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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth Session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 13th MEETING

Held at Headquarters, New York,  
on Tuesday, 20 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

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International commercial arbitration (continued)

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The meeting was called to order at 3.25 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 33 (continued)

1. Mr. HOLTZMANN (United States of America) said that his delegation and the delegation of India proposed that paragraph 1 (e) should be amended to read:

"(e) Each party shall bear its own expenses for legal assistance, provided, however, that the arbitrators may include such expenses as costs of the arbitration if they determine it is appropriate to do so under the circumstances of the case, and then only if such costs were claimed during the arbitral proceedings and to the extent that the amount is deemed reasonable by the arbitrators."

2. They further proposed that paragraph 2 should be amended to read:

"2. The arbitrators, taking into account the circumstances of the case, shall determine in the award which party shall bear each of the costs of the arbitration or in what proportions such costs shall be borne by the parties."

3. The sponsors had found that there was a wide variety of practice in different countries as to whether parties bore their own costs of arbitration or whether the costs were borne by the unsuccessful party. It seemed, however, that no arbitration rules went so far as to provide that the unsuccessful party should pay compensation for legal assistance of the successful party without exception, as was the case in paragraph 1 (e).

4. Under the rules of procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, each party bore its own expenses, including lawyers' fees, but the Arbitration Commission could direct that one party should reimburse the other party because of delaying tactics or bad faith. The arbitration rules of the German Democratic Republic provided that the lawyers' fees should be paid by the parties themselves, but that the arbitrators could require the unsuccessful party to pay those fees if he had displayed bad faith. Similar rules existed in other CMEA countries and also in the Netherlands, where the party which had incurred costs paid them unless the arbitrators decided otherwise for specific reasons. In the United States, each party bore its own costs, with rare exceptions. Most international arbitration rules were silent on the subject of costs; that was the case with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the ICC and ECE rules, and the rules of the Inter-American Commercial Arbitration Commission.

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(Mr. Holtzmann, United States)

5. The sponsors felt that a question of principle was involved, since a poorer party might hesitate to seek justice if it feared that it might have to bear the costs of a richer party. They considered that some provision should be made for costs, but that it should be flexible: it was, for example, difficult to prove bad faith.
6. Mr. ROEHRICH (France) said that the provisions in paragraph 1 (e) of the existing draft were very flexible, and suggested that that text should be retained. The costs of a case could be very heavy, and there was no reason why the successful party should be forced to pay them.
7. Mr. PIRRUNG (Federal Republic of Germany) agreed that the provision in paragraph 1 (e) was sufficiently flexible and was likely to produce satisfactory results.
8. Mr. GUEVARA (Philippines) supported the proposal of the United States and Indian delegations. That proposal was in line with the law in his own country, under which each party bore its own expenses and the only exception was where a court specifically declared that the costs should be borne by one party, for example in cases where the claimant was compelled to litigate because of the repressive acts of the respondent.
9. The CHAIRMAN said that it would be possible to leave paragraph 1 (e) as it stood but to mention legal assistance in paragraph 2.
10. Mr. ROEHRICH (France) said that it would be difficult to do that, since paragraph 2 concerned the apportionment of costs whereas paragraph 1 (e) was part of the list of costs to be fixed by the arbitrators.
11. The CHAIRMAN suggested that paragraph 1 (e) should be amended to read: "The compensation for legal assistance of the parties;". It would be left to the arbitrators under paragraph 2 to decide who should meet the costs of that legal assistance.
12. Mr. PIRRUNG (Federal Republic of Germany) thought that the principle set forth in paragraph 2 of the secretariat text was too important to be omitted from the rules.
13. Mr. HOLTZMANN (United States of America) pointed out that the proposed amendment to paragraph 2 reproduced almost exactly a provision in the rules of the International Chamber of Commerce; it also followed the principle contained in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
14. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that, as explained in the commentary (A/CN.9/112/Add.1), paragraph 2 of the secretariat

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(Mr. Sanders)

text was based on the provisions in article 43 of the ECE Arbitration Rules and article VII, paragraph 7, of the ECAFE Arbitration Rules. The secretariat had also had in mind cases where a party might not be completely successful in a case and where it would be partly compensated for costs of legal assistance. Article 33 provided that the arbitrators should fix the costs of the travel expenses of witnesses and compensation for legal assistance, in order to ensure that the successful party would be compensated only to the extent that was reasonable.

15. Mr. HOLTZMANN (United States of America) pointed out that the ECE Rules were designed for a region where the predominant practice was that the unsuccessful party should in principle pay the costs of the legal assistance of the successful party; however, rules of international application, such as those he had mentioned earlier, adopted a neutral approach.

