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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 9th MEETING

Held at Headquarters, New York,
on Friday, 16 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

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The meeting was called to order at 3.05 p.m.

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

Draft UNICTRAL Arbitration Rules (continued)

Article 22, paragraph 1

1. The CHAIRMAN suggested that the paragraph should be retained in its present form.

2. It was so decided.

Article 22, paragraph 2

3. Mrs. BELEVA (Bulgaria), supported by Mr. MANTILLA-MOLINA (Mexico) said that a party intending to produce witnesses should give not only the names and addresses of those witnesses but also the facts to be established by their testimony, in order to allow the other side to prepare its case.

4. Mr. TSEGAH (Ghana) agreed with that view, since the production of surprise evidence might lead the other party to ask for additional time to prepare its case, and that would increase the costs.

5. Mr. HOLTZMANN (United States of America) also supported the Bulgarian view but suggested that a party should be required to provide information not on the facts to be established but on the subject-matter to be covered by the testimony, since to list each fact would prove too complex.

6. Mrs. BELEVA (Bulgaria) accepted the United States suggestion.

7. Mr. PIRRUNG (Federal Republic of Germany) asked whether the arbitral tribunal could hear witnesses which neither party had asked for, even if one of the parties was not present.

8. The CHAIRMAN said that the point was covered by article 14. Each individual case would be governed by the national legislation to which it was subject.

9. Mr. SANDERS (Special Consultant to the UNICTRAL secretariat) said that, if one party was absent, and the arbitrators felt unable to make a decision on the basis of the evidence available, they could under the provisions of article 14 ask the claimant to produce further witnesses.

10. The CHAIRMAN suggested that the Committee adopt paragraph 2, as amended by the representatives of Bulgaria and the United States.

11. It was so decided.

Article 22, paragraph 3

12. Mr. TSEGAH (Ghana) said that the question of interpretation had already been covered by article 16. Paragraph 3 should therefore be deleted.

13. Mr. HOLTZMANN (United States of America), supported by Mr. DEY (India), said that the paragraph referred not only to interpretation but also to verbatim records. Since there was often confusion as to who was responsible for organizing such matters, any positive guidance was welcome. The paragraph should therefore be retained.

14. Mr. ROEHRICH (France) said that the paragraph should be retained, but should refer only to verbatim records.

15. Mr. JENARD (Belgium), supported by Mr. PIRRUNG (Federal Republic of Germany), said that, in the French text, the word "sténographique" should be deleted; sound recordings should be acceptable.

16. Mr. MANTILLA-MOLINA (Mexico) said that the word "interpretation" should be replaced by the word "translation" or "interpretation into the language of the proceedings", since "interpretation" was ambiguous.

17. The CHAIRMAN said that "translation" applied to written documents, whereas "interpretation" applied to oral proceedings.

18. Mr. JENARD (Belgium) said that the word "translation" was preferable.

19. Mr. ROEHRICH (France) supported the proposal of the representatives of Mexico and Belgium, since paragraph 5 referred to the possibility of written statements.

20. The CHAIRMAN suggested that the Committee should retain the existing text, except for the deletion of the word "sténographique" in the French text and the substitution of the word "translation" for the word "interpretation".

21. It was so decided.

Article 22, paragraph 4

22. Mr. MELIS (Austria) said that the second, third and fourth sentences of the paragraph should be deleted. The second sentence was merely a repetition of the first. The third sentence assumed that witnesses would be present throughout the proceedings unless the arbitrator asked them to leave, whereas most legal systems stipulated that witnesses should be present only while giving their evidence. The fourth sentence merely reiterated the provisions of article 14, paragraph 1.

23. Mr. MANTILLA-MOLINA (Mexico) proposed that the third sentence should be retained, but should be amended to specify that witnesses should not be present unless giving testimony.

24. Mr. SZASZ (Hungary) supported the Mexican proposal. If the hearings were not held in camera, it was particularly important that witnesses should not be present except when giving evidence.

25. Mr. GUEST (United Kingdom) said that it should be for the arbitrator to decide whether a witness should be present, since expert witnesses might need to listen to the testimony of other witnesses. Furthermore, since the word "witness" was difficult to define, it would be wrong to establish rigid general rules. The sentence should be retained in its present form, in order to give the arbitrator added authority and resolve points of doubt.

