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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 17th MEETING

Held at Headquarters, New York,
on Thursday, 22 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS

International commercial arbitration (continued)

The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION (A/CN.9/112 and Add.1, A/CN.9/113 and 114) (continued)

Draft UNCITRAL arbitration rules

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

1. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the phrase "interim matters" in paragraph 2 could give rise to confusion since reference was made elsewhere in the draft rules to interim awards. He proposed, therefore, that the reference to such matters should be deleted.

2. It was so decided.

3. Mr. PIRRUNG (Federal Republic of Germany) said that it was advantageous in certain situations for the presiding arbitrator to have the power to decide interim matters. His delegation was, however, willing to accept the deletion of "interim matters" from paragraph 2. As one of the members of the drafting group which had prepared article 26 bis, he informed the Committee that the heading chosen for the article was "Decisions".

4. Mrs. OYEKUNLE (Nigeria) endorsed the comments made by the Soviet representative, since interim matters might in practice include questions of substance. Her delegation would also propose the deletion from paragraph 2 of the words "subject to any later change by the arbitral tribunal".

5. Mr. PIRRUNG (Federal Republic of Germany) said that, when an arbitral tribunal met for the first time after the presiding arbitrator had taken a decision alone in accordance with the provisions of the paragraph, it might happen that only the presiding arbitrator supported the decision in question. The presiding arbitrator might even eventually accept the view of the other two arbitrators. It was essential, therefore, to retain an express provision allowing such decisions to be reviewed and changed.

6. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that he wondered whether it was still necessary to provide for subsequent review by the arbitral tribunal of decisions taken by the presiding arbitrator in view of the fact that the words "interim matters" had been deleted. It was difficult to imagine that procedural decisions which would have already taken effect should be reversed by the tribunal. He suggested that, since paragraph 2 now referred only to decisions on procedural matters, the paragraph should begin with a reference to procedural matters, for the sake of emphasis.

7. Mr. ROEHRICH (France) said that the provision providing for the possibility of

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review by the tribunal as a whole of decisions taken by the presiding arbitrator alone should be retained. Such revision was only possible and not automatic. It should also be borne in mind that procedural decisions could have a determining effect on the outcome of the arbitration, since they might cover a wide range of issues.

8. Mrs. OYEKUNLE (Nigeria) endorsed the suggestion of the Special Consultant to begin paragraph 2 with a reference to procedural matters.

9. Mr. MANTILLA-MOLINA (Mexico) agreed that the provision for review of decisions taken by the presiding arbitrator should be retained. It was not clear, however, whether that provision would also be applied in the event that no majority could be reached and a decision was taken through the casting vote of the presiding arbitrator. His delegation was inclined to believe that the rule should apply in such cases but the text should, in any event, be made clear on that point.

10. The CHAIRMAN suggested that the following wording should be adopted: "In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own subject to possible revision by the arbitral tribunal."

11. It was so decided.

Article 27, (A/CN.9/112, A/CN.9/IX/C.2/CRP.24, CRP.29)

12. Mr. JENARD (Belgium) pointed out that the second sentence of the French version of paragraph 2 was meaningless. It went without saying that an award was binding. As to the adjective "final", he suggested that it should be translated into French by the phrase "qui n'est plus susceptible de voie de recours". He proposed that his delegation together with the French delegation should confer on a French text of paragraph 2 which they would submit to the Secretariat. The English version of the text would remain unchanged.

13. Mr. GUEVARA (Philippines) said that the language of the second sentence was inappropriate, since the parties were obliged to carry out the award without delay.

14. Mr. MANTILLA-MOLINA (Mexico) said that the provisions of paragraph 2 were redundant, since the parties would have already undertaken in their contract to carry out any award which might be made. Moreover, the second sentence was inappropriate and should be deleted.

15. Mr. GUEST (United Kingdom) said that his delegation wished to see the second sentence retained since similar provisions had proved useful in the past in determining the date from which interest was payable on the amount of an award.

16. Mr. BOSTON (Sierra Leone) endorsed the United Kingdom view and said that the main purpose of the second sentence was to introduce a note of urgency with regard to the carrying out of the award.

