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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 16th MEETING

Held at Headquarters, New York,
on Thursday, 22 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

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International commercial arbitration (continued)

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The meeting was called to order at 10.10 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION

Draft UNCITRAL Arbitration Rules (A/CN.9/112 and Add.1, A/CN.9/113, A/CN.9/114)
(continued)

1. The CHAIRMAN invited the Committee to continue the second reading of the draft UNCITRAL Arbitration Rules.

Article 14 (A/CN.9/IX/C.2/CRP.4)

2. The Committee agreed to retain the heading "General provisions".

3. Mr. PIRRUNG (Federal Republic of Germany) pointed out that the word "arbitrators" should be replaced by the words "arbitral tribunal" throughout the rules, in accordance with the Committee's earlier decision. Referring to the English text of document A/CN.9/IX/C.2/CRP.4, he said that it would be preferable to use the word "proceedings" rather than "procedure" in paragraphs 1 and 2.

4. Mr. JENARD (Belgium), referring to the French text, said that the word "stades" should replace "étapes" in paragraphs 1 and 2, and that it would be better to speak of "exposé orale" in paragraph 2.

5. The Committee decided to retain the text of article 14 as it appeared in document A/CN.9/IX/C.2/CRP.4 with the drafting changes that had been suggested.

Article 15 (A/CN.9/IX/C.2/CRP.6)

6. The Committee decided to retain the heading "place of arbitration".

7. Mr. JENARD (Belgium) suggested that in paragraph 2 of the text in document A/CN.9/IX/C.2/CRP.6 the words "or city" should be deleted.

8. It was so decided.

9. The Committee decided to retain the text of article 15 proposed in document A/CN.9/IX/C.2/CRP.6, as orally amended.

Article 16

10. The Committee decided to retain the heading "Language" and the text of the article as it appeared in document A/CN.9/112.

Article 17 (A/CN.9/IX/C.2/CRP.7, CRP.10 and CRP.14)

11. The Committee decided to retain the heading "Statement of claim".

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12. The Committee decided to retain article 16, paragraph 1, as it appeared in document A/CN.9/IX/C.2/CRP.7 and article 16, paragraph 2, as it appeared in document A/CN.9/112 with the addition proposed in document A/CN.9/IX/C.2/CRP.10, and to delete article 16, paragraph 3.

Article 18 (A/CN.9/IX/C.2/CRP.8, CRP.10 and CRP.14)

13. The Committee decided to retain the heading "Statement of defence".

14. The Committee decided to retain article 18 as it appeared in document A/CN.9/112, with the amendments to paragraphs 2, 3 and 4 proposed in documents A/CN.9/IX/C.2/CRP.10, CRP.8 and CRP.14 respectively.

Article 18 bis (A/CN.9/IX/C.2/CRP.14)

15. Mr. JENARD (Belgium) suggested that the heading of the proposed new article 18 bis should be "Amendment of the statement of claim or statement of defence".

16. It was so decided.

17. Mr. JENARD (Belgium), referring to the French text, suggested that the words "déborde le cadre de" in the penultimate line should be replaced by "sort du cadre de".

18. It was so decided.

19. The Committee decided to retain article 18 bis as it appeared in document A/CN.9/IX/C.2/CRP.14 with the suggested drafting change.

Article 19

20. The Committee decided to retain the heading "Pleas as to arbitrator's jurisdiction".

21. Mr. JENARD (Belgium) suggested that in paragraph 1 of the French text the expression "touchant l'existence" should be replaced by "relative à".

22. The CHAIRMAN said that the Secretariat had taken note of that suggestion; he asked delegates to submit such drafting changes directly to the Secretariat.

23. He suggested that the second sentence of article 19, paragraph 3, should not be deleted, as proposed by the drafting group in document A/CN.9/IX/C.2/CRP.14, since the content was not covered by the new article 18 bis.