16. Mr. MANTILLA-MOLINA (Mexico) said that he personally preferred paragraph 2 of the secretariat text; it would be unfair for the successful party to incur costs in order to vindicate his rights and then not receive compensation for them.

17. Mr. ROEHRICH (France), Mr. PIRRUNG (Federal Republic of Germany), Mr. MELIS (Austria) and Mrs. OYEKUNLE (Nigeria) said that they would prefer to retain paragraph 2 of the secretariat text.

18. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation preferred the version of paragraph 2 in the secretariat draft, since it specified more clearly how costs should be apportioned. It was flexible, but at the same time set forth the general principle that the costs of arbitration should be borne by the unsuccessful party. He reserved his position on paragraph 1 (e).

19. Mr. TAKAKUWA (Japan) said that he preferred the amended version of paragraph 2.

20. The CHAIRMAN noted that the majority preferred the secretariat version of paragraph 2 for all arbitration costs except legal assistance fees; for such fees, the majority preferred to leave the arbitrators free to decide if compensation should be made. Therefore paragraph 2 would remain unchanged and would relate to all costs except those specified in paragraph 1 (e); the arbitrators would be free to decide on the apportionment of the costs specified in paragraph 1 (e), and no principle of compensation would be laid down.

21. Mr. GUEST (United Kingdom) said that paragraph 1 (e) could be left unchanged since it formed part of the list of costs of arbitration and had nothing to do with the apportionment of costs.

22. The CHAIRMAN observed that the question at issue was whether the costs referred to in subparagraph (e) were necessarily covered by the rule set out in paragraph 2 or whether a separate rule should be laid down for them.

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23. Mr. GUEST (United Kingdom) said that subparagraph (e) was, in any event, not the appropriate place for the inclusion of any such rule. The purpose of that subparagraph was to define the costs in question and not to specify how they were to be apportioned. Any special rule which might be laid down for that purpose should be placed in a separate paragraph or in paragraph 2.

24. Mr. ROEHRICH (France) suggested that there was no need for an additional paragraph; a provision stipulating that the expenses referred to in subparagraph (e) were excepted from the general rule could be included in paragraph 2.

25. He pointed out that the use of the word "notamment" in the French text of paragraph 1 gave the impression that the list of costs which followed was not exhaustive but merely illustrative. He proposed therefore that that word should be deleted from the French version.

26. The CHAIRMAN drew attention to the fact that it had been agreed to include in paragraph 1 (f) the costs, if any, arising from the involvement of the Secretary-General of the Permanent Court of Arbitration in an arbitration case. Such costs were mainly for the provision of translation services. He requested the representatives of France and the United States to redraft article 33 to take into account all the changes approved by the Committee at the preceding and present meetings, it being understood that for certain provisions they would have to await the conclusion of the deliberations of the conciliation group.

27. It was so decided.

28. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that the drafting group should formulate subparagraph (f) in such a way as not to encourage the appointing authority to seek fees for its services in all cases.

29. The CHAIRMAN pointed out that the costs referred to in all the subparagraphs might not necessarily arise in all cases. If the Committee felt it necessary to stress that point, it could add the words "if any" in each subparagraph.

30. Mr. PIRRUNG (Federal Republic of Germany) said that he was not sure whether the commentary on article 33 would specify when the apportionment of costs should be made according to a different principle from that enunciated in paragraph 2. He was thinking specifically of the case in which costs were incurred because the successful party had failed to nominate an arbitrator. In such cases, the costs in question should probably be borne by the successful party.

31. The CHAIRMAN pointed out that there would be no commentaries accompanying the draft rules. He encouraged interested representatives to write commentaries for publication in legal journals in their respective countries.

Article 34, paragraph 1

32. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that

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(Mr. Sanders)

the costs of arbitration referred to were the fees and expenses of the arbitrators themselves.

33. The CHAIRMAN observed that the juxtaposition of articles 33 and 34 gave the erroneous impression that the deposit of costs referred to in the latter pertained to all the costs enumerated in the former. In the light of the Special Consultant's explanation, however, lawyers' fees were not covered by article 34. Accordingly, the drafting group for article 33 might consider removing them from the list in paragraph 1 and placing them in a separate article 33 bis.

34. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that, while only the costs of the arbitrators themselves had been envisaged in article 34, in practice the arbitrators might require the deposit of additional amounts for the purpose of paying for any necessary expert advice.

35. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that IACAC intended to adopt the UNCITRAL arbitration rules as its own, as it believed that they would represent a vast improvement over all the existing rules. However, IACAC required the payment of an administrative fee at the beginning of an arbitration case, and he urged the Committee to include a provision requiring a deposit to cover the fees of the appointing authority or at least to draft article 34 in such a way as not to preclude the requirement of a deposit to cover such costs.

