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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 11th MEETING

Held at Headquarters, New York,
on Monday, 19 April 1976, at 3 p.m.

Chairman: Mr. SZÁSZ (Hungary)

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International commercial arbitration (continued)

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The meeting was called to order at 3.05 p.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 27, paragraph 3

1. Mr. HOLTZMANN (United States of America) said that, in view of the fact that the Committee had not yet found a solution to the situation in which the tribunal could not reach a majority decision regarding the award, it might be helpful if the Special Consultant would give his view on the matter.
2. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that, in drafting article 27, paragraph 3, he had intended to specify that awards should be made by at least a majority; he suggested that the words "at least" might be added to the paragraph in order to make it clearer.
3. In drafting rules regarding arbitration, it was necessary to take into account the different customs in various parts of the world. For example, in Asia there seemed to be a marked preference for unanimity in making arbitral awards and conciliation was generally preferred to arbitration. Thus, it would be preferable not to place too much emphasis on the role of the presiding arbitrator since to do so might encourage the remaining two arbitrators to act as advocates for the parties which had nominated them. As the representative of Austria had correctly pointed out at the previous meeting, in the many years of ICC arbitration, there had been only one case in which the presiding arbitrator had had to break a deadlock.
4. Mrs. OYEKUNLE (Nigeria) said that her delegation supported the text of paragraph 3 as it stood. It was also willing to accept the addition of the words "at least", as suggested by the Special Consultant.
5. Mr. GUEVARA (Philippines) said that the Committee had still not provided a solution to the situation in which each arbitrator had a separate opinion regarding the award. His delegation believed that in such cases the arbitral tribunal should be considered to have reached no decision. The opinion of the presiding arbitrator should be equal in weight to the opinions of the other arbitrators and the suggestion that the presiding arbitrator should cast the deciding vote was, therefore, unsuitable.
6. Mr. MANTILLA-MOLINA (Mexico) said that his delegation shared the view that the presiding arbitrator should not be empowered to decide in the event that a majority decision was not reached. The principle of the majority should be maintained. If, after the allotted time, the arbitrators were unable to make an award by a majority decision, they should communicate that fact to the appointing authority which would then appoint new arbitrators.

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7. Mr. BOSTON (Sierra Leone) said that the final decision in making an award must rest with the majority, especially in the light of the comments made by the Special Consultant and the United States representative at the preceding meeting. If the presiding arbitrator was given the power to cast the deciding vote, the remaining two arbitrators would be reduced to the position of mere assessors.
8. Mr. JENARD (Belgium) said that if the paragraph was adopted as it stood, the national legislation governing arbitration in the particular case would determine the course to be followed if the tribunal failed to arrive at a majority decision.
9. Mrs. OYEKUNLE (Nigeria) said that the text should be left as it stood. Her delegation could not support the addition of a reference to the appointing authority, as suggested by the representative of Mexico; that would make the Rules too cumbersome, which was contrary to the Committee's intention.
10. Mr. HOLTZMANN (United States of America) agreed with the representative of Nigeria. There was no need for further special provisions to be applied in the event of a deadlock. If the three arbitrators could not reach agreement on the award, they could be said to have failed to act, in which case the provisions of article 12 would come into play.
11. Mr. DEY (India) said that his delegation could not accept the interpretation that the provisions of article 12 covered the situation envisaged in article 27, paragraph 3.
12. Mr. MANTILLA-MOLINA (Mexico) requested that it should be mentioned in the report that one delegation felt it was necessary to include in the draft Rules a provision expressly governing the situation in which a majority of the arbitrators could not agree on an award.
13. Mr. ROEHRICH (France) said that he did not understand the need to add the words "at least" in paragraph 3. Either there was a majority or there was not.
14. The CHAIRMAN explained that some delegations felt that the requirement of a majority did not cover the case of unanimity.
15. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that it had also been suggested that paragraph 3 even seemed to rule out the possibility of unanimity.
16. Mr. JENARD (Belgium) said he understood that the Special Consultant had on one occasion stated that there was a growing tendency among arbitrators to defend the interests of the parties which had appointed them. If that was true, it would seem that tribunals would encounter increasing difficulties in reaching a majority decision. Paragraph 3 as it stood, however, provided no solution to such a situation. Accordingly, it would be better to adopt the system of having a sole arbitrator.