24. It was so decided.

25. The Committee decided to retain article 19 as it appeared in document A/CN.9/112 with the suggested drafting change.

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Articles 20 and 21 (A/CN.9/IX/C.2/CRP.16)

26. Mr. GUEST (United Kingdom), introducing the revised text of articles 20 and 21 (A/CN.9/IX/C.2/CRP.16), pointed out that the decision taken by the Committee to combine article 21 in document A/CN.9/112 with article 20 meant that paragraph 2 of the revised article 20 would not apply to the statement of claim or the statement of defence. The drafting group therefore suggested the inclusion of an additional article 20 bis, as contained in the commentary in document A/CN.9/IX/C.2/CRP.16, in order to fill that gap.
27. The Committee decided to retain the abbreviated heading for article 20 "Further written statements".
28. Mr. JENARD (Belgium) suggested that the word "faculté" should replace "autorisation" in the second line of paragraph 1.
29. The CHAIRMAN suggested that the representative of Belgium should submit the correction he desired to the Secretariat.
30. The Committee decided to retain article 20 as it appeared in document A/CN.9/IX/C.2/CRP.16.
31. The Committee decided to retain the heading of article 21, "Time-limits" as the heading for the new article 20 bis.
32. Mr. HOLTZMANN (United States of America) pointed out that, while his delegation agreed that 45 days was an appropriate time-limit for the communication of statements of claim and statements of defence, it considered that the arbitrators should be free to determine what was an appropriate time-limit for other documents which they might require. A distinction should be made between pleadings, for which 45 days was an appropriate time-limit, and other documents, for which 45 days might not be sufficient.
33. Mr. ST. JOHN (Australia) suggested that the second sentence of the old article 21, which permitted the arbitrators to extend the time-limits if they concluded that an extension was justified - and which appeared to have been inadvertently omitted - should be added to article 20 bis.
34. It was so decided.
35. The Committee decided to approve the new article 20 bis as it appeared in document A/CN.9/IX/C.2/CRP.16, as amended.
36. The Committee decided to approve the heading for the new article 21, "Evidence and hearings", proposed by the drafting group in document A/CN.9/IX/C.2/CRP.16.
37. Mr. HOLTZMANN (United States of America) referring to the English text of the new article 21, suggested that paragraph 1 should read "Each party shall have the burden of proving ..." instead of "shall prove", since that was the intention of the drafting group.
38. It was so decided.

39. Mr. MANTILLA-MOLINA (Mexico) expressed the view that the other language versions should be brought into line with the English.

40. The Committee decided to retain the new article 21 as it appeared in document A/CN.9/IX/C.2/CRP.16, as amended.

Article 22 (A/CN.9/IX/C.2/CRP.18)

41. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that the heading of the new article 21 applied also to article 22. The heading of article 22 should therefore be deleted.

42. It was so decided.

43. The Committee decided to retain the text of article 22, paragraph, as it appeared in document A/CN.9/112.

44. Mr. ST. JOHN (Australia) proposed that the word "upon" should be inserted after the word "subject" in the third line of the new version of paragraph 2 proposed in document A/CN.9/IX/C.2/CRP.18.

45. It was so decided.

46. The Committee decided to retain the text of article 22, paragraph 2, as it appeared in document A/CN.9/IX/C.2/CRP.18, as amended.

47. The Committee decided to retain the text of article 22, paragraphs 3, 4 and 5, as it appeared in document A/CN.9/112, with the changes proposed by the drafting group in document A/CN.9/IX/C.2/CRP.18.

48. The CHAIRMAN said that the meaning of the word "matérialité" in the French text of article 22, paragraph 6, proposed in document A/CN.9/IX/C.2/CRP.18 was unclear.

49. Mr. GUEST (United Kingdom) said that, in the English text, the terms "relevance" and "materiality" were synonymous. Consequently, it was not necessary to include both.

50. Mr. HOLTZMANN (United States of America) said that, from the point of view of United States law, all four terms used in paragraph 6 had different meanings and were therefore necessary.

