should be drafted in the same terms.

9. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) noted that, while paragraph 2 might seem superfluous to members of the Committee, it might not appear so to prospective users of the draft Rules who were less familiar with arbitration procedures.

10. Mr. GUEST (United Kingdom) endorsed the views expressed by the Special Consultant. Paragraphs 1 and 2 were quite satisfactory as they stood.

11. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the revised Rules had been drafted so as to leave the arbitrators as much freedom as possible. Under the provisions of paragraph 2, they could either proceed to make an award or call for further investigation. It was quite normal to allow the arbitrators to exercise such discretion.

12. Mr. HOLTZMANN (United States of America) supported the views expressed by the Special Consultant. The draft Rules should be sufficiently flexible to accommodate the different applicable national laws. The wording of paragraph 2 was quite satisfactory.

13. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished paragraph 2 to be retained and to be redrafted along the lines of paragraph 1.

14. It was so decided.

Article 25, paragraph 3

15. Mr. MANTILLA-MOLINA (Mexico), supported by Mr. PIRRUNG (Federal Republic of Germany), proposed the deletion of the words "and such proceedings shall be deemed to have been conducted in the presence of all parties", since the proceedings should not be based on the fiction that all parties had been present.

16. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to delete the words in question.

17. It was so decided.

18. Mr. ROEHRICH (France) said that the French text of the first part of the paragraph should be clarified.

19. Mr. GUEVARA (Philippines) said that paragraph 3 should include a provision that any party which had failed to appear at a hearing could appear at a subsequent hearing at the discretion of the arbitrators.

20. The CHAIRMAN said that the arbitrators in fact had a duty to summon parties concerned to subsequent hearings whether they had attended earlier hearings or not. A sentence might be added to the paragraph to the effect that failure to attend a hearing did not deprive a party of the right to appear at subsequent hearings.

Article 25, paragraph 4

21. Mr. JENARD (Belgium) said that, in the French text, the words "après avoir été dûment notifiée" should be replaced by the words "après en avoir reçu dûment la notification".

22. Mr. MANTILLA-MOLINA (Mexico) said that paragraph 4 should be made more general by stating simply that, if parties failed without showing sufficient cause to submit documentary evidence, the award would be made on the basis of the evidence available.

23. Mr. PIRRUNG (Federal Republic of Germany) said that, as had been suggested for article 14, paragraph 2, the word "solely" should be deleted.

24. The CHAIRMAN suggested that a drafting group consisting of the representatives of Belgium, Mexico and the Philippines, should be formed to redraft the article on the basis of the proposals made by members of the Committee.

25. It was so decided.

Article 25 bis

26. Mr. JENARD (Belgium) proposed the inclusion of a separate article 25 bis that would enable the arbitrators to request the parties to produce additional witnesses or documentary evidence, to announce the closure of the hearing in order to invite the parties to submit their written conclusions and, in certain circumstances, to reopen the hearing upon their own initiative or at the request of one of the parties before proceeding to announce the award. Such a provision would be in keeping with the rules of procedure of the Inter-American Commercial Arbitration Commission.

27. Mr. GUEST (United Kingdom) and Mr. MELIS (Austria) expressed support for the Belgian proposal in principle, pending further study of its precise wording.

28. The CHAIRMAN requested the representatives of Belgium and the United Kingdom to prepare the text of such a provision for consideration during the second reading.

Article 26

29. Mr. DOMKE (Observer for the International Chamber of Commerce) drew attention to the frequent case, not covered by article 26, where a party did object to non-compliance with the rules, and wondered whether the arbitrators should be permitted to proceed despite any such objection.

30. The CHAIRMAN replied that the arbitrators should in such cases try to correct the omission if that was still possible, but felt that it was difficult to formulate rules for correcting such omissions.

31. Mr. ROEHRICH (France) suggested that, in such cases, it should be left to the arbitrators to rule on that question by means of an interlocutory award.

32. Mr. GUEST (United Kingdom) suggested that a provision might be included enabling the arbitrators in cases of purely technical non-compliance to decide, where appropriate, that such non-compliance did not affect the proceedings provided that none of the parties had been unduly prejudiced by it.

33. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that it was very difficult for the arbitrators to decide whether non-compliance had prejudiced one of the parties; the arbitrators would then have the onerous task of deciding as to the importance of the rule that had not been complied with. In cases where an objection was stated, the arbitrators would try to rectify such non-compliance, but could do so only with the consent of the parties.

34. Mr. TSEGAH (Ghana) said the question arose as to how it could be proved at what time a party knew that a provision of the rules had not been complied with. He also wondered whether a party might not argue that the arbitrators should be deemed to have known all the provisions and requirements.

35. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) replied that it was sometimes clear whether certain provisions had been complied with, as in the case of time-limits. Knowledge of non-compliance with such provisions was presumed, no further proof being required.

