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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth Session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 12th MEETING

Held at Headquarters, New York,
on Tuesday, 20 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

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The meeting was called to order at 10.10 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 29, paragraph 3

1. The CHAIRMAN said that, if there were no comments, he would take it that the Committee wished to retain the present text of article 29, paragraph 3, appearing in document A/CN.9/112.

2. It was so decided.

Article 30

3. Mr. PIRRUNG (Federal Republic of Germany) suggested that, since most difficulties relating to the interpretation of an award arose during the execution stage, the time-limit in article 30, paragraph 1, should be extended to three years.

4. Mr. MANTILLA-MOLINA (Mexico) opposed that suggestion, on the grounds that it would create a long period of uncertainty.

5. Mr. ROEHRICH (France) said that he would prefer to leave the text unchanged.

6. Mr. HOLTZMANN (United States of America) proposed that article 30, paragraph 2, should refer to article 27, paragraphs 2 to 7, not 3 to 7.

7. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that in that case the second sentence of paragraph 1 could be deleted since it repeated part of article 27, paragraph 2.

8. Mr. GUEST (United Kingdom) said it had been suggested to him that the words "and form part of the award" should be added to paragraph 2 in order to ensure that the interpretation would be enforceable as part of the award.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to retain the present text of article 30, as amended by the representatives of the United States, the USSR and the United Kingdom.

10. It was so decided.

11. In reply to a question put by Mr. LEBEDEV (Union of Soviet Socialist Republics), Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the Secretariat had envisaged the interpretation of an award as an award in itself which, as such, should comply with the relevant provisions of article 27. Although no mention had been made of the costs of the interpretation, it was assumed that the rules applicable to the costs of the original award would also apply to the interpretation.

12. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that, since any need for an interpretation or correction of the award or for an additional award would be due to some failure or omission on the part of the arbitrators, a provision should be added, in article 33 or 34, to the effect that the arbitrators would not be entitled to remuneration in connexion with any of the functions listed in articles 30 to 32.

13. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that some such provision should be added to article 33.

14. It was so decided.

Article 31

15. Mr. GUEVARA (Philippines), referring to article 31, paragraph 1, suggested that there should be no time-limit set for a request for the correction of an award, since a correction would not alter the substance of the award.

16. Mr. MANTILLA-MOLINA (Mexico) disagreed. He pointed out that in most cases typographical errors would be so obvious that they would not even need to be corrected. If, however, a correction affecting the substance was needed - for example, if a negative had been omitted - that would be a very serious matter and could not be left open indefinitely, otherwise, the door would be open for one party to try to change the award at a later date on the pretext that it contained such a typographical error.

17. Mr. TSEGAH (Ghana) said that his delegation supported the present wording of the article.

18. In a reply to a question put by Mr. LEBEDEV (Union of Soviet Socialist Republics), Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that since article 31 related to simple errors in computation and clerical or typographical errors, it had been felt that only the provisions of article 27, paragraphs 6 and 7, need apply. If, however, members so wished, reference could be made to the provisions of article 27, paragraphs 2 to 7, which would bring the text in line with the similar provision in paragraph 30.

19. The CHAIRMAN said that, if he heard no objection, he would take it that that was the wish of members of the Committee.

20. It was so decided.

Article 32, paragraphs 1 and 2

21. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the implication in article 32, paragraph 2, that an additional award could be made only if it did not require further hearing or evidence, did not seem justifiable in view of the fact that the need for an additional award was closely connected

(Mr. Lebedev, USSR)

with the arbitrators' performance and omissions. If a party had made special claims which had not been resolved in the arbitral award and claimed an additional award, the arbitrator might conceivably refuse to make such an award, citing article 32, paragraph 2. That would mean that a party submitting additional claims in good faith would have to resort to a new arbitration process. Accordingly, he proposed that the limitative phrase should be deleted.

22. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) explained that article 32 was intended to cover obvious cases of omission on the part of the arbitrators, in other words cases in which, although all the elements necessary for an award had been submitted, the arbitrators had not rendered a complete award.

23. Mr. HOLTZMANN (United States of America) said that it should be clearly stated in the commentary to the Rules that article 32 was intended to deal only with cases in which no further hearing was required. However, the problem raised by the representative of the Soviet Union might be settled if the notion that an additional award should not need further hearing or evidence were moved to paragraph 1.

24. Mr. SZASZ (Hungary) supported the USSR proposal, pointing out that there were sufficient safeguards elsewhere to ensure that the deletion of the phrase in question would not open the door to an unnecessary extension of the arbitration proceedings.