51. Mr. PIRRUNG (Federal Republic of Germany) suggested that the word "matérialité" might be deleted from the French text.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to delete the word "matérialité" from the French text of article 22, paragraph 6, and to retain the English text as it appeared in document A/CN.9/IX/C.2/CRP.18, and to leave it to the Spanish-speaking and Russian-speaking delegations to decide whether the Russian and Spanish texts should contain three or four terms.

53. It was so decided.

The meeting was suspended at 11.10 a.m. and resumed at 11.35 a.m.

Article 23 (A/CN.9/IX/C.2/CRP.17)

54. The Committee decided to amend the heading of article 23 in the French text to read "Mesures provisoires ou conservatoires".

55. The Committee decided to retain the text of article 23, paragraphs 1 and 2, as it appeared in document A/CN.9/112.

56. The Committee decided to retain the text of paragraph 3 as it appeared in document A/CN.9/IX/C.2/CRP.17.

Article 24 (A/CN.9/IX/C.2/CRP.19)

57. The Committee decided to retain the text of article 24, paragraphs 1-3, as it appeared in document A/CN.9/112.

58. The Committee decided to retain the text of article 24, paragraph 4, with the deletion proposed in document A/CN.9/IX/C.2/CRP.19.

Article 25 (A/CN.9/IX/C.2/CRP.26)

59. The Committee decided to abbreviate the heading of article 25 to read "Default" and "Défaut" in the English and French texts respectively, and to request the Russian-speaking and Spanish-speaking delegations to decide on appropriate equivalents in the Russian and Spanish texts.

60. Mr. GUEST (United Kingdom) said that the English text of article 25, paragraph 1, proposed in document A/CN.9/IX/C.2/CRP.26 left something to be desired. Accordingly, he and the United States representative had drafted a more appropriate version which involved no change of substance.

61. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, if the respondent failed to communicate his statement of defence, the arbitrators were under an obligation to continue the proceedings. Consequently, the word "shall" should be inserted before the word "grant" in paragraph 1.

62. Mr. MANTILLA-MOLINA (Mexico) said that he supported the text as it stood. To place the arbitrators under such an obligation would be to encourage the parties not to respect the time-limits established.

63. Mr. PIRRUNG (Federal Republic of Germany) said that the arbitrators had a duty either to terminate or to grant a continuance of the proceedings if either of the parties failed to communicate his statement after having been allowed further time.

64. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) suggested that, since article 21 already provided for the possibility of extending the period of time for the communication of statements, the first sentence of article 25, paragraph 1, could be deleted.

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65. Mr. JENARD (Belgium) supported that suggestion.
66. Mr. DZIKIEWICZ (Poland) supported the views expressed by the representative of the Soviet Union. It might be preferable to deal with the different ideas contained in the paragraph in separate sentences.
67. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed.
68. The CHAIRMAN suggested that the Secretariat should be requested to redraft article 25, paragraph 1, accordingly.
69. It was so decided.
70. The Committee decided to retain the text of article 25, paragraph 2, as it appeared in document A/CN.9/IX/C.2/CRP.26.
71. Mr. HOLTZMANN (United States of America) proposed that the words in square brackets in the proposed new text of article 25, paragraph 3, should be deleted.
72. It was so decided.
73. The Committee decided to retain the text of article 25, paragraph 3, as it appeared in document A/CN.9/IX/C.2/CRP.26, as amended.

