

SUMMARY RECORD OF THE ONE HUNDRED AND SIXTIETH MEETING

held on Tuesday, 8 April 1975, at 3.15 p.m.

Chairman: Mr. LOEWE Austria

INTERNATIONAL COMMERCIAL ARBITRATION (agenda item 7) (continued) (A/CN.9/97 and Add.1-4)

Mr. DERAINS (International Chamber of Commerce), speaking at the invitation of the Chairman, said that ICC had a special interest in arbitration for two reasons: first, its Court of Arbitration had more than 50 years' experience and dealt with about 200 cases per year; and, secondly, ICC represented, in 80 countries, trading parties which resorted to arbitration.

As the time available since receipt of the documentation had been insufficient to enable ICC to conduct a proper consultation of the circles it represented, his comments would be preliminary ones only. The same problem had arisen at the Fifth International Arbitration Congress held in January 1975 at New Delhi where, in its final recommendation (A/CN.9/97/Add.1, annex IV) the Congress had advocated more thorough consultations of interested economic circles.

In the first place, it should be stressed that the preliminary draft set of international commercial arbitration rules (A/CN.9/97) was not based on all the rules on arbitration in current use, as some delegations had stated. For example, it differed from the ICC rules on a number of extremely important points. Those differences were attributable to the fact that the UNCITRAL secretariat had initially been concerned only with ad hoc arbitration; and the fact that the draft rules now also covered administered arbitration gave rise to certain reservations. The provisions of the draft concerning administered arbitration might create dangerous confusion in trading circles.. When the parties selected an institution to administer arbitration, they would do so because they had confidence in that institution as a result of the services it had rendered in the past in applying its own rules. However, according to the draft rules, the arbitration institution would have no control over the procedure adopted but would confine itself merely to applying the UNCITRAL rules. In practice, the institution would place its seal on the arbitration proceedings, without having any power to guarantee the quality of arbitration.

In addition, the concept of administered arbitration as provided for in the preliminary draft did not correspond to any genuine practical need. According to the draft, the role of the administering institution would be to appoint the arbitrators where necessary, to decide whether the challenge of an arbitrator was justified, and to receive deposits for arbitration costs. However, according to the part of the draft which dealt with non-administered arbitration, the appointment of arbitrators and the rendering of decisions on challenges were the responsibility of the "competent authority", which would thus have exactly the same powers as the arbitral institution in the case of administered arbitration. Thus, the only original feature of administered arbitration was that the administering institution would receive the funds paid in as deposits, and it might be doubted whether it was worth while maintaining the concept of administered arbitration for that reason alone.

It appeared that the rules could be restricted to non-administered arbitration without losing any of their substance.

The problem he had mentioned was just one of the many problems that required more thorough study. That was why ICC, in its preliminary observations (A/CN.9/97/Add.1, annex II), had expressed the wish that a study group should be set up and had stated that it was ready to participate fully in the work of such a study group.

Mr. KHOO (Singapore) said that business circles in Singapore had been consulted regarding the UNCITRAL preliminary draft arbitration rules. One of the questions they had been asked was to what extent arbitration was resorted to as a means of settling disputes in international trade. The response of the organizations which had been consulted in a preliminary fashion was that arbitration was very rarely used for the settlement of such disputes. In his own view, there were two reasons for that somewhat surprising reply: the natural tendency of business men to try to settle disputes amicably, and the difficulties arising from the fact that standard contractual clauses provided for arbitration to take place in distant countries where, of course, the costs involved precluded recourse to arbitration save in cases involving very large amounts of money.

A further disincentive was the fact that arbitration clauses often provided for the arbitrators to be appointed by arbitral institutions in far-off foreign countries, and the arbitrators so appointed were usually quite unknown to the trader.

For the various reasons he had mentioned, trading circles in Singapore had a natural fear of the unknown and a suspicion that they would find themselves at a disadvantage. They had made the interesting suggestion - which his delegation was now putting forward as a proposal - that the United Nations should assume the functions of an administering arbitral institution and should establish a panel of arbitrators consisting of qualified persons from all countries in the world, including the developing countries. In making that proposal, his delegation was encouraged by the suggestion to the same effect put forward by ECE (A/CN.9/97/Add.1, annex I). Recourse to the UNCITRAL arbitration rules and to the United Nations panel of arbitrators would, of course, have to be agreed upon by the parties to a contract in the contractual provisions themselves.