25. Mr. PIRRUNG (Federal Republic of Germany) said that the USSR proposal might be dangerous since any party that was dissatisfied with the award might be tempted to submit additional claims for correction of the award. Article 32 should be limited to cases in which an additional award was designed to correct an unintentional omission.

26. Mr. MANTILLA-MOLINA (Mexico) expressed disagreement with the views of the USSR and Hungarian representatives. As the representative of the Federal Republic of Germany had pointed out, the USSR proposal would open the door to new claims and proceedings. He supported the principle set forth in article 32 and the amendment suggested by the United States representative, which would make it clear that the parties requesting the additional award considered that the award could be rendered without further delay. As currently worded, the implication seemed to be that it was for the arbitrators to decide whether to hold a new hearing or consider further evidence and that might lead to the situation about which the Soviet representative had voiced concern. The substance of article 32 should be retained, but it should be amended as suggested by the United States representative.

27. Mr. HOLTZMANN (United States of America) said that, in the light of the views expressed in the Committee, he was prepared to support the USSR proposal.

28. Mr. ROEHRICH (France), Mr. MELIS (Austria) and Mr. DEY (India) said that the current wording of the paragraph should be retained.

29. The CHAIRMAN suggested that the words in question should be retained and that a drafting group composed of the representatives of Mexico and the United States should consider whether they should be inserted in paragraph 1 or paragraph 2.

30. It was so decided.

Article 32, paragraph 3

31. The CHAIRMAN said that if he heard no objection, he would take it that the Committee agreed to retain the present text of article 32, paragraph 3.

32. It was so decided.

The meeting was suspended at 11.05 a.m. and resumed at 11.25 a.m.

Article 33, paragraph 1 (Introduction)

33. Mr. STROHBACH (German Democratic Republic) said that it would be appropriate to include in article 33 all rules relating to questions of costs. Consequently, he proposed that the following words should be added to the end of the first sentence of paragraph 1: "or in the respective order for the discontinuance of the arbitral proceedings".

34. He also proposed that the following special provision should be included in article 33: "The parties may, however, agree upon the costs and their apportionment".

35. The CHAIRMAN suggested that the second proposal might be dealt with under article 33, paragraph 2.

36. Mr. JENARD (Belgium) proposed that all provisions relating to costs, including article 29, paragraph 2, should be included in article 33.

37. Mr. TAKAKUWA (Japan) supported that proposal.

38. The CHAIRMAN said that, if he heard no objections, he would take it that the Committee agreed to the Belgian proposal.

39. It was so decided.

40. Mr. DYER (Observer for the Hague Conference on Private International Law) noted that the English text of article 33, paragraph 1, used the word "includes", whereas the French text read "comprennent notamment". As a result, differences of opinion could arise with regard to the possible inclusion of other costs.

41. The CHAIRMAN said that the question would be considered by the drafting group to be appointed to deal with the article.

Article 33, paragraph 1 (a)

42. Mr. GUEVARA (Philippines) said that, under the terms of paragraph 1 (a), the arbitrators would have absolute freedom in fixing costs; that would discourage parties from settling their disputes by arbitration. A standard schedule of fees should therefore be adopted to serve as a guide for arbitrators and parties, and he proposed that the following words should be added to the introductory sentence of paragraph 1: "in accordance with a schedule of fees, but not higher than the scale of fees observed by _____." The name of the appropriate body could be inserted later.

43. Mr. GUEST (United Kingdom) wondered what schedule of fees the representative of the Philippines had in mind. Since it would be difficult to state in advance what the fees for a given case should be, he was not convinced that it would be advantageous to attach a schedule of fees to the Rules.

44. Mr. GUEVARA (Philippines) said that he had in mind a schedule such as that provided for in the Statute of the Permanent Court of Arbitration.

45. Mr. JENARD (Belgium) said that he shared the concern expressed by the representative of the Philippines. It might, however, be preferable for the Committee itself to establish a schedule of fees. The procedure whereby arbitrators determined their own fees sometimes gave rise to abuses which, if allowed to continue, could be damaging to the process of arbitration.

46. Mr. PIRRUNG (Federal Republic of Germany) supported the views expressed by the representatives of the Philippines and Belgium. The parties should be given some idea in advance of the probable costs of the arbitration proceedings, and some guidelines such as the schedule of the International Chamber of Commerce should be included in the text of the Rules. However, since the costs of arbitration could vary from one region to another, the appointing authority should be permitted to amend the schedule subject to the agreement of the parties.

47. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that, although the Inter-American Commercial Arbitration Commission had originally shared the view expressed by the representative of the Philippines, subsequent experience had shown that, where maximum and minimum limits were given for a schedule of fees, it was the maximum rather than the minimum that tended to be applied. The Commission had also come to the conclusion that schedules established by international bodies were not applicable in all parts of the world. The strength of an appointing authority lay in its ability to take account of the expectations and customs of the parties in the regions where arbitration proceedings took place. As a result, it had been decided that the best compromise solution would be to provide for consultations between the appointing authority and the arbitrators before the fees were fixed. Such a procedure would have a sobering effect on the arbitrators and

would relieve the parties of the obligation of having to discuss fees directly with the arbitrators.

48. Mr. MELIS (Austria) supported the proposal of the representative of the Philippines. It was very important for the parties to know in advance the approximate cost of the arbitration proceedings. To allow arbitrators to set their own fees would leave the way open for possible abuses, which would be disadvantageous for the application of the Rules. Any schedule of fees incorporated in the UNCITRAL Rules should be worked out specifically for those Rules.

49. Mr. HOLTZMANN (United States of America) said that to allow arbitrators to fix their own fees would be regarded as too risky by parties who were concerned with keeping costs to a minimum, since the only way in which they could appeal against the amount of such fees would be through costly litigation proceedings.

50. Furthermore, his delegation felt that, for the reasons set out in paragraphs 3, 4 and 5 of document A/CN.9/114, it would be impractical and inappropriate to include a schedule of fees in the Rules because of the difficulty of applying such a schedule uniformly on a world-wide basis and because the establishment of such a schedule was an economic task outside the competence of the Committee. Once such a schedule had been devised, it would be necessary to update it continually, since aribtrators would not accept appointments under a schedule which was out of date. Furthermore, whereas most sets of rules made provision for the administering authority to decide at which point in the schedule fees were to be fixed, under the UNCITRAL Rules there might be no appointing authority. Moreover, a schedule of fees would be inappropriate in rules designed for ad hoc arbitration.

51. The best alternative would be to provide for flexibility in the Rules so that the parties could ask the appointing authority, if there was one, to consult with the arbitrators with regard to the fixing of fees. Accordingly, his delegation, in conjunction with the delegation of India proposed that paragraph 1 (a) of article 33 should read:

> "The fees of the arbitrators to be stated separately and to be fixed by the arbitrators themselves; provided, however, that when an appointing authority has been designated, and when a party so requests and the appointing authority consents to perform the function, the arbitrators shall fix their fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitrators concerning the fees;".

52. The CHAIRMAN acknowledged that the United States representative had produced a convincing argument, but pointed out that frequently only one of the arbitrators was appointed by the appointing authority.

53. Mr. HOLTZMANN (United States of America) replied that the United States and Indian proposal was intended to conform to the spirit of the Rules, under which all the arbitrators, once they were appointed, were treated on an equal footing. In

(Mr. Holtzmann, United States)

his experience, the arbitral tribunal fixed the amount of the fees, which were divided equally among the three arbitrators, except where the presiding arbitrator received more in view of his greater responsibility or administrative duties.

54. The CHAIRMAN pointed out that the Committee had before it four proposals relating to article 33, paragraph 1 (a): the first, which seemed furthest removed from the text of article 33, would provide for the establishment of an independent schedule to be incorporated in the Rules; the second would refer to the schedules laid down by existing arbitral institutions; the third would require the appointing authority under certain conditions to advise the arbitrators with regard to the setting of fees; and the fourth would retain the current text of article 33, which left the arbitrators free to fix the cost of arbitration. He noted that the delegations of the Philippines, Belgium, Austria, the Federal Republic of Germany and France supported one of the first two proposals, while the delegations of the United States, India, the United Kingdom and Australia generally opposed the establishment of a schedule of fees and therefore favoured the third or fourth proposals.

55. Mrs. OYEKUNLE (Nigeria) felt that it would be difficult at the current stage to establish a schedule. On the other hand, she did not feel that the United States and Indian proposal would solve the problem. Clearly, further discussions were needed.

56. Mr. BOSTON (Sierre Leone) supported those speakers who felt that the power of the arbitrators to fix the fees should be limited. He therefore endorsed the first proposal or, if it was impracticable, then the second.

57. Mr. DZIKIEWICZ (Poland) said he did not support the establishment of a schedule of fees. He suggested that, as a compromise, the words "taking into account the amount in dispute and the duration of the arbitral proceedings" should be added at the end of paragraph 1 (a).

