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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 15th MEETING

Held at Headquarters, New York,
on Wednesday, 21 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS

The meeting was called to order at 3.40 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 4, paragraph 1 (A/CN.9/IX/C.2/CRP.22)

1. Mr. MANTILLA-MOLINA (Mexico) asked whether the word "notification" in the French text meant the same as "notice" in the English text.

2. Mr. ROEHRICH (France) said that "notification" was correct in French.

3. Mr. JENARD (Belgium) said that "notification" was the term used in Belgian legislation.

4. The CHAIRMAN suggested that paragraph 1 be adopted in its revised form.

5. It was so decided.

Article 4, paragraph 2 (A/CN.9/IX/C.2/CRP.22)

6. Mr. TSEGAH (Ghana) proposed that the words "the provisions of" be inserted after the words "in accordance with".

7. Mr. GUEST (United Kingdom) said that, in such a context, the use of the words "the provisions of" was optional.

8. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the revised paragraph 2 contributed nothing of importance to article 4. It should therefore be deleted.

9. Mr. PIRRUNG (Federal Republic of Germany) recalled that the text which he had proposed at the first reading had read: "Arbitral proceedings shall be deemed to commence on the date on which such notice hereinafter called 'notice of arbitration' is received by the respondent." The revised text made no mention of the commencement of the arbitral proceedings. He had not thought that the mandate of the drafting group extended to making such radical changes.

10. Mr. GUEST (United Kingdom) said he had thought that the drafting group had been charged with making article 4, paragraph 2, consistent with the new article 3. He had not realized that the drafting group should take account of the text referred to by the representative of the Federal Republic of Germany.

11. Mr. PIRRUNG (Federal Republic of Germany) said that it would be useful to give precise indications concerning the date of commencement of arbitral proceedings, since in several countries the national legislation did not do so.

12. The CHAIRMAN suggested that the version of article 4, paragraph 2, contained in document A/CN.9/112 should be wholly or partially restored.

13. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that the paragraph should read: "Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent."

14. It was so decided.

Article 4, paragraph 3 (A/CN.9/IX/C.2/CRP.22, A/CN.9/112)

15. Mr. MANTILLA-MOLINA (Mexico) said that the French text of subparagraph (d) contained the words "le cas échéant", but there was no corresponding phrase in the English text. The English text should therefore be amended accordingly.

16. It was so decided.

17. Mr. ROEHRICH (France) suggested that paragraph 3 (f) should become paragraph 3 (a) and paragraphs 3 (a) to (e) should become paragraphs 3 (b) to (f).

18. It was so decided.

Article 4, paragraph 4 (A/CN.9/IX/C.2/CRP.22)

19. Mr. HOLTZMANN (United States of America) proposed that the first sentence be amended to read: "The notice of arbitration may also include:", and that subparagraph (a) be amended to read: "The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 7, paragraph 1;", in order to make it consistent with the revised text of article 7 (A/CN.9/IX/C.2/CRP.21).

20. It was so decided.

Article 5 (A/CN.9/IX/C.2/CRP.3)

21. Mr. MANTILLA-MOLINA (Mexico) proposed that the heading be amended to read "Representation and assistance".

22. It was so decided.

23. Mr. HOLTZMANN (United States of America) said that the revised text would mean that the names and addresses of all persons assisting the parties, and not just those of the legal representatives or agents, would have to be communicated in writing. He therefore proposed that the paragraph be amended to read: "The parties may be legally represented or assisted by persons of their choice or may have agents. The names and addresses of such persons must be communicated in

(Mr. Holtzmann, United States)

writing to the other party; such communication must specify whether the appointment is being made for purposes of legal representation or assistance or as an agent."

24. It was so decided.

Article 6 (A/CN.9/112)

25. Mr. JENARD (Belgium) said that, in the light of the discussions, he now felt that, if the parties failed to agree on the number of arbitrators, a single arbitrator should be appointed.

26. Mr. GUEST (United Kingdom) and Mr. MELIS (Austria) supported that view.

27. Mr. LEBEDEV (Union of Soviet Socialist Republics), supported by Mr. ST. JOHN (Australia), Mr. MANTILLA-MOLINA (Mexico), Mr. SZÁSZ (Hungary) and Mr. HOLTZMANN (United States of America), said that article 6 should be retained in its present form.

