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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 14th MEETING

Held at Headquarters, New York,
on Wednesday, 21 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS



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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 28

1. The CHAIRMAN invited comments on the following text proposed by the delegations of France, Hungary and the United States which would replace article 28 in document A/CN.9/112.

"Applicable law

Article 28

"1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. /Such designation must be contained in an express clause, or unambiguously result from the contract./ Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it chooses.

2. The arbitral tribunal shall decide ex aequo et bono or as amiables compositeurs only if the parties have expressly authorized the arbitrators to do so and if the law of the country where the award is made permits such arbitration.

Effect of contract

Article 28 bis

In making its award the arbitral tribunal shall /be governed by/ /apply/ the terms of the contract, and shall take into account as well any usages of the trade applicable to the transaction."

2. Mr. GUEST (United Kingdom), referring to article 28, paragraph 1, of the proposed new text, said that his delegation would prefer it to include no reference to conflict of laws rules or applicable law since such questions were to be resolved by the terms of the contract and the arbitrators. His delegation could accept paragraph 1 of the proposed text, provided that the sentence in square brackets was deleted, since it would not necessarily be in accordance with all legal systems.

3. Mr. JENARD (Belgium), Mr. PIRRUNG (Federal Republic of Germany), Mr. MELIS (Austria) and Mr. MANTILLA-MOLINA (Mexico) endorsed the views expressed by the representative of the United Kingdom.

/...

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to delete the second sentence of the proposed text of article 28, paragraph 1, submitted by the delegations of France, Hungary and the United States.

5. It was so decided.

6. Mr. PIRRUNG (Federal Republic of Germany) said that the use of the word "chooses" in the last sentence of paragraph 1 suggested that the arbitrators would have complete freedom with regard to the conflict of laws rules to be applied. He suggested that it should be replaced by the words "deems applicable".

7. Mr. MANTILLA-MOLINA (Mexico) supported the views expressed by the representative of the Federal Republic of Germany.

8. Mr. RUZICKA (Czechoslovakia) said that while he supported the views expressed by the representative of the Federal Republic of Germany, he felt that the paragraph should go further in limiting the freedom of the arbitrators. Consequently, he proposed that the word "chooses" should be replaced by the words "deems applicable together with the rules of the country of the respondent".

9. Mr. SZÁSZ (Hungary) said that, in general, he preferred the draft text as it stood. He suggested, however, that it would be preferable to replace the word "chooses" by the phrase "finds applicable".

10. Mr. JENARD (Belgium) proposed that the words "which it chooses" at the end of paragraph 1 of the proposed text should be deleted.

11. Mrs. OYEKUNLE (Nigeria) said that the wording proposed by the representative of Czechoslovakia was too restrictive and would be unfair to the parties concerned. It would be preferable to use the words "deems applicable".

12. Mr. HOLTZMANN (United States of America) proposed that the word "chooses" should be replaced by the words "considers applicable".

13. Mr. TAKAKUWA (Japan) proposed that the final sentence of paragraph 1 should be deleted.

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to replace the word "chooses" at the end of paragraph 1 of the proposed text by the words "considers applicable".

15. It was so decided.

16. Mr. DYER (Observer for the Hague Conference on Private International Law) noted that, unlike article 2 of the Hague Convention on the Law Applicable to the

(Mr. Dyer)

International Sale of Goods of 15 June 1955, the first sentence of paragraph 1 contained no specific reference to internal law. He assumed, however, that the reference to the law designated by the parties was intended to have the same effect as the relevant article of the Hague Convention.

17. The CHAIRMAN said that such was the understanding of the Committee.

18. He asked why article 28, paragraph 2, of the text proposed by France, Hungary and the United States contained both terms "ex aequo et bono" and "amiables compositeurs". He suggested that the term "amiables compositeurs" might be placed in parentheses as in the French text of document A/CN.9/112.

19. Mr. HOLZMANN (United States of America) said that different legal systems placed different interpretations on the two terms. Furthermore, there was disagreement among legal scholars as to their exact meaning. Consequently, the sponsors of the proposal had decided to include both terms in the text so that parties would be free to use either, depending on the legal system to be applied.

20. Mr. ROEHRICH (France) proposed that, in the French text, the order of the two terms should be reversed and the words "ex aequo et bono" should be placed in parentheses.

21. The CHAIRMAN said that the question could be decided by the drafting group.

22. Mr. GUEST (United Kingdom) said that article 28, paragraph 2, of the proposed text was generally acceptable. However, it would be preferable to replace the words "the law of the country where the award is made" by the words "the law governing the arbitration". Although in most cases the two would be the same, under some systems, parties could choose the law to be applied. Furthermore, under the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, courts could refuse to recognize or enforce an award because of the composition of the arbitral authority or because the arbitral proceedings had not been in accordance with the applicable law as agreed on by the parties or with the law of the country where the arbitration had taken place.