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17. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that experience so far indicated that, in general, arbitrators did make an effort to be independent and impartial. In certain countries, contact between the arbitrator and the party which had nominated him was expressly forbidden. He was confident that the general trend was towards increasingly neutral and independent arbitrators.
18. Mr. MANTILLA-MOLINA (Mexico) said that it might be desirable to include in the Rules a stipulation that it was the duty of arbitrators to render an objective decision since they were not advocates of the party which appointed them.
19. The CHAIRMAN drew the attention of the Committee to the text of article 9 contained in Conference Room Paper 2, which made reference to the independence of arbitrators, and asked whether that provision satisfactorily accommodated the concern expressed by the representative of Mexico.
20. Mr. MANTILLA-MOLINA (Mexico) replied in the affirmative.
21. The CHAIRMAN observed that there seemed to be a consensus in favour of retaining article 27, paragraph 3, in its existing form.
22. It was so decided.
- Article 27, paragraph 4
23. Mr. DZIKIEWICZ (Poland) said that his delegation supported the text of article 27, paragraph 4, but suggested that a provision should be added at the end of that paragraph requiring that any dissenting opinion should be attached to the text of the award.
24. Mr. DEY (India) pointed out that, as currently drafted, the second sentence of paragraph 4 would seem to mean that a failure to sign the award on the part of one of the two arbitrators constituting the majority would not impair its validity.
25. The CHAIRMAN said it was his understanding that, in the event of a dissenting opinion, the two arbitrators who were in agreement must sign the award in order for it to be valid.
26. Mr. ROEHRICH (France) said that his delegation could not agree to the Polish suggestion. While he could understand the need in certain cases to attach the dissenting opinion to the award, it was going too far to make that an absolute requirement. The Rules should simply leave open the possibility that a dissenting opinion could be attached to the award without making it a requirement.

27. Mr. MELIS (Austria) said that the Committee should distinguish between the two issues that had been raised, namely, whether a dissenting opinion should be attached to the award and whether a dissenting arbitrator should sign the award. The legislation of some countries required only two of the three arbitrators to sign an award, while others required the signature of all three. As it stood therefore, the paragraph was misleading to the parties, since it did not take into account the legal requirements of certain countries. His delegation believed that a dissenting arbitrator was under an obligation to sign the award, since otherwise he would have the power to prevent its enforcement in a country which required the signature of all three arbitrators. To circumvent that problem, a new sentence might be added spelling out that obligation of the dissenting arbitrator; alternatively, the entire paragraph might be deleted, since it dealt with a matter that was essentially regulated by national legislation.

28. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation was in favour of retaining at least the first sentence of article 27, paragraph 4, since it was customary to include in arbitration rules some provision governing the signature of the award. In order to accommodate the concern of the Austrian delegation, a further sentence could be added specifying that the award was to be signed by all three arbitrators. His delegation also agreed that mention should be made of the date and place of the award and that a provision to that effect should be added in the first sentence of paragraph 4.

29. The second sentence of paragraph 4 was more appropriate to a convention than to a set of rules. His delegation agreed with the representative of Austria that it might mislead the parties into thinking that an award signed by at least two arbitrators would be valid in all cases irrespective of the requirements of the national laws applicable. It should, therefore, be deleted. The case of an arbitrator being unable to sign an award for whatever reason, despite his willingness to do so, was a minor issue which need not be dealt with in the Rules. As to the question of dissenting opinions, the paragraph as currently drafted did provide for the possibility of such opinions being included in the award.

30. Mr. HOLTZMANN (United States of America) said that the first sentence of paragraph 4 should be retained but should be amended to stipulate that the award must contain an indication of the date on which and the place at which it was made, as in the alternative version of the sentence appearing in document A/CN.9/113. He agreed that the language of the second sentence was more appropriate to a convention than to a private agreement between two parties and felt that it would be more satisfactory if the commentary accompanying the Rules were to point out the need to take account of national legislation. The question as to whether the reasons for a dissenting opinion should be added to the award should be left to the arbitrators and the appropriate national legislation. If, however, a reference to that question was considered necessary, the Rules should merely stipulate that the reasons for an arbitrator's dissent would be attached to the award if the arbitrator so wished.

31. Mr. MANTILLA-MOLINA (Mexico) said that, while the award should contain the date on which and the place at which it was made, it was not necessary to include

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(Mr. Mantilla-Molina, Mexico)

a provision to that effect in the Rules since it was normal practice for such information to be included. Where necessary, the award should indicate that it had been agreed upon by a majority, but it should be for the tribunal to decide whether the point of view of the dissenting arbitrator should be communicated. If an award was signed by only two arbitrators, it should still remain valid.