If the United Nations were to set up such a panel, the problem of arbitrators' costs should also be covered, since the potential parties to arbitration proceedings would then know in advance the dimensions of the costs likely to be incurred.

In view of the psychological advantage of removing the fear of the parties that they would have to submit to a person appointed by a body which did not enjoy the authority and prestige of the United Nations, it might not be necessary to have three arbitrators, since one person appointed by the United Nations, of a nationality other than that of either party, would suffice.

Mr. ADESALU (Nigeria) said that, in his delegation's view, the preliminary draft of the arbitration rules was highly commendable, since in drafting the rules consideration had been given to all the relevant international conventions. That fact would ensure their general acceptance and thus promote international trade.

The draft arbitration rules had been submitted to Nigerian business circles for their comments and reactions. In the meantime, his delegation would take part in the general consideration of the articles.

Mr. JAKUBOWSKI (Poland) observed that the representative of the Federal Republic of Germany had stated (159th meeting) that, in his country, few cases had been encountered of the use of the ECE Arbitration Rules or, indeed, of any arbitration rules drafted for optional use.

The Polish experience in that respect was quite the contrary. References to the ECE Arbitration Rules were very frequently encountered in the contracts drawn up between Polish enterprises and foreign firms, especially European firms. In fact, those rules had been published in Poland in a number of languages and in four or five editions - a circumstance which indicated the great interest displayed in them by Polish enterprises. He had personally seen references to those rules in contracts concluded between Polish enterprises and enterprises in the Federal Republic of Germany, and had personally taken part in ad hoc arbitration proceedings in Western Europe in which the rules had been used as rules of procedure.

In the circumstances, his delegation felt that the preparation of a set of UNCITRAL arbitration rules would achieve two very important objectives, namely, the establishment of a set of rules that were far better than the existing ECE Rules and, of course, the creation of a universal instrument rather than a regional one. In the circumstances, the speedy adoption of those rules would be of great practical importance for the further development of international trade.

Mr. LEMONTEY (France) said that, despite the efforts made by the Secretariat to supply documents in advance of the session, the documentation on item 7 had not been received in sufficient time for his Government to organize broad consultations with interested business circles. If the Commission were obliged to adopt the draft arbitration rules immediately, it would be impossible to carry out such consultations. Consequently, his delegation endorsed the suggestion that a working party or study group might be set up, even if it were to meet only once before the ninth session of the Commission. If that were impossible, members of the Commission should at least be given the opportunity of revising any text that might be adopted at the current session.

That being said, his delegation was able to accept the idea that the adoption of procedural rules for optional use in ad hoc arbitration relating to international trade would fill a gap in the settlement of international trade disputes. Nevertheless, it would hesitate to put an UNCITRAL label on such rules. In the first place, the Commission, although a subordinate organ of the General Assembly, consisted of only 36 States and was thus not wholly representative of the legal and economic systems of the world. If the Commission put its label on the rules, the resolution by which it adopted them or recommended their adoption would, in practice, remain solely the responsibility of the members of the Commission, even if it were formally endorsed at a later date by the General Assembly. That did not appear to be a sufficient basis to recommend rules for universal use.

His delegation's second objection was even more fundamental. There might be considerable danger in affixing an intergovernmental label to a set of rules which had no connexion with national legislation. It was not a question of adopting a

convention or universal law on arbitral procedure; the rules for ad hoc arbitration that were under consideration had no connexion with national legislation. As a result, difficulties might well arise concerning the compatibility of the rules with one or another national system at the level of the execution of a judgement rendered under the rules.

In any case, it was absolutely necessary to broaden consultations, since there were a number of points on which his delegation was unable to participate in the discussion, such as those connected with articles 1, 18 and 27.

With regard to administered arbitration, his delegation fully endorsed the comments by the observer for ICC. Like him, it thought that the Commission should entirely omit the provisions concerning so-called administered arbitration and should restrict the rules to non-administered or free arbitration.

The provisions of article 6 were far too complicated and it would be more useful as well as simpler to base the machinery, for example, on that of the European Convention on International Commercial Arbitration, of 1961.

It would also be useful if the rules could be supplemented by the addition of a scale of costs, as had been done in many sets of arbitration rules.

In any case, the matter was not one of great urgency since the various existing sets of rules had not been applied in practice to any great extent.