36. Mr. HOLTZMANN (United States of America) suggested that the words "costs of the arbitration" should be replaced by a more specific enumeration, which would include the fees of the arbitrators, travel expenses incurred by them and the expenses of any experts called upon by the arbitrators.

37. With regard to the point just raised by the observer for IACAC, he pointed out that his delegation's proposal for the addition of a new paragraph 2 bis was motivated by the same desire to have the fees of the appointing authority included in article 34.

38. The CHAIRMAN said that it was not necessary to repeat in article 34 the enumeration of costs contained in article 33, paragraph 1. It was sufficient merely to specify which subparagraphs of article 33, paragraph 1, were covered by the provisions of article 34.

#### Article 34, paragraph 2

39. Mr. MANTILLA-MOLINA (Mexico) observed that the word "require" in the English version ("requerir" in the French version) had been translated by the word "pedir" in the Spanish version. He could not understand why the verb "requerir" in Spanish, which sprang from the same root as the words in the other two languages, had not been used. He stressed the need for particular care in the translation of legal documents and requested that the Spanish text should be amended by the replacement of "pedir" by "requerir".

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40. Mr. JENARD (Belgium) said that the French and the Belgian delegations would actually prefer that the word "requérir" not be used in the French version. He suggested that it should be replaced by the word "demander".

41. The CHAIRMAN pointed out that the Committee would have the opportunity during the second reading of the draft rules to ensure the concordance of all language versions of the articles.

Article 34, new paragraph 2 bis

42. Mr. HOLTZMANN (United States of America) drew attention to his delegation's proposal for the addition of a new paragraph 2 bis and observed that the solution eventually adopted by the conciliation group for article 33, paragraph 1 (a), would have a direct bearing on that proposal. He therefore suggested that the Committee should postpone its consideration of the proposal until a decision had been taken on article 33, paragraph 1 (a). The same conciliation group might also be requested to consider the United States proposal for paragraph 2 bis.

43. It was so decided.

Article 34, paragraph 3

44. Mr. ROEHRICH (France) proposed that the phrase "les arbitres notifient le fait aux parties" in the French version should be amended to read "les arbitres mettent en demeure les parties".

45. Mr. TSEGAH (Ghana) observed that paragraph 3 would cover default by both parties but not default by only one of the parties.

46. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that, since the claimant had the greatest interest in getting the arbitration process under way, he would most likely make the required deposit on time. If the respondent defaulted, both parties would be notified of that fact and either the respondent would make the required deposit or the claimant might do so in his stead. The latter could recover any costs which he advanced for that purpose in the event that he won the case.

47. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that a solution to the problem raised by the representative of Ghana was to be found in article 29, paragraph 1, which provided for the discontinuance of the arbitral proceedings if their continuance became impossible for any reason.

48. Mr. MANTILLA-MOLINA (Mexico) said that he too was concerned at the lack of a sanction to be applied in the event that one party failed to make the required deposit. The representative of the Soviet Union had indicated one possible solution to the problem, but it would not suffice to solve all cases. He hoped that a definitive solution could be found.

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49. Mr. DZIKIEWICZ (Poland) proposed that the last sentence of the alternative text for article 34, paragraph 4, contained in document A/CN.9/113 should be added at the end of paragraph 3.

50. The CHAIRMAN pointed out that the Committee had already decided to use the word "termination" instead of "suspension" in the draft rules. He would take it that the Committee adopted the Polish proposal with that one change.

51. It was so decided.

Article 34, paragraph 4

52. Mr. HOLTZMANN (United States of America), supported by Mr. DEY (India), proposed that paragraph 4 be amended to read: "The arbitrators shall render an accounting to the parties of all deposits received and return any unexpended balance to the parties, except that, where the appointing authority has received the deposit pursuant to paragraph 2 bis, then such accounting shall be made by the appointing authority which shall return any unexpended balance to the parties."

53. The CHAIRMAN suggested that the new text proposed by the representatives of the United States and India be considered by the conciliation group.

54. It was so decided.

55. Mr. MANTILLA-MOLINA (Mexico), referring to the existing text, said that it was not clear when the arbitrators should render an accounting or return any unexpended balance. He therefore proposed that the words "Once the award has been made" should be inserted at the beginning of the sentence.

56. It was so decided.

Article 34, new paragraph 5

57. Mr. HOLTZMANN (United States of America) proposed that a new paragraph 5 be added to the existing text. It would read: "An appointing authority, upon being requested to appoint an arbitrator or to perform other functions, may require each party to deposit an equal amount as an advance for any fees and expenses of the appointing authority in connexion with its services. If such deposit is not paid in full within 30 days after a request therefore is sent, the appointing authority shall notify the parties of the default and give the other party an opportunity to make the required payment."