32. Mr. JENARD (Belgium) said that the first sentence of paragraph 4 should be replaced by the first sentence of the alternative text contained in document A/CN.9/113. The second sentence should be deleted, since the validity of the award in such a case would depend on national legislation. The third sentence should also be deleted, since it was ambiguous and since the format of the award would again be governed by national legislation.

33. Mr. GUEST (United Kingdom) agreed that the first sentence should refer to the date on which and the place at which the award was made. The second sentence, however, should be retained, since its deletion would imply that the award had to be signed by all three arbitrators; consequently, if one arbitrator refused to sign, the award would fail unless the appropriate national legislation contained a specific provision to the contrary. The existing text would no doubt contradict the national legislation of some countries, but that had to be accepted. The third sentence should be deleted. The Rules should either make no reference to the opinion of the dissenting arbitrator or should make it possible for the dissenting arbitrator to communicate his point of view without, however, requiring that he do so.

34. Mr. GUEVARA (Philippines) pointed out that the question of the place of the award had already been covered in article 15, paragraph 4.

35. Mr. MANTILLA-MOLINA (Mexico) said that the Rules must not be rigid. The existing text should be retained without any mention of the place or date of the award.

36. Mrs. BELEVA (Bulgaria) said that the text should stipulate that the award must indicate the date on which and the place at which the award had been made.

37. Mr. HOLTZMANN (United States of America) said that, in view of the arguments put forward by the representative of the United Kingdom, he now felt that the second sentence should be retained in order to avoid misunderstandings.

38. Mr. TAKAKUWA (Japan) said that if the second sentence was deleted, the award would be invalidated by the failure of one arbitrator to sign. The sentence should therefore be retained.

39. Mr. PIRRUNG (Federal Republic of Germany) proposed that the second and third sentences of paragraph 4 should be amended to read: "When there are three arbitrators and one arbitrator cannot sign the award, the award shall state the reasons thereof." Such a formulation would avoid inappropriate language and take account of national legislation.

40. Mr. ROEHRICH (France) expressed support for the proposal of the representative of the Federal Republic of Germany. There was no reason for an arbitrator who

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(Mr. Roehrich, France)

disagreed with the majority decision not to sign the award; his signature would not signify his agreement with the majority decision but would simply render the award valid. If, however, an arbitrator was physically unable to sign the award, his failure to sign should not invalidate the award.

41. Mr. MANTILLA-MOLINA (Mexico) said that he would not oppose the proposal made by the representative of the Federal Republic of Germany.

42. Mr. HOLTZMANN (United States of America), referring to the amendment proposed by the representative of the Federal Republic of Germany, suggested that the word "cannot" should be replaced by the words "fails to", in order to maintain uniformity with other articles, and that the word "thereof" should be replaced by the words "which the arbitrator gives".

43. Mr. ROEHRICH (France) said that it was not clear who should give the reasons for an arbitrator's failure to sign an award.

44. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the two arbitrators who signed the award would give the reasons.

45. Mr. PIRRUNG (Federal Republic of Germany) said that the word "cannot" was preferable to the words "fails to", since the arbitrator who did not sign the award should have to give good reasons for not doing so. The words "fails to" would imply that an arbitrator could simply refuse to sign for relatively insignificant reasons.

46. The CHAIRMAN said that the first sentence of paragraph 4 implied a certain obligation on the part of arbitrators to sign the award. He suggested that it should be retained and amended to require that the award contain the date on which and place at which the award was made. The second and third sentences of the existing text should be replaced by the new text proposed by the representative of the Federal Republic of Germany with the word "cannot" being replaced by the words "fails to".

47. It was so decided.

Article 27, paragraph 5

48. Mr. HOLTZMANN (United States of America) said that the commentary accompanying the Rules should emphasize that, under the national legislation of some countries, an award could be made public.