28. Mr. JENARD (Belgium) said he would accept the existing text provisionally.

Article 7, paragraph 1 (A/CN.9/IX/C.2/CRP.21)

29. Replying to a question put by Mr. MANTILLA-MOLINA (Mexico), the CHAIRMAN said that the heading of the article would remain the same as in the secretariat draft (A/CN.9/112).

30. Mr. HOLTZMANN (United States of America) said that in paragraph 1 (b) the words "or persons" had been put in brackets since the drafting group had been divided on whether it was better to specify that the appointing authority would be an institution rather than a person or to take a more flexible approach. Several members of the drafting group had considered that there were great advantages in providing that only institutions should be able to act as appointing authorities, for the sake of continuity and expertise; others had thought it preferable to provide for the possibility of a person acting as an appointing authority. Those who held the first view had pointed out that article 1 made a general provision for such modification as the parties might agree.

31. Mr. ROEHRICH (France) said his delegation felt that the Committee should leave open the possibility of persons acting as appointing authorities and should therefore remove the brackets in paragraph 1 (b).

32. Mr. ST. JOHN (Australia) supported that view. Although in many cases institutions might be best suited to be appointing authorities, the possibility of a person acting as an appointing authority should not be excluded.

33. Mr. SZÁSZ (Hungary) also considered that the brackets should be removed.

34. The CHAIRMAN said that there seemed to be a majority in favour of removing the brackets.

35. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) recalled that, when the Committee had discussed articles 33 and 34, some representatives had expressed reservations as to whether some of the tasks specified there could be carried out by persons.

Article 7, paragraph 2 (A/CN.9/IX/C.2/CRP.21)

36. Mr. ROEHRICH (France) and Mr. PIRRUNG (Federal Republic of Germany) said that the brackets in paragraph 2 should be removed; the time-limit was not a sanction against the appointing authority but a guide to parties so that they would know when to apply to the Secretary-General of the Permanent Court of Arbitration at The Hague.

37. Mr. HOLTZMANN (United States of America) said that his delegation strongly felt that it was unwise to set a time-limit. He knew of no arbitration rules, either institutional or ad hoc, which placed such a burden on the appointing authority without taking into account the circumstances of the case. Under the UNCITRAL arbitration rules the appointing authority could not fully control the time in which it could make an appointment; parties might, for example, delay in providing information requested from them, or there might be difficulty in finding arbitrators. The parties would then apply to the Secretary-General of the Permanent Court of Arbitration at The Hague, and the whole process would start all over again.

38. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) agreed with the United States representative and felt that the appointing authority should be left to carry out its task in a normal time.

39. Mr. PIRRUNG (Federal Republic of Germany), supported by Mr. JENARD (Belgium), said that there was a precedent for such a time-limit in the World Bank arbitration rules, which gave the President 30 days to appoint an arbitrator. The 60-day time-limit was a guide to parties as to when they should regard the appointment procedure as unsuccessful; a time-limit of 60 days had been specified because it had been thought that an appointing authority should be able to find an arbitrator within two months.

40. Mr. MELIS (Austria) favoured a 30-day time-limit. Two months would represent an unnecessary delay.

41. Mr. SZÁSZ (Hungary) said that, if the appointing authority was a person, that individual could be delayed for one reason or another.

42. Mr. HOLTZMANN (United States of America) pointed out that, in the case of the

(Mr. Holtzmann, United States)

World Bank, there was a panel of arbitrators to choose from and the disputes involved were confined to investment matters. The task of the President in appointing an arbitrator was therefore much easier.

43. The CHAIRMAN said that there appeared to be a majority in favour of removing the brackets.

Article 7, paragraph 3 (A/CN.9/IX/C.2/CRP.21)

44. Mr. JENARD (Belgium) said that the compromise previously reached with regard to the list procedure (A/CN.9/9/C.2/SR.4, p. 9) had not been respected in the revised text.

45. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation felt that the revised version of paragraph 3 should remain as it stood. The other wording could be unclear in countries where the list system was unknown.

46. He proposed that in the first sentence the words "at the request of one of the parties" should be added after the words "The appointing authority".