26. Mr. HOLTZMANN (United States of America) agreed that the sentence should be retained. In the United States, witnesses were rarely asked to leave.

27. Mr. PIRRUNG (Federal Republic of Germany), supported by Mr. ROEHRICH (France) and Mr. JENARD (Belgium), said that the fourth sentence should be deleted.

28. Mr. HOLTZMANN (United States of America) said that, at the eighth session of UNCITRAL, no agreement had been reached on the method of interrogating witnesses. It had therefore been decided that it should be for the arbitrators to decide on the method to be used. The fourth sentence had been inserted to make that clear, and should therefore be retained.

29. Mr. AYLING (United Kingdom), supported by Mr. MANTILLA-MOLINA (Mexico), said that the fourth sentence should be retained, but the word "interrogated" should be replaced by the word "examined", to make it clear that arbitrators could allow the cross-examination of witnesses.

30. Mr. DEY (India) proposed that, in the fourth sentence, the words "and place" should be inserted after the words "to determine the manner". The sentence should be retained whether his amendment was accepted or not.

31. Mr. ROEHRICH (France) said that it was important to use the same concept in each language. In French, the words "examiner" and "interroger" were not identical in meaning. "Interroger" covered the questioning of witnesses, while "examiner" was meaningless in that context.

32. The CHAIRMAN, supported by Mr. HOLTZMANN (United States of America), suggested that the problem could be solved by using both words. The words "or examined" could be added to the end of the sentence.

33. Mr. PIRRUNG (Federal Republic of Germany), supported by Mr. ROEHRICH (France), said that the word "interrogated" could be replaced by the word "heard", which was more comprehensive.

34. Mr. GUEST (United Kingdom) suggested that the word "examined" be used in the

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English text and the word "interrogés" be used in the French text, since the words denoted the same concept. The representatives of Mexico and the USSR could advise on the appropriate terms for the Spanish and Russian texts.

35. Mr. MANTILLA-MOLINA (Mexico) said that in Spanish the verb "examinar" expressed the desired concept.

36. The CHAIRMAN suggested that, in paragraph 4, the first and third sentences should be retained in their present form and the second sentence should be deleted. The fourth sentence should be retained, but a drafting group headed by the representative of France should be requested to find a suitable replacement for the word "interrogated" in each language.

37. It was so decided.

Article 22, paragraph 5

38. Mr. MELIS (Austria) said he had difficulty with paragraph 5 because under Austrian law evidence of witnesses in written form was not acceptable and would be regarded as contrary to public order.

39. Mr. MANTILLA-MOLINA (Mexico) said that he too in principle considered that such evidence was not acceptable, because it excluded the possibility of cross-examining witnesses. He could agree that experts might present evidence in written form, and that would give an opportunity to study such evidence; however, affidavits did not exist in continental or Latin American law.

40. The CHAIRMAN suggested that it might be possible to omit paragraph 5, since the point raised was covered by the last sentence of paragraph 4.

41. Mr. ROEHRICH (France) said that he could not agree to omit paragraph 5; although it conflicted with some national laws, that had been the case with other articles of the arbitration rules and all the rules would be under international supervision. If paragraph 5 was to be omitted, paragraph 3 would have to be reconsidered: if an arbitral award was based on oral testimony with no verbatim record, there would be difficulty in recognizing it under French law, and perhaps other systems of law too.

42. Mr. PIRRUNG (Federal Republic of Germany) said that in his country the witnesses in arbitration cases could give evidence in written form. That was often a more practical and less expensive arrangement. He therefore considered that paragraph 5 should be retained. He pointed out that paragraph 4 concerned only the hearings and therefore did not cover the question of written evidence by witnesses.

43. Mr. HOLTZMANN (United States of America) said that, if paragraph 5 was retained as it stood, it would imply that written statements would have the same weight as the statements of witnesses who appeared in person. Paragraph 6 did not

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make any mention of the weight of evidence. He therefore suggested that paragraph 5 should be amended along the lines of the Inter-American Arbitration Commission Rules and the American Arbitration Association Rules, by adding at the end of the paragraph the phrase: "but shall be given only such weight as the arbitrators deem appropriate after consideration of any objections made to their admission." For example, the reasons why witnesses did not appear at a hearing could be taken into account in determining the weight of written statements.

