

SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-SEVENTH MEETING

held on Monday, 14 April 1975, at 10.40 a.m.

Chairman: Mr. LOEWE Austria

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

Examination of the preliminary draft "International Commercial Arbitration Rules"
(continued) (A/CN.9/97)

Article 27 (Applicable law) (continued)

The CHAIRMAN summarized the trends which had emerged from the beginning of the discussion on article 27 at the 166th meeting. Ten representatives had already expressed their views on the article. Their general feeling was that it was essential to specify that paragraphs 1, 2 and 4 of article 27 dealt with the law applicable to the substance of the dispute, while paragraph 3 related to procedure. Two representatives considered that the article should be re-cast and that reference should be made first to the mandatory provisions of the governing law, secondly to the terms of the contract and finally to trade usages.

With regard to paragraph 1, one representative thought that it should be deleted, because it was impossible to give the parties such a wide freedom of choice regarding the law applicable to the substance. The other representatives felt that the provision should be maintained in some form or another. In addition, most representatives considered that it was essential to take into consideration not only the express, but also the implied, choice of the parties, although a hypothetical choice should be excluded. One representative felt that the wording of the 1961 European Convention should be followed, and that reference should be made to the law "determined" or "indicated" by the parties. Several representatives considered that it was too restrictive to refer only to the "contract" and that the word "contract" should be replaced by the term "legal relationship" or "the matters in dispute". One representative considered that the law designated by the parties must not extend to the rules of private international law.

Two representatives considered that paragraph 2 should be deleted. One, while not wishing to go as far as that, felt that the paragraph was not very clear. Two representatives thought it was essential to specify the law which governed the choice of the parties: that law should be either the law of the place of arbitration or the law of the place where the arbitral proceedings had begun, or the law of the place where the award would be enforced. In the opinion of some representatives, the existing text adequately met present-day requirements, although it should be simplified and should allow the arbitrators complete freedom of choice.

Four representatives were of the opinion that paragraph 3 should be deleted on the grounds that it appeared to be superfluous. One of them had pointed out that the law would always have to be observed, regardless of whether it authorized the arbitrators to decide ex aequo et bono, and regardless of whether the rules contained a provision stating that they might do so. Four representatives felt that paragraph 3 should be maintained, because it dealt with an important question on which the rules could not remain silent.

Three representatives considered that paragraph 4 should be deleted, whereas five felt that it should be maintained, provided that it stated specifically that the usages of the trade must always be taken into account within the context of the applicable law.

Mr. HANOTTAU (Belgium) said that his delegation had no major objection to article 27, although the text could be improved in several respects.

The distinction between the substance of the dispute and the law applicable thereto, on the one hand, and procedure and rules on the other hand, was insufficiently clear and the arrangement of the provisions in the article should be improved. In paragraph 1, the words "their contract" should be replaced by the words "the substance of the dispute", which were wider in scope. The word "expressly" should be deleted because the parties might have chosen tacitly, but unambiguously, the law which was to govern their legal relationship. The 1955 Hague Convention on the Law Applicable to International Sales of Goods stipulated, in article 2, that the applicable law must be expressly designated by the parties or unambiguously result from the provisions of the contract.

Like many representatives, he considered that it was absolutely essential not to restrict the freedom of choice of the parties, who must be able to have recourse to a law which was not in any way connected with their contract.

Paragraph 3 would be improved if the words "of the country where the award is rendered" were deleted, since they were superfluous and misleading.

Mr. BENNETT (Australia) said that if article 27 was intended to be included in a set of rules applicable to arbitration in Australia, he would prefer it to be deleted altogether. However, in the context of international arbitration, other countries considered such provisions indispensable, for reasons both of content and of tradition. His delegation therefore agreed to the inclusion of the article, although reluctantly, provided that it did not cause any avoidable problems.

It was not clear whether the provision contained in paragraph 1 concerned the law applicable to the substance of the dispute (although the 1961 European Convention was quite specific on that point) or whether it concerned the arbitration procedure. In his opinion, the provision should not apply to the arbitration procedure. He fully understood the thinking of those who, like the representative of Poland, were of a contrary opinion but, whether the principle was sound or not, in Australia at least it was very unlikely that the courts would subscribe to it.

In paragraph 2, the word "deem" was inappropriate because it gave the impression that the arbitrators had subjective discretion and that they exercised it in a conclusive manner, a situation which would be impossible in Australia. The wording should be amended to read: "... the conflict-of-laws rules which appear to the arbitrators to be applicable". That difference was important, since it was essential to ensure that the arbitrators appreciated the situation objectively - to the satisfaction of the Australian courts, for example.