47. It was so decided.

Article 7, paragraph 4 (A/CN.9/IX/C.2/CRP.21)

48. Mr. JENARD (Belgium) said that the paragraph was too categorical. It was not always desirable to have an arbitrator of a nationality other than the nationalities of the parties; indeed, it might be preferable to have an arbitrator of the same nationality, if the parties themselves were of the same nationality. It might be better to say "shall take into account as well the circumstances which might make it advisable to appoint an arbitrator ...".

49. Mr. PIRRUNG (Federal Republic of Germany) and Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the English and Russian texts were not categorical and could be left unchanged.

50. Mr. SZÁSZ (Hungary) said that he would also prefer to keep the English text as it stood.

51. The CHAIRMAN said that the French text could perhaps be reworded to read "en tenant également compte du fait qu'il peut être souhaitable de nommer ...".

52. He suggested that the Committee could perhaps dispense with discussing alternate paragraphs 1 and 2 since they related to questions already decided on.

The meeting was suspended at 5.05 p.m. and resumed at 5.30 p.m.

Article 8 (A/CN.9/IX/C.2/CRP.21)

53. The CHAIRMAN said that, for the sake of consistency with article 7, paragraph 2, the phrase in brackets in paragraph 2 (b) should be retained.

54. Mr. JENARD (Belgium) said that the words "à son tour" in the French text of paragraph 2 could be omitted.

55. The CHAIRMAN said it seemed that article 8 was acceptable to the Committee.

Article 8 bis (A/CN.9/IX/C.2/CRP.21)

56. Mr. JENARD (Belgium) suggested that in paragraph 2 the words "for appointment" could be omitted.

Article 9, paragraph 2 (A/CN.9/IX/C.2/CRP.2)

57. Mr. JENARD (Belgium) said that the paragraph had been included at the request of his delegation; its purpose was to prevent a party from using delaying tactics.

58. Mr. PIRRUNG (Federal Republic of Germany), Mr. MELIS (Austria), Mr. ROEHRICH (France) and Mr. MANTILLA-MOLINA (Mexico) said that paragraph 2 should be retained.

59. The CHAIRMAN noted that it seemed that the majority was in favour of retaining the paragraph as it stood.

Paragraph 3 (A/CN.9/112)

60. Mr. ROEHRICH (France) suggested that in the French text the word "justifier" should be changed to "soulever".

61. The CHAIRMAN said that it might be better to say in the French text "de nature à soulever des doutes sérieux".

62. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that the English text of paragraph 3 was modelled on the provisions of the American Arbitration Association rules and the Inter-American Arbitration Commission rules.

63. Mr. HOLTZMANN (United States of America) said that the omission of the word "justifiable" in the English text could open up too many areas of challenge.

64. The CHAIRMAN said that the English text would thus remain as it stood, and the French text would be amended in accordance with his suggestion.

65. Mr. MANTILLA-MOLINA (Mexico) said that the Spanish text would have to be amended in line with the amended French text. However, he did not think it was altogether appropriate to speak of "serious doubts", since a party would always consider its doubts serious. Perhaps provision could be made in article 11 for the appointing authority to impose a sanction if a challenge was unacceptable.

Article 10, paragraph 1 (A/CN.9/IX/C.2/CRP.11)

66. The CHAIRMAN pointed out that, in accordance with the Committee's decision, the time period of 30 days provided for in document A/CN.9/112 had been reduced to 15 days in the revised version of the paragraph.

67. Mr. JENARD (Belgium) suggested that the word "notified" would be more appropriate than the word "made".

68. Mr. PIRRUNG (Federal Republic of Germany) said that the word "notified" would seem to imply that the challenge would have to be received by the other party within the 15-day time period. He did not believe that that was what had been intended.

69. Mr. HOLTZMANN (United States of America) said that the lack of a provision in article 3 defining when a notice, notification, communication or proposal would be deemed to have been sent was at the root of the difficulties that had arisen in connexion with article 10. The Committee could choose either to stipulate in article 10 that the challenge had to be received within a specified time period (which could, if the Committee felt it necessary, be longer than the 15 days provided for in the revised text) or to add a provision in article 3 defining when the various communications might be deemed to have been sent. His delegation was of the opinion that it would be simpler to redraft article 10 along the lines he had just suggested.