49. The CHAIRMAN suggested that the present text of article 27, paragraph 5, should be retained.

50. It was so decided.

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Article 27, paragraph 6

51. Mr. JENARD (Belgium) said that copies of the award should be communicated to the parties only by the presiding arbitrator, since parties would not need three copies of the award.
52. Mrs. OYEKUNLE (Nigeria) agreed and proposed that the word "arbitrators" at the end of the sentence should be replaced by the words "arbitral tribunal".
53. The CHAIRMAN suggested that the Nigerian proposal should be adopted.
54. It was so decided.
55. Mr. DEY (India) suggested that paragraph 6 should stipulate a time-limit for the communication of the award to the parties.
56. Mr. ROEHRICH (France) agreed that a time-limit should be set. A party who had failed to pay costs should still receive a copy of the award within a given period.
57. Mr. MANTILLA-MOLINA (Mexico) agreed that a time-limit should be set for the distribution of copies of the award after the award had been made. The Rules should contain some indication as to who was responsible for such tasks as communicating the award and summoning witnesses.
58. The CHAIRMAN suggested that a time-limit of a given number of days be set.
59. Mr. ST. JOHN (Australia) suggested that a time-limit of a given number of days would be too rigid. He therefore proposed that the words "without delay" should be added at the end of the sentence.
60. Mr. GUEVARA (Philippines) said he thought it would be preferable to use the wording "without unnecessary delay".
61. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that in his experience the critical period was that between the end of the last hearing and the handing down of an award, rather than the time between the handing down of an award and its communication to the parties.
62. Mr. GUEVARA (Philippines) suggested that if there was to be a time-limit for the notification of the award, there should also be one for the making of the award: the Rules should specify that the award should be handed down without unnecessary delay.
63. The CHAIRMAN asked the representative of the Philippines to prepare a text of his proposed amendment, specifying in which part of the Rules it should be included. The Committee could then discuss it at a later stage.

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64. Mr. MANTILLA-MOLINA (Mexico) said he considered that it would be better to specify a time period, and that a time-limit of five days would be sufficient. Although the expression "without delay" was better than "without unnecessary delay", it gave a degree of uncertainty to the rule.

65. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he did not think it was necessary to establish any time-limit for the notification of the award, because the arbitrators would clearly not delay in communicating an award to the parties. It would be more effective to specify in article 34 that the arbitrators could not distribute the deposits to be paid by parties until they had sent out notification of the award. If there was a precise time-limit and the arbitrators violated it, that could make the award invalid or inoperable. Furthermore, he did not think it was necessary to set an abstract time-limit such as "without delay".

66. Mr. GUEST (United Kingdom) agreed with the remarks of the representative of the Soviet Union.

67. The CHAIRMAN said that there seemed to be a majority in favour of the Soviet proposal. If he heard no objection, he would take it that the Committee wished to retain the present text of article 27, paragraph 6.

68. It was so decided.

Article 27, paragraph 7

69. Mr. HOLTZMANN (United States of America) proposed that the words "by the arbitrators" should be added after the words "filed or registered".

70. The CHAIRMAN said that that proposal seemed to be acceptable. It would also be necessary to change the word "arbitrators" to "arbitral tribunal" in line with earlier amendments. If he heard no objection, he would take it that the Committee wished to retain article 27, paragraph 7, with those changes.

71. It was so decided.

Article 28

72. The CHAIRMAN suggested that the Committee should defer its discussion of article 28 until it had received the proposal from the representative of the Philippines.

Article 29

73. The CHAIRMAN pointed out that the discussions at the previous meeting on the translation of the word "discontinuance" would also apply to article 29, paragraph 1.

74. Mr. ROEHRICH (France), supported by Mr. MANTILLA-MOLINA (Mexico), suggested that it would be better to divide paragraph 1 into two parts since it contained two hypotheses.

75. It was so decided.

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76. Mr. MELIS (Austria) suggested that, in the new paragraph 1, provision should be made for the settlement to be recorded in the form of an arbitral award on agreed terms at the request of one of the parties, if the other party and the arbitrators agreed. In many cases, that could be a pre-condition for an enforceable compromise.
77. Mr. GUEST (United Kingdom) said that he could not agree with that suggestion. If the parties agreed on a settlement of the dispute, they would agree between themselves what form the settlement should take and it was therefore unnecessary to provide for an arbitral award on agreed terms at the request of only one of the parties.
78. Mr. DZIKIEWICZ (Poland) said he felt that it would be more logical to reverse the order of articles 28 and 29.
79. Mr. MELIS (Austria) said he agreed with the remarks of the United Kingdom representative. He suggested, however, that the words "and accepted by the arbitrators" should be deleted in paragraph 1; if the parties were in agreement, the arbitrators should go along with that agreement.
80. Mr. PIRRUNG (Federal Republic of Germany) said that his country's national law on arbitration made provision for the enforcement of agreements between parties before the arbitral tribunals. In such cases of agreement between the parties there did not necessarily have to be a recorded settlement. The commentary to article 29 might indicate that such an agreement which was recorded by the arbitral tribunal but was not in the form of an arbitral award would not be excluded:
81. With regard to the procedure set forth in the first sentence of paragraph 1 an arbitral award on agreed terms would clearly need the approval of both parties; his delegation had an open mind on the question of whether the agreement of the arbitrators or the arbitral tribunal was also needed.
82. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that it had been considered necessary for both parties to agree to a settlement since otherwise the arbitrators would be in no position to formulate one. With regard to the agreement of the arbitrators, there could be exceptional cases of settlements agreed to by the parties which were unacceptable to the arbitrators because they were contrary to public policy or, for example, were in violation of foreign exchange regulations.
83. The CHAIRMAN said that there seemed to be a majority in favour of keeping the text of paragraph 1 as it stood; he suggested that the ideas expressed on the subject could be reflected in the commentary.
84. Mr. MANTILLA-MOLINA (Mexico) said that he could not accept the text of paragraph 1 as it stood, even if it was separated into two parts, because it lacked clarity and mixed different hypotheses. If parties agreed on a settlement of a dispute, that either meant that they had reached a satisfactory solution and did not