23. Mr. MANTILLA-MOLINA (Mexico) supported the proposal of the representative of the United Kingdom. Furthermore, he felt that paragraph 2 should not be included under the heading "Applicable law" since it related to circumstances in which the arbitrators were to make the award not according to the applicable law, but as amiables compositeurs. Consequently, he proposed that paragraph 2 should be a separate article.

24. Mr. JENARD (Belgium) said that, while he shared the views expressed by the representative of the United Kingdom, he wondered whether in the light of the provisions of article 28, paragraph 1, of the proposed new text, it was necessary to make a specific reference to the law governing the arbitration.

25. Mr. ST. JOHN (Australia) supported the proposal of the representative of the United Kingdom. Paragraph 2 should contain a specific reference to the law governing the arbitration.

26. Mr. TAKAKUWA (Japan) also supported the proposal of the representative of the United Kingdom.

27. Mr. DYER (Observer for the Hague Conference on Private International Law) said that the reference to the law of the country where the award was made as contained in the original proposed new text of article 28, paragraph 2, would cover the part of that country's legislation which permitted arbitration according to foreign rules. Consequently, even if the paragraph was changed as proposed by the representative of the United Kingdom, situations might still arise where a country permitting arbitration under foreign law did not permit arbitrators to decide ex aequo et bono or as amiables compositeurs under its own rules of public policy.

28. The CHAIRMAN said that the phrase proposed by the representative of the United Kingdom should be considered only as a warning and not as a complete safeguard. If an award was to be executed in another country, it could always happen that a decision made by arbitrators as amiables compositeurs would be contrary to public policy in the country of execution. That applied to all the rules and not simply to article 28.

29. Mr. HOLTZMANN (United States of America) said that, while he supported the United Kingdom proposal, he would prefer the words "arbitral procedure" to be used instead of the word "arbitration", in order to retain the exact wording of the New York Convention.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to the United Kingdom proposal, as amended by the representative of the United States.

31. It was so decided.

32. The CHAIRMAN, referring to the proposal made by the representative of Mexico, suggested that the two paragraphs could be retained in a single article 28, to be entitled "Applicable law and amiables compositeurs".

33. Mr. MANTILLA-MOLINA (Mexico) agreed with that suggestion. He also asked that the report of the Committee should show that one delegation considered that the validity of an award made by arbitrators ex aequo et bono or as amiables compositeurs should be that recognized by the law of the country in which the award was to be executed.

34. Mr. GUEVARA (Philippines), referring to the proposed new article 28 bis, said that the term "any" was too broad. The usages to be taken into account should be those which were generally recognized, in order to prevent arbitrators from applying only local usages which would be unfair to the parties. Furthermore, the articles should state that, in the absence of such generally recognized usages, the general principles of equity should be applied.

35. The CHAIRMAN wondered whether the use of the word "applicable" might not cover the point made by the representative of the Philippines, since it would be within the discretion of the arbitrators to decide if particular usages were applicable.

36. Mr. ROEHRICH (France), referring to the two expressions appearing in square brackets, said that his delegation preferred the term "apply" since it placed the terms of the contract and the usages of the trade on an equal footing.

37. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation would prefer the words "be governed by". Moreover, he wondered whether in fact it was necessary to mention the usages of the trade. Finally, it was not clear from the text whether the provisions of the proposed article 28 bis were applicable when the arbitrators acted as amiables compositeurs.

38. The CHAIRMAN pointed out that when arbitrators acted as amiables compositeurs they must in any event apply the terms of the contract. Whether they were also bound to apply the usages of the trade was not as clear.

39. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation would prefer to have one article instead of two. He therefore suggested that article 28, paragraph 4, as contained in document A/CN.9/112, should become the third paragraph of the revised article 28 and that the proposed article 28 bis should be omitted.

40. Mr. MANTILLA-MOLINA (Mexico) said that he doubted whether the terms of the contract should be taken into account when the arbitrators acted as amiable compositeurs, in view of the fact that it might have been those very terms that had caused the parties to resort to arbitration. In cases where the economic circumstances of the parties had changed, strict application of the terms of the contract might create unnecessary hardship; accordingly, it should be left to the discretion of the arbitrators to determine to what extent the terms of the contract and the usages of the trade should be applied.

41. Mrs. BELEVA (Bulgaria) supported the proposal to make article 28, paragraph 4, as contained in document A/CN.9/112 the third paragraph of the revised article 28.