17. Mr. ROEHRICH (France) pointed out that the use of the word "binding" served no useful purpose since parties could always appeal to the provisions of applicable national law to oppose the carrying out of the award. He agreed, however, with the United Kingdom representative that it was useful to provide for the case in which a party refused to carry out the award promptly. Accordingly, the second sentence of the paragraph should be retained.

18. The CHAIRMAN observed that a majority was in favour of adopting the text as it stood and that the French text should be revised in order to bring it into line with the English text and to provide a more meaningful translation of the words "final and binding".

19. It was so decided.

20. Mr. DZIKIEWICZ (Poland) proposed that a further provision should be added to paragraph 4 to the effect that a dissenting opinion, where one existed, should be attached to the award.

21. The CHAIRMAN said that he would hesitate to reopen the discussion of so controversial an issue so near to the end of the Committee's work. At its previous session, UNCITRAL had engaged in a long discussion on the question and the first draft of the rules had, in fact, included a provision along the lines suggested by the representative of Poland. It had become apparent from the discussion at both the previous and present session that opinions were fairly well divided on that issue and, accordingly, it had been felt that it would be wiser to say nothing in the rules on that question, leaving it to the arbitrators and the national law of the country in which the arbitration took place to decide whether dissenting opinions should be attached to the award.

22. The Committee decided to retain article 27 as it appeared in documents A/CN.9/112, A/CN.9/IX/C.2/CRP.24 and CRP.29.

Article 28 (A/CN.9/IX/C.2/CRP.32)

23. Mr. HOLTZMANN (United States of America) said that the draft rules had been widely discussed in the United States and the words "take into account", in paragraph 3, had frequently been misunderstood. The ECE arbitration rules had not been used by many American corporations precisely because they contained similar wording. Wherever possible, ambiguous wording should be avoided, and the revised text should therefore be amended to read: "In all cases, the arbitrators shall decide in accordance with the terms of the contract and the usages of the trade applicable to the transaction".

24. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that, although in practice arbitrators normally applied the terms of the contract very strictly in any case, the words "in accordance with" underlined the primary importance of the contract and were therefore acceptable.

25. Mr. ROEHRICH (France) said that the revised text in document A/CN.9/IX/C.2/CRP.32 represented a compromise between two opposing views on the relative importance of the "terms of the contract" and "the usages of the trade applicable to the transaction". The arbitration rules of ECE and ECAFE used the same formula. The revised text should therefore be retained.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, in the ECE arbitration rules and in the European Convention on International Commercial Arbitration, where the English text used the words "shall take account of" the Russian text used the equivalent of the English words "shall be governed by". The Russian text was preferable, and a suitable English equivalent should therefore be found for the UNCITRAL Arbitration Rules. He suggested the words "shall be governed by", but would accept the words "in accordance with".

27. Mr. STRAUS (Observer for the Inter-American Commercial Arbitration Commission and the International Council for Commercial Arbitration), speaking for the Inter-American Commercial Arbitration Commission, said that he preferred the words "shall be governed by".

28. Mr. SZÁSZ (Hungary) said that the arbitration rules should indicate as strongly as possible that arbitral proceedings should be governed by the terms of the contract.

29. Mr. MANTILLA-MOLINA (Mexico) said that, in cases where strict application of the terms of the contract would result in undue hardship for the respondent, the arbitrators should be able to review the terms of the contract. Such was already the case in some countries. The revised text should therefore be retained, since it allowed a certain flexibility.

30. Mr. HOLTZMANN (United States of America) pointed out that, since the rules were subordinate to national legislation, they could not change the situation in countries where a review of the terms of a contract was permissible.

31. Mr. PIRRUNG (Federal Republic of Germany), supported by Mr. TAKAKUWA (Japan), said that the revised text in document A/CN.9/IX/C.2/CRP.32 should be retained.

32. Mr. GUEVARA (Philippines) said that the revised text was preferable, since it gave more flexibility to the arbitrators.

33. The Committee decided to retain article 28 as it appeared in document A/CN.9/IX/C.2/CRP.32.

Article 29 (A/CN.9/IX/C.2/CRP.28)

34. The CHAIRMAN recalled that it had already been decided to include paragraph 2 in article 33.

35. The Committee decided to retain article 29 as it appeared in document A/CN.9/IX/C.2/CRP.28.

Article 30 (A/CN.9/IX/C.2/CRP.31)

36. The Committee decided to retain article 30 as it appeared in document A/CN.9/IX/C.2/CRP.31.

Article 31 (A/CN.9/IX/C.2/CRP.31)

37. The Committee decided to retain article 31 as it appeared in document A/CN.9/112, with the change proposed by the drafting group in document A/CN.9/IX/C.2/CRP.31.