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(Mr. Mantilla-Molina, Mexico)

need arbitration, or that, after some evidence had been heard, agreement was reached on a settlement and there was no need to hear further evidence. In the new paragraph 2, the parties should be able to request discontinuance so as to work out an agreement; if they reached agreement, the arbitrators would merely register the decision as an award, and if they did not reach agreement, proceedings would be resumed.

85. He considered that article 29 should be placed before article 27.

86. Mr. PIRRUNG (Federal Republic of Germany) said that he felt it would be better to leave article 29 where it was; if it was placed before the provisions relating to the making of the award, that would change the whole nature and emphasis of the Rules.

87. The CHAIRMAN said that there seemed to be a majority in favour of leaving article 29 where it was.

88. He invited comments on the new paragraph 2.

89. Mr. DEY (India) said that the new paragraph 2 seemed to be inconsistent since the first sentence implied that the ultimate decision lay with the arbitrators, whereas the second sentence made it possible for a party to object to the discontinuance.

90. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that some redrafting of the new paragraph 2 would be necessary. The word "discontinuance" had already been discussed in relation to article 25. In the article under consideration, the question of costs was dealt with in paragraph 2 of the text in document A/CN.9/112, which would become the new paragraph 3. In the new paragraph 2, the words "for any other reason" referred to paragraph 1 and some redrafting was therefore needed.

91. The CHAIRMAN said that the phrase "for any other reason" could be changed to read "reasons other than those mentioned in paragraph 1".

92. Mr. JENARD (Belgium) said that, in connexion with the new paragraph 3, the Committee should take into account the comments made by the Chairman at the previous meeting regarding article 25, paragraph 1. He therefore suggested that the paragraph should be redrafted to read:

"In all cases where the arbitrators order the discontinuance of the arbitral proceedings or make an arbitral award on agreed terms they shall fix the costs of arbitration as specified under article 33 in the text of this order or this award."

He also wondered whether the second sentence of that paragraph was necessary; if the parties agreed to an apportionment of the costs, the arbitrators would be obliged to abide by that agreement.

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93. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the second sentence of the new paragraph 3 referred to article 33, paragraph 1, on the question of fixing costs. Article 33, paragraph 2, however, referred to the unsuccessful party and did not apply to the paragraph under consideration. It was for that reason that the second sentence of the new paragraph 3 had been included. It could, however, be deleted because there was a specific reference to the fixing of costs as specified in article 33, paragraph 1. Under article 25, for example, it could be the claimant who would have to pay the costs of arbitration.
94. Mr. PIRRUNG (Federal Republic of Germany) said that he agreed with the remarks made by the representative of Belgium concerning the new paragraph 3. He, too, felt that the second sentence was unnecessary because it was covered by article 33, paragraph 1, and by the general provisions.
95. Mr. TAKAKUWA (Japan) suggested that the end of the first sentence of the new paragraph 3 should read "as specified under paragraph 1 of article 33".
96. The CHAIRMAN said that there seemed to be support for the proposal by the representative of Belgium to alter the first sentence of the new paragraph 3. He therefore asked the representative of Belgium to provide an exact text. There also seemed to be no opposition to the proposal to delete the second sentence of the paragraph, since it was covered by article 33. There seemed to be no support for the proposal of Japan.

The meeting rose at 5.55 p.m.