42. Mr. SZÁSZ (Hungary) said that he, too, could accept that proposal, provided that the words "applicable to the transaction" were added at the end of the paragraph to make quite clear the exact scope of the usages involved.

43. Mr. DEY (India) also supported the proposal.

44. Mr. HOLTZMANN (United States of America) said that his delegation could agree to having just one article, provided that the term "shall be governed by" or "shall apply" was used in respect of the terms of the contract, in order to give greater emphasis to the provisions of the contract than had been done in document A/CN.9/112. His delegation would, however, object to the retention of the wording in article 28, paragraph 4, of document A/CN.9/112 since it made no distinction between the importance of the contract and that of trade usages.

45. Mr. DYER (Observer for the Hague Conference on Private International Law), said that, since article 28 laid down the general rule concerning the applicable law and the proposed new article 28 bis provided for the arbitrators to make exceptions to that rule, it would be logical to combine them.

46. The CHAIRMAN noted that there seemed to be broad agreement that there should be a single article; article 28 would thus have three paragraphs. There also seemed to be general agreement that the third paragraph should start with the words "in any case" like the similar provision in the original draft article 28, paragraph 4.

47. Mr. MANTILLA-MOLINA (Mexico) said that the record should show that one delegation had dissented from the general view and had expressed the opinion that when arbitrators acted as amiables compositeurs, notwithstanding the clauses of the contract, they should take into account the possibility that strict application of those clauses might cause excessive hardship.

48. The CHAIRMAN pointed out that the Committee still had to decide whether to use the same verb with respect to the terms of the contract and the usages of the trade and whether to state which usages were applicable.

49. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation could, as a compromise, accept the verb "apply".

50. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that the question whether to stress that the contract terms should be applied was not a minor one since in many cases there was a basic conflict between the two main principles involved in applying a contract, namely, pacta sunt servanda and rebus sic stantibus. Moreover, both the European Convention on International Commercial Arbitration and the ICC Rules used the same term, "take into account" in respect of both the contract and the usages of the trade, in order to give the arbitrators greater latitude to determine a case having regard to changed circumstances which might cause excessive hardship if the contract was strictly applied.

51. The CHAIRMAN noted that there seemed to be general agreement that the term "take into account" should be used in both cases.

52. It was so decided.

53. Mr. MANTILLA-MOLINA (Mexico), referring to the question of whether the article should state which usages were applicable, said that, although it might seem obvious, it would be useful to retain the words "applicable to the transaction" at the end of the new third paragraph of article 28.

54. It was so decided.

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

55. The CHAIRMAN pointed out that the Committee had as yet to decide whether to keep the headings of the individual articles.

56. Mr. ROEHRICH (France), supported by Mr. MELIS (Austria), proposed that the headings of the individual articles should be deleted since the text was already divided into sections, each of which had a heading.

57. Mr. HOLTZMANN((United States of America) proposed that the headings of the individual articles should be retained in order to make it easier to refer to the Rules.

58. Mr. ST. JOHN (Australia), Mr. BOSTON (Sierra Leone) and Mr. SZÁSZ (Hungary) supported the United States proposal.

59. The Committee agreed to retain the headings of the individual articles.

60. Mr. DZIKIEWICZ (Poland) said that his delegation was in favour of the whole text being entitled "UNCITRAL Arbitration Rules".

61. The CHAIRMAN noted that the Committee had already agreed on that title.

62. He invited the Committee to commence the second reading of the draft UNCITRAL Arbitration Rules.

Articles 1 and 2 (A/CN.9/IX/C.2/CRP.1)

63. The CHAIRMAN drew attention to document A/CN.9/IX/C.2/CRP.1, containing the text of article 1 as redrafted by the drafting group, which would replace articles 1 and 2 of the text in document A/CN.9/112.

64. If he heard no objection he would take it that the heading, "Scope of application", was acceptable.

65. It was so decided.

66. Mrs. BELEVA (Bulgaria) said that her delegation believed that any agreement to refer disputes to arbitration under the UNCITRAL Rules must be in writing as must any agreement regarding any modification thereof. Accordingly, she proposed that the words "in writing" should be retained.

67. Mr. DZIKIEWICZ (Poland) said that he accepted the revised draft provided that the brackets around the words "in writing" were removed.

68. Mr. GUEST (United Kingdom), supported by Mr. PIRRUNG (Federal Republic of Germany), said that the words in question should be deleted since in practice, situations might arise in which parties to a contract might wish to give effect to an oral agreement.

69. Mr. MANTILLA-MOLINA (Mexico), supported by Mr. TAKAKUWA (Japan), Mr. GUEVARA (Philippines) and Mr. SZÁSZ (Hungary), opposed the deletion of the words "in writing" in both places where they occurred in article 1, since an arbitration agreement that was not in writing might be difficult to prove.