Article 33 (A/CN.9/IX/C.2/CRP.33, A/CN.9/IX/C.2/CRP.36)

38. The Committee decided to retain paragraphs 1 (a) to (e) as they appeared in documents A/CN.9/IX/C.2/CRP.33 and CRP.36.

39. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat), referring to subparagraph 1 (f), said that the Secretary-General of the Permanent Court of Arbitration at The Hague had confirmed that he charged no fees for his services.

40. The CHAIRMAN proposed that the text of paragraph 1 (f) be amended to read: "Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague."

41. It was so decided.

42. Mr. JENARD (Belgium) said that the rules should stipulate which language should be used in communications with the Permanent Court of Arbitration at The Hague.

43. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that any language could be used, but communications in English and French would require no translation and would therefore involve no costs.

44. Mr. ROEHRICH (France), referring to subparagraph 2 bis (b), said that the words between brackets should be retained.

45. Mr. MANTILLA-MOLINA (Mexico) said that the words between brackets should be deleted.

46. Mr. HOLTZMANN (United States of America), supported by Mr. PIRRUNG (Federal Republic of Germany), said that appointing authorities enjoyed great flexibility

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when establishing fees for a given case, and the arbitral tribunal should have the same rights. The phrase between brackets should therefore be retained, and the subparagraph adopted in full.

47. It was so decided.

48. The CHAIRMAN said that he assumed that the Committee would also remove the brackets in subparagraph 2 bis (c) for the sake of consistency.

49. It was so decided.

50. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that subparagraph (c) could not necessarily apply when the appointing authority was a person, since it might not be appropriate to ask a person to provide a schedule of fees. Even an appointing authority which did not have a schedule of fees might not want to furnish a statement setting forth the basis for establishing fees.

51. Mr. HOLTZMANN (United States of America) said that the points raised by the Special Consultant had been discussed in the Co-ordinating Group. It had been felt that the appointing authority, whether it was an institution or a person, should provide a statement setting forth the basis for establishing fees only if it wished to do so. The Co-ordinating Group had also felt that it did not have the authority to change a decision of the Committee by limiting any portion of subparagraph (c) to cases where the appointing authority was an institution. In respect of both subparagraph (c) and subparagraph (a), the Group had felt that, since some appointing authorities published schedules of fees and others did not, the rules should not give extra weight to appointing authorities which had schedules. Therefore, if subparagraph (b) was to be included, subparagraph (c) was also needed, and subparagraph (d) applied to both subparagraph (b) and subparagraph (c), especially in cases where an appointing authority had no schedule of fees.

52. Mr. GUEST (United Kingdom) said that his delegation agreed to paragraph 2 bis on the assumption that subparagraph (a) was the leading provision of the paragraph, and that subparagraphs (b) and (c), in so far as they referred to the duty of arbitrators to take into account schedules of fees to the extent they considered appropriate, referred back to subparagraph (a).

53. Mr. JENARD (Belgium) said that his delegation attached great importance to article 33 and would have preferred a stricter wording; however, it would accept the revised text in a spirit of compromise.

54. Mr. HOLTZMANN (United States of America) was of the opinion that paragraph 2 bis should precede paragraph 2.

55. The Committee decided to retain paragraphs 2, 2 bis, 3 and 4 as they appeared in documents A/CN.9/IX/C.2/CRP.33 and CRP.36.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that a new paragraph 5 be inserted in article 33, to read: "No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 30 to 32."

57. It was so decided.

Article 34 (A/CN.9/IX/C.2/CRP.34)

58. Mr. ROEHRICH (France) said that it was not clear whether the deposits were to be made to the arbitrators themselves or to a third party.

59. The CHAIRMAN said that the arbitrators might either request that a deposit be made to them personally or simply ask for a bank guarantee.

60. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) pointed out that there was no reference to article 33, paragraph 1 (f). He felt that those costs should be reflected in the deposit.