Article 25 bis (A/CN.9/IX/C.2/CRP.25)

74. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that paragraph 2 of the proposed new article 25 bis seemed to imply that both parties might make their final submissions simultaneously. Such a provision would deprive the respondent of his right under most legal systems to make his final submission after that of the claimant had been made. He accordingly proposed that paragraph 2 should end with the words "declare the hearings closed", that the remainder of paragraph 2 should be deleted, and that paragraphs 1 and 2 should be amalgamated.
75. Mr. GUEST (United Kingdom) replied that paragraph 2 was not intended to cover the question of the order in which the final submissions could be made. It still left the respondent free to make his final submission after that of the claimant had been made.
76. Mr. MANTILLA-MOLINA (Mexico) suggested that paragraph 2 should cover the case in which the parties failed to reply to the arbitrators. It should also provide for the possibility of oral submissions, which would resolve the difficulty to which the USSR representative had referred.
77. Mr. HOLTZMANN (United States of America) suggested that the difficulty could be resolved by replacing the words "set a date" by the words "set dates".
78. The CHAIRMAN, speaking as the representative of Austria, said that any attempt to supplement the provisions of article 14, which gave the arbitrators discretionary powers, would make it necessary to cover the questions of whether the final conclusions could be made orally and whether they must be made in a specific order.

79. Mr. PIRRUNG (Federal Republic of Germany) supported the USSR proposal, but pointed out that the words "Upon receiving negative replies" in paragraph 2 made it necessary for both parties to reply before the arbitrators could declare the hearings closed. He accordingly suggested that those words should be replaced by the words "If neither party replies in the affirmative". That amendment would make it easier for the arbitrators to declare the hearings closed.

80. Mr. JENARD (Belgium) said he could accept the suggestions made by the representatives of the USSR, Mexico and the Federal Republic of Germany.

81. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) took the view that article 25 bis might encourage one of the parties to resort to delaying tactics, particularly if he felt that he was losing the case.

82. Mr. JENARD (Belgium) felt that, with the amendments proposed, a party could be prevented from resorting to such tactics.

83. The CHAIRMAN took the view that the text of article 25 bis, as it stood, would encourage the arbitrators to inquire whether the parties wished to produce further evidence or witnesses or to make further submissions.

84. Mr. HOLTZMANN (United States of America) took the view that the provision was a useful one. He recalled that, under article V, paragraph 1 (b), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, one of the grounds for refusal to recognize an award was the situation where a party was unable to present his case. Under the proposed new article 25 bis, however, it was difficult for one of the parties to claim that he had not had an adequate opportunity to do so. Similar provisions were embodied in the commercial arbitration rules of the American Arbitration Association and, as far as he knew, in the rules of procedure of the Inter-American Commercial Arbitration Commission. He believed that, in practice, such provisions had not resulted in excessive delay, since the parties did not wish to offend the arbitrators before the latter had taken a decision.

85. The CHAIRMAN suggested that paragraphs 1 and 2 of article 25 bis could be combined to read:

"The arbitrators may inquire of the parties if they have any further proofs to offer or witnesses to be heard or submissions to make, in the absence of which the arbitrators may declare the hearings closed."

86. It was so decided.

87. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that article 25 bis, paragraph 3, should be deleted.

88. Mr. MANTILLA-MOLINA (Mexico) supported that proposal, since he felt that article 14 gave the arbitrators sufficient power to reopen the hearings.

89. Mr. GUEST (United Kingdom) felt that paragraph 3 should be retained, since it left no doubt that the arbitrators could, in exceptional circumstances, reopen the hearings.

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90. Mr. PIRRUNG (Federal Republic of Germany) supported that view, but suggested that the word "appropriate" should be replaced by the word "necessary".

91. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that paragraph 3 made no mention of exceptional circumstances. As it stood, it might encourage a party to resort to delaying tactics. He agreed with the representative of Mexico that article 14 could be invoked in the event of exceptional circumstances.

92. The CHAIRMAN accordingly suggested that the words "if they consider it appropriate" should be replaced by the words "if they consider it necessary because of exceptional circumstances".

93. It was so decided.

Article 26 (A/CN.9/112)

94. The Committee decided to retain the text of article 26 as it appeared in document A/CN.9/112.

Article 26 bis (A/CN.9/IX/C.2/CRP.27)

95. The Committee decided to retain the text of article 26 bis proposed in document A/CN.9/IX/C.2/CRP.27.

The meeting rose at 12.45 p.m.