36. The CHAIRMAN pointed out that article 26 was subject to national laws, which often stipulated whether a party could waive his right to object to non-compliance.

37. Mr. DOMKE (Observer for the International Chamber of Commerce) remarked that frequently a party who wished to submit further evidence was informed by the arbitrators that no further evidence was required. The question arose as to whether it was possible in such a case for a ruling to be given regarding an objection by one of the parties.

38. The CHAIRMAN felt that such cases should be left to the national law.

39. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) added that the submission of evidence and the production of witnesses was dependent upon

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appropriate notice being given. If a claimant later wished to submit new evidence, it was for the parties to decide the matter, failing which the national laws applied. In practice, such problems were generally resolved by agreement between the parties.

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) supported the retention of article 26 as it stood. However, he felt that an additional provision was required to cover those cases where a party objected to non-compliance. Such a provision should specify that decisions on matters arising during the proceedings should be taken by a majority of the arbitrators.

41. Finally, he took the view that article 26 was of a general nature and should therefore be transferred to section I.

42. Mr. MELIS (Austria) supported the retention of article 26 and agreed that it should be transferred to section I. He suggested, however, that the word "knows" should be replaced by the word "thinks", since the question whether a provision had been complied with might be a matter of opinion.

43. Mr. ST. JOHN (Australia) suggested that it would be better to use the formulation "knows or should know", since it was difficult to prove such knowledge. The word "thinks" could create similar difficulties.

44. Mr. PIRRUNG (Federal Republic of Germany) proposed the wording "knows or should have known", which was an expression already used in arbitration rules.

45. He disagreed, however, that the article should be transferred to section I. Since it dealt principally with the proceedings, he felt that it should remain in section III.

46. Mr. MANTILLA-MOLINA (Mexico) supported the retention of article 26 in section III. In his view, the Australian amendment was unnecessary, since it was obvious that the party in question should know of the non-compliance. He suggested, however, that the wording could be simplified: it would be sufficient to state that, if one of the parties continued with the proceedings when a provision or requirement of the Rules had not been complied with, then he would be deemed to have waived his right to object.

47. Mr. ROEHRICH (France), took the view that article 26 was a source of great ambiguity, and proposed that it should be deleted. It would then rest with the parties to draw attention to any non-compliance, and the arbitrators could take an interlocutory decision as to whether the proceedings should continue.

48. The meeting was suspended at 11.35 a.m. and resumed at 11.55 a.m.

49. Mr. DEY (India) emphasized the importance of article 26 and felt that it should be retained. He fully agreed with the suggestion by the representative of the Federal Republic of Germany for replacement of the word "knows" by the words "knows or should have known", since the knowledge might be difficult to prove. He also felt that the article should remain in section III.

50. Mr. GUEVARA (Philippines) took the view that article 26 should be retained, provided its application was limited to matters of omission that were of minor importance. The fact was that certain violations such as a violation of the provision relating to the nationality of the presiding arbitrator, might deprive a party of his fundamental rights that could not be waived.

51. Mrs. BELEVA (Bulgaria) supported the retention of article 26 as it stood, since the inclusion of the words "should have known" could give rise to a problem of interpretation under national laws.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to retain article 26 as it stood and to leave it in section III.

53. It was so decided.

54. In reply to questions from Mr. PIRRUNG (Federal Republic of Germany), the CHAIRMAN said that the Committee had agreed that decisions rendered during the arbital proceedings must be taken by a majority. He suggested that, wherever possible, the Rules should refer to the arbitral tribunal rather than to the arbitrators.

55. Mr. ROEHRICH (France) suggested that the term "members of the arbitration tribunal" should be used where it was not possible to refer simply to the tribunal, in order to ensure consistency.

56. The CHAIRMAN suggested that the representatives of the Federal Republic of Germany and France should obtain the texts prepared by the various drafting groups and make the necessary changes with respect to the use of the term "arbitration tribunal" and add a rule concerning the need for decisions rendered during the proceedings to be taken by a majority.

57. It was so decided.

Article 27, paragraph 1

58. Mr. MANTILLA-MOLINA (Mexico) asked for an explanation of the precise scope of the terms "interim award" and "partial award".

59. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that paragraph 1 reflected the provisions in the Arbitration Rules of the Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration

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and represented an attempt to give the arbitrators as much freedom as possible in order to ensure maximum efficiency. Broadly speaking, an interim award was one which helped to bring a case closer to a solution. A partial award related to part of a case which could be settled immediately; the other parts which required more detailed consideration were dealt with subsequently and were the subject of other partial awards.

Article 27, paragraph 2

60. Mr. GUEVARA (Philippines) suggested that the last phrase should be deleted, so that the paragraph would end with the words "upon which it is based".