70. Mr. JENARD (Belgium) supported the deletion of the words "in writing", for the following reasons: firstly, the question should be regulated by the law applicable to the arbitration; secondly, there was no clear definition of what those words meant, since they could be applied to telex communications; and, thirdly, it was not clear whether agreement in writing was a condition of validity.

71. Mr. RUZICKA (Czechoslovakia) supported the retention of the words "in writing", and the removal of all the square brackets in the revised text of article 1.

72. Mrs. OYEKUNLE (Nigeria) supported the deletion of the words "in writing", bearing in mind the fact that the Rules would be used in many cases by parties living in different countries who might communicate by telex or telephone.

73. Mr. TSEGAH (Ghana) also felt that the words "in writing" should be deleted.

74. Mr. DEY (India) and Mr. BOSTON (Sierra Leone) supported the retention of the words "in writing".

75. The CHAIRMAN said that there appeared to be a majority in favour of retaining the words "in writing". Accordingly, he suggested that those words should be retained.

76. It was so decided.

77. Mr. GUEST (United Kingdom) suggested that the definition of the words "in writing" should be left to judicial interpretation, since any definition might be contrary to applicable law.

78. It was so decided.

79. Mr. ROEHRICH (France) proposed that the words "as in force at the time of the conclusion of the arbitration agreement" should be deleted.

80. It was so decided.

81. The CHAIRMAN drew attention to document A/CN.9/IX/C.2/CRP.15, which would add to the end of article 1 as proposed in document A/CN.9/IX/C.2/CRP.1 the words "and subject also to the provisions of the law applicable to the arbitration".

82. Mr. HOLTZMANN (United States of America), noting that the revised text of article 1 was a considerably compressed version of former articles 1 and 2, took

(Mr. Holtzmann, United States)

the view that such compression would make it very difficult for reference to be made to any one of the three very important provisions contained therein. He therefore felt that the article should be divided into three paragraphs.

83. The CHAIRMAN accordingly suggested that the United States representative should consult with the Belgian and United Kingdom representatives, who had redrafted the article, with a view to finding a new formulation.

84. It was so decided.

Article 3 (A/CN.9/IX/C.2/CRP.13)

85. Mr. PIRRUNG (Federal Republic of Germany), introducing the revised text of article 3 proposed by the drafting group, explained that the two alternative sentences in square brackets at the end of paragraph 1 reflected a divergence of views between the representatives of the United States and Norway. A third alternative would be to delete both sentences.

86. Mr. HOLTZMANN (United States of America) pointed out that, if the third alternative was adopted, it would be necessary to reword certain subsequent articles that referred to the question of sending, receiving or giving notices. If the first sentence in square brackets was deleted, the second must be retained, since it defined the word "sent".

87. The CHAIRMAN suggested that paragraph 1 might end with the words "the day it is so delivered", and that the second set of words in brackets could become paragraph 2.

88. Mr. JENARD (Belgium) felt that the second sentence in square brackets merely stated the obvious and need not be retained.

89. The CHAIRMAN recalled that, during the discussions on the question of receipt of communications, a majority had favoured the concept of effective delivery. In the absence of such a concept, a recipient, particularly the respondent, might find himself faced with arbitral proceedings without having received prior notification.

90. Mr. TSEGAH (Ghana) said he thought that the idea contained in the first sentence in square brackets in paragraph 1 was embodied in the first sentence of paragraph 2.

91. Mr. GUEST (United Kingdom) said he could accept a régime governing receipt of notification that was less than complete, since the Rules were already more elaborate in that respect than any other set of arbitration rules that he knew. He would therefore prefer to delete both sentences in square brackets.

92. Mr. JENARD (Belgium), Mr. MELIS (Austria) and Mr. ROEHRICH (France) were also in favour of deleting both sentences.

93. The CHAIRMAN accordingly suggested that both sentences in square brackets should be deleted.

94. It was so decided.

95. Mr. ST. JOHN (Australia) proposed that the word "habitual" in the phrase "last known habitual residence" at the end of the first sentence of paragraph 1 should be deleted.

96. It was so decided.

97. Mr. JENARD (Belgium) proposed that all references to either of the parties in paragraph 1 should be deleted since the provision should also apply to notices sent by the arbitrators.

98. It was so decided.

99. The CHAIRMAN suggested that, in paragraph 2, the sentences in square brackets should be deleted, since elsewhere in the Rules reference was made to days rather than weeks or months.

100. It was so decided.

101. Mr. JENARD (Belgium) suggested that the heading of article 3 should be amended to read "Notice, calculation of periods of time".

102. It was so decided.

The meeting rose at 12.55 p.m.