Mr. GUEST (United Kingdom) said that, like the Czechoslovak representative (159th meeting), he wondered what was the purpose of discussing the preliminary draft rules at the present session. His delegation had been under the impression that the Commission's normal pattern of work would be followed and that, after a draft had been produced, it would be sent to Governments for their comments and reactions. At a later session, the Commission would then consider those comments and amend the draft accordingly. The Commission's report on its seventh session gave no indication that a different procedure was planned and that the greater part of the current session would be devoted to consideration of the draft arbitration rules.

It now appeared that some delegations wished to finalize the rules at the current session, without having given the States not represented on the Commission any opportunity to present their views. That did not appear to be an appropriate course of action.

In the circumstances, his delegation agreed with the suggestion by the representatives of the United States of America and the Union of Soviet Socialist Republics that the rules should be discussed at the current session but should not be finalized until a later session. Unfortunately, his own delegation had not a full brief of comments on the individual articles and its comments would perforce be of an inexperienced nature. He suspected that many delegations would find themselves in the same position.

Mr. BENNETT (Australia) said that his delegation supported in general the preliminary draft arbitration rules. A recent seminar in Australia had had the opportunity of discussing the rules and the general opinion had emerged that they were, for the most part, desirable. In particular, their chief advantage was considered to be the prospect of universality of application.

The preliminary draft rules should be considered at the current session as far as was practicable, in view of the Commission's commitments for its future sessions. It would not, however, be possible to reach the final stage of adopting the rules at the current session, since there were a number of questions of detail that would have to be resolved.

There were two such details that sprang to mind immediately - the possibility of conflict between the rules and the applicable law of the contract, and the question whether the rules should extend to administered arbitration or should be confined to free arbitration.

Australian law did not go as far as the laws of some countries in permitting party autonomy in arbitration. Questions of law remained within the jurisdiction of the courts and, although opinions were divided on the subject, it was generally accepted that an ex aequo et bono approach was not permissible. In consequence, application of the provisions of article 18, paragraph 1, and article 27, paragraph 2, would not be possible under Australian law.

It was unlikely that those difficulties were peculiar to Australia, since Australian law was very largely based on English law. Moreover, the difficulties would not affect Australian businessmen only but would apply to any arbitration procedures conducted in Australia. At the very least, therefore, the rules should clearly indicate that some particular rules might become inoperable as a result of the applicable law of the country in which arbitration was taking place and, in particular, that an ex aequo et bono approach was not permissible in all countries.

Needless to say, any statement to that effect would give rise to undesirable uncertainty, and the question deserved some study.

The question of the extension of the rules to administered arbitration was a difficult one and, in that connexion, some very interesting views had been expressed by the observer for ICC. It certainly appeared that, if the rules were to cover administered arbitration, there was need for very extensive discussions and consultations with the various arbitral institutions.

In view of the fact that there seemed to be no urgent need to adopt rules for administered arbitration, his delegation felt that it might be appropriate to exclude those provisions from the preliminary draft rules. If a need for such rules subsequently arose, the preliminary draft rules could be extended to cover that subject after appropriate consultations with the relevant institutions.

Mr. EYZAGUIRRE (Chile) said that many disputes arising from international contracts to which Chilean companies were parties were settled under arbitration clauses involving institutions based in Paris, London or New York. In many cases, Chilean businessmen were ill acquainted with the competence of those organizations - a fact which created insecurity for Chilean trade.

In general, his delegation was satisfied with the preliminary draft arbitration rules prepared by the Secretariat. They reflected modern trends and referred to administered, as well as non-administered, arbitration. They contained provisions concerning the appointment and number of arbitrators, the place of arbitration, arbitral proceedings, rules of evidence, the powers of arbitrators and the possibility of amicable settlement. They would therefore seem to provide

a means of ensuring expeditious, flexible, simple and relatively inexpensive arbitration; and he hoped that they would help to promote international economic relations and to foster regional and world-wide trade.

In the inter-American region, the Inter-American Juridical Committee of OAS had in 1974 recommended for adoption the draft Inter-American Convention on International Commercial Arbitration, which had subsequently been approved by the Specialized Conference on International Private Law held in Panama in January 1975. That convention solved the main legal problems arising for inter-American arbitration, relating to (a) the validity of the pledge clause in respect of commercial transactions, (b) the appointment of arbitrators, who could be of foreign nationality, (c) the procedure for international commercial arbitration and (d) the force of the award and appeal procedures.