70. The CHAIRMAN said that, if the Committee had not felt it necessary to include in article 3 a definition of the act of sending, it had been because it was self-evident that sending a communication merely involved mailing it. The time-limit in article 10, paragraph 1, was important not so much for the party receiving notification of challenge but for the challenging party. Despite the fact that article 3 remained silent on the question of the sending of communications, that action could be referred to in article 10.

71. Mr. PIRRUNG (Federal Republic of Germany) proposed that paragraph 1 should read: "A party who intends to challenge an arbitrator shall send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been communicated to the challenging party or within 15 days after the circumstances mentioned in article 9 became known to that party." Such a revision made it clear that the act of sending the challenge was envisaged and eliminated the need to add a further provision in article 3.

72. It was so decided.

Article 10, paragraph 2 (A/CN.9/IX/C.2/CRP.11 and 20)

73. Mr. BERGSTEN (Secretary of the Committee) read out the following revised text of the first sentence: "The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal." The second sentence of the paragraph, as contained in document A/CN.9/112, had been inadvertently omitted from the French version of the revised text.

Article 10, paragraph 3 (A/CN.9/IX/C.2/CRP.11 and 20)

74. The CHAIRMAN pointed out that a new sentence had been added between the second and third sentences of the original version in order to remove any implication of dishonour from the voluntary withdrawal of an arbitrator or the removal of an arbitrator by mutual agreement of the parties. The sentence in question could stand some stylistic improvement and he suggested that delegations should submit any suggestions in that regard to the Secretariat. The last sentence of the paragraph had been expanded and revised in accordance with the desire of the Committee to remove the ambiguity of the original text.

Article 11 (A/CN.9/IX/C.2/CRP.9)

75. The CHAIRMAN drew the attention of the Committee to the fact that the phrase "in the cases mentioned under subparagraphs (a), (b) and (c) of paragraph 1" had been deleted from the original version of the text as those subparagraphs were the only ones in paragraph 1.

76. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that paragraph 1 (c) should be revised to take into account the amendments incorporated in articles 7 and 8. Article 8 as amended no longer described the procedure for designating an appointing authority but merely referred to the procedure set out in article 7. There was, therefore, no longer any reason to refer to article 8. In addition, the reference to article 7 could be made more precise by replacing the words "the provisions of article 7" with the words "the procedure for designating an appointing authority as provided for in article 7".

77. It was so decided.

78. Mr. HOLTZMANN (United States of America) said that his delegation had accepted the Soviet proposal ad referendum.

Article 12 (A/CN.9/112, A/CN.9/IX/C.2/CRP.5)

79. The CHAIRMAN suggested that, since articles 10 and 11 merely referred the reader back to articles 7 and 8 for the procedures for nominating arbitrators, the words "in articles 10 and 11" in paragraph 2 should be replaced by the phrase "in the preceding articles" in order to eliminate the unnecessary cross-reference.

80. It was so decided.

81. The CHAIRMAN suggested that the heading of article 12 would have to be revised because it was no longer appropriate in the light of the revised text.

82. Mr. ROEHRICH (France) observed that it was difficult to find a convenient heading for article 12 which did not repeat the entire contents of the article.

83. Mr. JENARD (Belgium) proposed that the heading should be "Replacement of an arbitrator".

84. It was so decided.

Article 12 bis (A/CN.9/IX/C.2/CRP.12)

85. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, in accordance with the wishes of the Committee, the provisions of the original article 12, paragraph 3, were set out in a separate article. The heading "Consequences of replacement of an arbitrator" had been chosen for the new article.

86. The CHAIRMAN observed that the heading of article 12 bis was perhaps too general in relation to its contents and suggested as a possible substitute "Repetition of hearings".

87. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that the question of the repetition of hearings would arise only in the event of the replacement of an arbitrator and suggested that the words "in the event of the replacement of an arbitrator" should be added to the heading suggested by the Chairman.

88. It was so decided.

89. The CHAIRMAN pointed out that article 8 bis had not been given a heading.

90. Mr. PIRRUNG (Federal Republic of Germany) suggested that a common heading "Appointment of arbitrators" should be given to articles 7 to 8 bis.

91. It was so decided.

92. Mr. ROEHRICH (France) pointed out that the title of section II would have to be changed as well.

93. Mr. PIRRUNG (Federal Republic of Germany) proposed that section II should be retitled "Composition of the arbitral tribunal".

94. It was so decided.

The meeting rose at 6.25 p.m.