61. The CHAIRMAN pointed out that, if that were done, agreement by the parties to dispense the arbitrators from the need to state the reasons upon which the award was based might constitute a violation of the Rules and might lead to the setting aside of the award.

62. Mr. GUEST (United Kingdom) said that it was not traditional in the United Kingdom for arbitrators to state the reasons as part of the award. He proposed that the paragraph should be redrafted as follows: "An award shall be made in writing and shall be binding upon the parties. The arbitrators may state the reasons upon which the award is based". That would leave the arbitrators free to incorporate the reasons in the award or to state them separately, depending on the tradition in their country. Alternatively, the second sentence could use the word "shall" instead of "may", for it was his understanding that the parties could by mutual agreement dispense with any of the provisions of the Rules. If that was not clear it might be advisable to say so.

63. Mrs. OYEKUNLE (Nigeria) said that her delegation would prefer to keep the word "shall".

64. Mr. HOLTZMANN (United States of America) supported the United Kingdom suggestion, which provided sufficient flexibility to cover the different practices. In the United States, the reasons on which an award was based were not given, so as not to provide grounds for a court to overturn an award on the merits.

65. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation would prefer to see the article remain as it was. However, to cover the point raised by the United Kingdom and the United States representatives he proposed that the word "expressly" in the last line should be omitted.

66. Mr. JENARD (Belgium) supported that proposal.

67. Mr. DZIKIEWICZ (Poland) supported the existing text. It was helpful to oblige the arbitrators to state their reasons in writing.

68. Mr. MELIS (Austria) said that the paragraph should remain as it was. While appreciating the point raised by the United Kingdom and United States

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representatives, he pointed out that enforcement would be sought in accordance with the relevant international conventions and, in some countries, it might be difficult to enforce an award which did not state the reasons upon which it was based.

69. Mr. ROEHRICH (France) supported the proposal made by the representative of the Federal Republic of Germany. However, in his view the award should always be made in writing; that was not clear in the text as it stood.

70. Mr. MANTILLA-MOLINA (Mexico) endorsed the comments of the representative of France, adding that the exception provided for in the second sentence could be omitted entirely, since article 2 empowered the parties to modify any provision of the rules.

71. Mr. LEBEDEV (Union of Soviet Socialist Republics) supported the United Kingdom proposal. It would be correct to omit the exception, which was superfluous in the light of article 2.

72. Mr. GUEVARA (Philippines) noted that in the Philippines reasons must always be given in support of an award. The proposal to delete the last part of paragraph 2 was intended to prevent the possibility of an award being questioned on the ground that it was unconstitutional and therefore unenforceable. One of the grounds for questioning an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was that such recognition or enforcement would be contrary to the public policy of a country.

73. Mr. GUEST (United Kingdom) said that his delegation could accept the solution proposed by the representative of the Federal Republic of Germany, whereby the word "expressly" would be omitted.

74. Mr. TAKAKUWA (Japan) said that paragraph 2 was more or less acceptable to his delegation and that it could accept the proposed compromise.

75. The CHAIRMAN said that there seemed to be an agreement that the award and the reasons upon which the award was based should be dealt with in separate sentences. While some delegations believed that the exception referred to at the end of the second sentence was already covered by the provisions of article 2, most delegations agreed that the sentence could be made more flexible by merely deleting the word "expressly". He proposed that the representatives of the Federal Republic of Germany, the United Kingdom and the USSR should draft a text for that paragraph.

76. Mr. JENARD (Belgium) said that, in the French text, the word "obligatoire" was ambiguous and suggested that the term "rendue en dernier ressort" might be more satisfactory.

77. Mr. HOLTZMANN (United States of America) said that his delegation would prefer the term "final and binding".

Article 27, paragraph 3

78. Mr. SZASZ (Hungary) said that the presiding arbitrator should be given the casting vote, in the event that the arbitrators each had a different opinion.

79. Mr. HOLTZMANN (United States of America) said that his delegation could agree to that proposal only in respect of procedural decisions. If the Rules stated that decisions regarding the award must be reached by a majority, that would force the president of the arbitration tribunal to reach accommodation with at least one of the other members and that would have a modifying effect on extreme awards.

80. Mr. St. John (Australia) endorsed the comment made by the United States representative.

81. Mr. MELIS (Austria) supported the view expressed by the representative of Hungary, adding that a similar provision existed in the Rules of the International Chamber of Commerce. As it had been invoked only once in 50 years, the danger of it being abused seemed minimal in comparison to the advantages of avoiding a deadlock resulting from the arbitrators' failure to agree among themselves. In fact, the knowledge that the president of the tribunal had the power to take a decision on his own might create an atmosphere more conducive to agreement.

The meeting rose at 1.05 p.m.