58. The payment of fees to those appointing authorities which charged them would therefore be subject to the same regulations as the payment of fees to arbitrators.

59. Mrs. OYEKUNLE (Nigeria) said that such a paragraph was unnecessary. The question of the payment of fees was already covered under the provisions of article 33, paragraph 1 (f), and article 34, paragraph 1.

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60. The CHAIRMAN said that, since the appointing authority had completed its task by the time the arbitrators began theirs, the fees of the appointing authority and those of the arbitrators could not be deposited at the same time. The payment of appointing authorities' fees was not therefore covered under the provisions of article 34, paragraph 1.
61. Mrs. OYEKUNLE (Nigeria) said that the function of the appointing authority did not cease with the appointment of the arbitrators. The appointing authority could be referred to during the course of a dispute.
62. Mr. MANTILLA-MOLINA (Mexico) asked what amounts were involved in the payment of appointing authorities' fees.
63. Mr. HOLTZMANN (United States of America) said that, while he could give no exact figures, the fee would not be more and might be less than the administrative fee charged by the International Chamber of Commerce and other bodies. Some appointing authorities charged no fee.
64. With reference to the point raised by the representative of Nigeria, he said that several appointing authorities had informed him that, after the initial fee had been paid, no additional fee would be required if they were consulted again in the course of a dispute. That would probably be the case with other appointing authorities.
65. Mrs. OYEKUNLE (Nigeria) said that, if many appointing authorities charged no fee, it was pointless to encourage them to start doing so by including the proposed new paragraph 5.
66. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that IACAC charged 3 per cent on the first \$10,000 of a claim; for claims greater than \$10,000, the percentage fell rapidly. It would have to retain the right to charge fees in advance, since there was often a time lag of several months between the initiation of a case and the appointment of arbitrators. The new paragraph 5 proposed by the representatives of the United States and India, or a similar provision, was therefore desirable.
67. Mr. MANTILLA-MOLINA (Mexico) said that appointing authorities should perform their function as a public service without charging fees, since the imposition of large fees would discourage the use of arbitration. The proposed new paragraph 5 should not therefore be adopted.
68. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that the figures he had given were maxima. The minimum fee was only \$25.
69. Mr. ROEHRICH (France) said that the functions of the appointing authority should be seen as a public service. He therefore firmly opposed the proposed new paragraph 5.

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70. Mr. AYLING (United Kingdom) expressed support for the arguments put forward by the representative of Nigeria. Furthermore, the question at issue was not whether appointing authorities should charge fees or not, but whether the UNCITRAL Arbitration Rules could commit appointing authorities one way or another. In practice, an appointing authority, when asked to appoint arbitrators, would follow its own regulations concerning the payment of fees.
71. Mr. JENARD (Belgium) and Mr. BOSTON (Sierra Leone) expressed support for the views advanced by the representative of Nigeria.
72. Mr. ST. JOHN (Australia) said that, while he had no serious objection to the proposed new paragraph 5, it was not for the Committee to decide whether appointing authorities should charge fees.
73. Mr. HOLTZMANN (United States of America) said that, while it was preferable for parties to be warned that the appointing authority might charge a fee, he would not insist on his proposal for a new paragraph 5.
74. The CHAIRMAN suggested that a drafting group composed of the representatives of France and the United States should be requested to redraft paragraphs 1 to 4 where necessary, in order to incorporate the changes accepted by the Committee.
75. It was so decided.
76. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) suggested that, when considering article 34, paragraph 4, the drafting group might wish to take into account article 27, paragraph 6, and ask arbitrators to render the accounting to the parties when they communicated copies of the award.
- Articles 28 and 28 bis
77. Mr. HOLTZMANN (United States of America) read out a text for articles 28 and 28 bis proposed by the delegations of France, Hungary and the United States.
78. Mr. MANTILLA-MOLINA (Mexico) requested that a Spanish translation be provided of the new text.
79. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, while in principle he agreed about the need for translations of texts being discussed, he himself had not insisted on a Russian translation of the new text, since to do so would delay the work of the Committee and since the text was not an official document.
80. Mr. ROEHRICH (France) supported the representative of the Soviet Union. Some concessions had to be made if the Committee was to make progress.
81. Mr. MANTILLA-MOLINA (Mexico) said that he would be prepared to work on the basis of the English text, but emphasized that his decision should not be seen as a precedent for future practice.

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82. The CHAIRMAN proposed that discussion should be based on the English text.
83. It was so decided.

The meeting rose at 5.55 p.m.