58. Mr. SHAYO (Observer for the East African Community) took the view that it was extremely difficult to establish a schedule. He therefore supported the United States and Indian proposal.

59. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that consultations should be held with a view to finding a compromise solution.

60. The CHAIRMAN accordingly suggested that a conciliation group consisting of the representatives of the United States, the Union of Soviet Socialist Republics, Belgium, the Philippines, Nigeria, Austria and the United Kingdom, should be established to try to formulate a compromise proposal.

61. It was so decided.

Article 33, paragraph 1 (b) and (c)

62. The CHAIRMAN noted that there appeared to be no comments with regard to paragraph 1 (b) and (c).

Article 33, paragraph 1 (d)

63. Mr. MELIS (Austria) suggested that paragraph 1 (d) should be deleted. Since the witnesses were generally produced by the parties who wished them to appear, their travel expenses should not be included in the costs of arbitration.

64. The CHAIRMAN pointed out that, in some cases, witnesses were called by both parties or by the arbitrators themselves.

65. Mr. MELIS (Austria) replied that the arbitrators had no power to force witnesses to appear; they could only request the parties to make the necessary arangements.

66. Mr. TSEGAH (Ghana) suggested that, if paragraph 1 (d) was retained, additional wording should be included which would explicitly provide for those cases where witnesses were called by the arbitrators.

67. Mr. GUEST (United Kingdom) took the view that, particularly in the case of international arbitration, the travel expenses of witnesses should be part of the costs of arbitration, without regard to which party had called them. Since arbitral proceedings were often held in Europe, the exclusion of travel expenses from the costs of arbitration would be prejudicial to many developing countries.

68. Mr. HOLTZMANN (United States of America) added that the travel expenses of witnesses could be a major element in the costs of arbitration. He supported the retention of paragraph 1 (d), since article 33, paragraph 2, empowered the arbitrators to apportion the costs between the parties if they considered that apportionment was reasonable.

69. Mr. ROEHRICH (France) supported the Austrian proposal for the deletion of paragraph 1 (d). A provision under which the travel expenses of witnesses were defrayed by the parties who had produced those witnesses would help to discourage parties from calling the maximum number of witnesses in order to influence the final award. He felt that it was indeed possible to distinguish the witnesses called by the parties from those who had been called by the arbitrators.

70. Mr. DEY (India) supported the views expressed by the United Kingdom and the United States representatives. He emphasized that, in many cases, the claimant had a genuine claim which was strongly resisted by the respondent, and, in order to prove his claim, he depended upon oral evidence. He felt that the words "to the extent such expenses are approved by the arbitrators" in paragraph 1 (d) were an adequate safeguard to prevent the parties from abusing their right to call witnesses.

71. Mr. GUEVARA (Philippines) believed that the travel expenses of witnesses should be excluded from the costs of arbitration. It was possible for a party to produce so many witnesses that the costs of arbitration became an unbearable burden. Such expenses should be treated on a par with those incurred by a party in hiring a counsel to defend him in court.

72. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) explained that, in paragraph 1 (d), no distinction had been drawn between the witnesses called by the parties and those called by the arbitrators. It had been felt that failure to provide compensation for the travel expenses of witnesses would be a considerable hindrance to the claimant and would be unjustified. On the other hand, the words "to the extent such expenses are approved" had been added in order to avoid abuse of the right to call witnesses. That provision had nothing to do with article 33, paragraph 2, which related to the apportionment of the costs of arbitration between the parties.

73. Mr. ST. JOHN (Australia) supported the retention of paragraph 1 (d), but stressed the importance of the proviso that such expenses must be approved by the arbitrators. The provision could, however, be amplified in order to make it quite clear that the arbitrators had full discretion in deciding whether the expenses were justifiable.

74. Mrs. OYEKUNLE (Nigeria) supported the retention of paragraph 1 (d), but suggested that the word "previously" should be inserted before the word "approved".

75. Mr. SZASZ, (Hungary) supported the retention of paragraph 1 (d) as it stood.

76. Mr. MANTILLA-MOLINA (Mexico) also supported the retention of paragraph 1 (d), but suggested that it should be extended to cover the subsistence costs incurred by witnesses. He also supported the Nigerian amendment.

77. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that paragraph 1 (d) was also intended to cover the subsistence costs of witnesses.

78. The CHAIRMAN said that, if he heard no objection, he would take it that, subject to the addition of appropriate wording making it clear that it also covered subsistence costs, the Committee agreed in principle to retain article 33, paragraph 1 (d).

79. It was so decided.

The meeting rose at 1 p.m.