44. Mr. ROEHRICH (France) said that, since national practice varied, the Committee should not give more weight to one form of evidence than another, particularly as paragraph 6 gave the arbitrators the latitude and liberty to determine the admissibility, relevance and materiality of the evidence offered.

45. Mr. SZASZ (Hungary) suggested that paragraph 5 should be left as it stood and the word "weight" should be added in paragraph 6.

46. Mr. STROHBACH (Observer for the German Democratic Republic), speaking at the invitation of the Chairman, said that paragraph 5 reflected the discussions at the 1974 London Seminar and the Fifth International Arbitration Congress on what kind of evidence was acceptable under different legal systems. The inclusion of a provision such as that contained in paragraph 5 was a useful innovation and could stimulate changes in national law, especially the law of arbitration. In his own country, for example, written statements by witnesses had recently become admissible.

47. Mr. DEY (India) said that written statements must be subject to cross-examination by the party against whom they were given; that safeguard was essential.

48. The CHAIRMAN said that the Indian representative should be reassured by the last sentence of paragraph 4.

49. If there was no objection, he would take it that the Committee wished to retain paragraph 5 in its existing form.

50. It was so decided.

Article 22, paragraph 6

51. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished to adopt the Hungarian amendment, whereby the word "weight" would be added to the paragraph.

52. It was so decided.

53. The meeting was suspended at 4.20 p.m. and resumed at 4.40 p.m.

Article 23, paragraphs 1 and 2

54. The paragraphs were adopted without change.

Article 23, paragraph 3

55. Mr. HOLTZMANN (United States of America) said that the words "arbitration agreement" should be changed to "arbitration clause" for the sake of consistency with the rest of the text.

56. Mr. TSEGAH (Ghana) suggested that the words "by any of the parties" should be added at the end of the first sentence.

57. Mr. MANTILLA-MOLINA (Mexico) suggested that the words "may also be" in the first sentence and the words "Such a request" in the second sentence should be omitted, and that the two sentences should be combined.

58. The CHAIRMAN said that it seemed that the Committee could agree to adopt the paragraph as amended.

59. It was so decided.

Article 24, paragraph 1

60. Mr. MANTILLA-MOLINA (Mexico) asked whether article 24 precluded the possibility of parties appointing their own experts.

61. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that article 24 was designed to regulate the appointment of experts by arbitrators; the parties were completely free to appoint their own experts.

62. Mr. MANTILLA-MOLINA (Mexico) said that it should be made clear in paragraph 1 that the arbitrators could appoint experts without prejudice to those appointed by the parties. He therefore suggested that the phrase: "Without prejudice to the expert proof provided by the parties" should be added at the beginning of paragraph 1.

63. It was so decided.

Article 24, paragraphs 2 and 3

64. The paragraphs were adopted without change.

Article 24, paragraph 4

65. Mr. DEY (India) said that the second sentence was unnecessary, since there was no doubt that a party could produce expert witnesses if it wished. That sentence also seemed to limit the rights of parties by allowing them to produce experts only at a particular stage of the proceedings, namely after the experts appointed by the arbitrators had given their report.

66. Mr. PIRRUNG (Federal Republic of Germany) supported that view.

67. Mr. HOLTZMANN (United States of America) said that he would prefer to retain the sentence, because paragraph 3 provided that parties should be given the opportunity to express, in writing, their opinion of the experts' report, and it should therefore be made clear that they could also produce expert witnesses. However, the words "At this hearing" in the second sentence of paragraph 4 could be omitted.

68. Mr. MANTILLA-MOLINA (Mexico), supported by Mr. DZIKIEWICZ (Poland), said that he considered it better to retain those words for the sake of clarity.

69. Mr. MANTILLA-MOLINA (Mexico) said that in the first sentence the words "and their counsel or agent" and also the words "to be present and" should be omitted, as they were unnecessary.

70. The CHAIRMAN said that that amendment could be referred to the Drafting Committee.

The meeting rose at 5.05 p.m.