61. Mr. HOLTZMANN (United States of America) recalled that his delegation's proposal for a new paragraph 5 in article 33 would have allowed an appointing authority to accept a deposit in advance, but that paragraph had been rejected by the Committee.

62. The CHAIRMAN drew attention to paragraph 2 bis proposed by the Co-ordinating Group and circulated during the meeting.

63. The Committee decided to retain article 34 as it appeared in document A/CN.9/IX/C.2/CRP.34 and in the report of the Co-ordinating Group.

Model arbitration clause or separate arbitration agreement.

64. The CHAIRMAN invited comments on the wording proposed in paragraph 20 of document A/CN.9/112 and on the alternative proposal of the United States delegation circulated at the meeting.

65. Mr. HOLTZMANN (United States of America) said that his delegation considered that the words "which the parties declare to be known to them" in the secretariat draft (A/CN.9/112, para. 20) were unnecessary. It had been made clear in other parts of the rules that, when the parties referred to the rules, they meant the rules currently being drafted and not any future rules. The rules of the International Chamber of Commerce, the American Arbitration Association and many other bodies did not contain such a phrase, although the ECE rules did.

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66. He recalled that the second sentence in the introductory paragraph of the secretariat draft had been added at the suggestion of his delegation. He now wished to propose the deletion of that sentence, because the law had changed in the United States. Furthermore no similar provision existed in any other international arbitration rules known to his delegation.

67. Mr. ROEHRICH (France) supported the position of the United States delegation.

68. Mr. PIRRUNG (Federal Republic of Germany) proposed that the Committee should replace the words "which the parties declare to be known to them" by the words "as of ..." and add the date on which drafting of the rules was completed.

69. Mr. JENARD (Belgium) supported the proposal made by the representative of the Federal Republic of Germany. If the arbitration rules were changed at a future date, it must be clear in the model arbitration clause whether the old or new rules were being referred to.

70. Mr. HOLTZMANN (United States of America) said that, if the Committee wished to indicate that parties were bound by the current rules, it should do so by restoring the phrase which had been placed in brackets in article 1 of the rules: "as in force at the time of the conclusion of the arbitration agreement". Parties tended to be careless in preparing arbitration clauses.

71. Mr. GUEST (United Kingdom) suggested that the words "as at present in force" could be added at the end of the first sentence of the model arbitration clause. The rules might well be revised and that could lead to doubt as to which set of rules applied.

72. Mr. MANTILLA-MOLINA (Mexico) said that paragraph (a) should refer to the names of the arbitrators as well as the name of the appointing authority.

73. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that that suggestion could give rise to difficulties in practice.

74. Mr. JENARD (Belgium) agreed with the Special Consultant. The model arbitration clause would become too complicated if it provided for the names of the arbitrators and also covered cases of the death of arbitrators and so forth.

75. Mr. GUEST (United Kingdom) proposed that the phrase "The parties also agree that:" should be changed to "Note: the parties may wish to consider adding provisions designating:". Paragraphs (a) to (e) would then not be part of the model arbitration clause. The parties should not feel bound to name an appointing authority.

76. Mrs. OYEKUNLE (Nigeria) supported that proposal.

77. Mr. HOLTZMANN (United States of America) said that the object of preparing a model arbitration clause was to provide the businessman with easily used wording; it would therefore be clearer if paragraphs (a) to (d) were included in the clause itself. Paragraph (e) was not a recommendation but a reminder and it should therefore be included in brackets in the form of a note.

78. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the secretariat had put paragraph (e) in brackets to show that it was not to be included in the model clause.

79. He noted that the United States draft mentioned applicable law in paragraph (e). If that meant substantive law, that was normally provided for in the contract itself; if it meant procedural law, parties normally provided for that indirectly by indicating the place of arbitration. He therefore felt that the reference to applicable law should be omitted.

80. Mr. HOLTZMANN (United States of America) said that his delegation would be prepared to omit paragraph (e) entirely and to leave the matter to the parties' lawyers.

81. With regard to the United Kingdom proposal, he would be prepared to change the phrase in question to "It is recommended that the parties add the following additional clauses:".

82. The CHAIRMAN suggested that a drafting group should be established composed of the representatives of Nigeria, the United Kingdom and the United States of America.

83. It was so decided.

The meeting rose at 6.05 p.m.