Another instrument relating to the American hemisphere was the draft inter-American uniform law on commercial arbitration, adopted at the third meeting of the Inter-American Council of Jurists in 1956. The Inter-American Juridical Committee had requested that that text be adopted by the relevant authorities of each country.

The Inter-American Convention adopted at the Conference in Panama also took account of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which likewise dealt with the validity of the pledge clause, and had been signed or ratified by many countries of North America, Central America and South America. The Panama Conference had also taken from the New York Convention a provision enumerating the grounds on which an appeal might be lodged against an arbitral award. The Inter-American Convention had been unanimously adopted by all the countries of the American hemisphere, including the United States of America.

The preparatory work on that convention had been undertaken by the Inter-American Commercial Arbitration Commission and, in particular, its Executive Committee, of which Chile was a member. The Commission was a private body whose purpose was to establish and maintain a system of conciliation and arbitration for solving commercial disputes. It had been established in 1934, following a resolution adopted at the seventh Conference of American States in Uruguay. The Commission had been reorganized in 1967, under the auspices of the Inter-American Council of Commerce and Production, which had agreed to promote a series of conferences with the purpose of improving the inter-American arbitration system. In 1969, the Commission had been recognized as an institution in consultative status with the Organization of American States. At the five conferences held by the Commission between 1967 and 1974, a number of resolutions had been adopted with a view to expediting the adoption of legislation at the inter-American and international level. It had been considered that the ratification of the Inter-American Convention would contribute to the establishment of a generalized uniform system of international arbitration.

The Inter-American Commercial Arbitration Commission was at present engaged in a study of the draft rules now being considered by UNCITRAL. At its most recent meeting, held in Bogotá in 1974, it had decided in principle to endorse those draft rules and to transmit the text to the national branches of the Commission for information. In addition, other regional bodies, such as the Inter-American Development Bank, had expressed the view that the draft rules constituted an

appropriate basis for arbitration in the field of trade law. The Fifth International Arbitration Congress, held at New Delhi in January 1975, had also expressed the view that the draft rules would facilitate arbitration and promote the development of international trade.

His delegation considered that the draft rules deserved general support, although a number of questions would have to be clarified during the current discussions by UNCITRAL. The text should be the subject of broad consultations and his delegation would support any effort to improve it. If the Commission succeeded in agreeing on a text in the foreseeable future, it would have made an important step towards solving any disputes that might subsequently arise in connexion with commercial transactions.

Mr. PAREJA (Argentina) said that he wished to make a number of general comments on the UNCITRAL preliminary draft arbitration rules. In connexion with article 1, and particularly paragraph 2 thereof, his delegation was concerned to know what would be the role of third parties in arbitral proceedings. While it was aware that, under article 26 of the draft rules, an arbitral award would be binding only upon the parties to a contract, certain disputes might arise between the latter which directly or indirectly concerned third parties and, hence, the arbitration commitment entered into under the contract. In his delegation's view, the draft rules should contain specific provisions designed to protect the interests of such third parties. Such provisions should cover, first, cases in which third parties were interested solely in participating in the proceedings in which matters of concern to them were being dealt with. In the present context, his delegation did not wish to advance any opinion regarding the degree of participation in such cases, since that would largely depend on the contracting parties. Secondly, provision should be made for cases in which third parties had a direct interest in the outcome of the dispute - in other words, the consequences of the award - or had a common interest with one of the "original" parties and were present at the arbitral proceedings, either on their own initiative or at the request of the claimant or respondent - a situation which would constitute "litis consortio". There, too, his delegation did not wish to venture any opinion regarding the degree of participation of third parties.

Certain provisions in the draft rules, such as articles 16 and 17, appeared to be somewhat unbalanced - a situation which, in his delegation's view, was attributable to the scope of the powers vested in the arbitrators.

With regard to the comments made at the 159th meeting by the representative of the Federal Republic of Germany in regard to the usefulness of the current exercise, his delegation was of the opinion that the value of the exercise would depend not only on the important discussions in the Commission prior to the mandate given to the Secretariat but also, and to a much greater extent, on the ultimate fate of the draft rules - in other words, the effect given to them by Governments. That question was of course related to the extent to which the draft rules were in keeping with national constitutional and legislative provisions.

Mr. CHAFIK (Egypt) considered that the scope of the preliminary draft rules should be limited to non-administered ad hoc arbitration. In that connexion, the use of the term "free arbitration" in the text might be confusing