In connexion with paragraph 3, he observed that in Australia arbitrators were not authorized to decide ex aequo et bono, but he acknowledged that the provision contained the necessary reservation: "... if the arbitration law of the country where the award is rendered permits such arbitration". He hoped that the users of the rules would take the same reservation into account in their interpretation of many other provisions of the rules that were incompatible with the competence accorded to the arbitrators or to the parties under national law. Business circles might believe that the rules, including the provision in question, would be applied to the letter and that they were not subject to the applicable law. Consequently, the working group which was to consider the draft rules must make every effort to ensure that the parties were not misled in such a way and, in addition to the fundamental provisions of the rules, it must include a foot-note, for example - and not a mere comment - reminding users that the provision concerned was subject to the applicable law. Since that reminder would have to be repeated quite frequently, it might raise doubts in the minds of users and it might detract from the value that they would attach to the UNCITRAL rules, but it was nevertheless absolutely essential.

He would have preferred paragraph 4 to be deleted, in the light of Australian legislation. However, since the provision in that paragraph was of value in other systems, he would endorse it as constituting a general guideline for arbitrators.

Mr. GUEST (United Kingdom) said that the question of the applicable law was one of the most difficult to regulate. However, the régime defined in article VII of the 1961 European Convention was, in his opinion, reasonably satisfactory. In so far as the four paragraphs of article 27 of the draft rules attempted to apply article VII of that Convention, they were also satisfactory and could be maintained. But in so far as they were significant and probably deliberate differences between article 27 of the draft rules and article VII of the European Convention, it would, in his opinion, be preferable to revert to the provisions of the Convention. Generally speaking, those provisions could be incorporated without change in the UNCITRAL rules, subject to the comment made by the Australian representative concerning the word "deem" as it was used in the expression "that the arbitrators deem applicable" in paragraph 2 of article 27 of the rules.

The reference to the usages of the trade, both in article 27 of the UNCITRAL rules and in article VII of the European Convention, was indeed important, because trade usages constituted a significant source of law for the purposes of commercial arbitration and an important indication of the applicable law.

Mr. GOKHALE (India) said that his delegation generally agreed with the provisions of article 27, subject to the same observations.

In paragraph 1, the words "expressly designated" should be replaced by the words "agreed to". The words "applicable to their contract" should be replaced by the words "applicable to the matters in dispute".

The words "that the arbitrators deem applicable" should be deleted from paragraph 2.

Those amendments would bring article 27 of the UNCITRAL rules closer to article VII of the 1961 European Convention.

In paragraph 3, the words "the arbitration law of the country where the award is rendered permits such arbitration" should be replaced by the words "the decision is not repugnant to the law of the country where the award is rendered".

Mr. BURGUCHEV (Union of Soviet Socialist Republics) considered that paragraph 1 of article 27 should be kept as it stood. With regard to paragraph 2, it was essential - as the representative of Hungary had observed (166th meeting) - to ensure that the parties retained complete freedom. In paragraph 4, the terms of the contract must indeed be taken into account, a point which extended to the rules of enforcement of the contract. In addition, he agreed with the representative of the United States of America (166th meeting) that reference should be made in the commentary to the distinction that must be drawn between the applicable law, the terms of the contract and the usages of the trade.

Mr. EYZAGUIRRE (Chile) considered that article 27 was on the whole satisfactory. Paragraph 1 rightly enunciated the principle of the freedom of choice of the parties, a principle which was of great importance for certain Latin American countries in particular. For example, in shipping contracts involving Chilean merchants, the parties could agree, through the insertion of the paramount clause, 10/ to apply the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924) and in that case the contract was not governed by Chilean law. His delegation therefore considered that the expression "applicable to their contract" was satisfactory, but it thought that the word "designated" should be replaced by the words "agreed on".

Paragraph 2 was also satisfactory, and, when the parties had given no indication to the arbitrators concerning the applicable law, it was only logical that the latter should apply the rules of private international law contained in the international or regional conventions in force. They would, for example, apply the Montevideo treaties of 1940 (Treaty on International Procedural Law, Treaty on International Commercial Navigation Law, and Treaty on International Commercial Terrestrial Law), and since January 1975 they had been obliged to take into account the conflict-of-laws rules adopted in Panama by the Specialized Conference on International Private Law.

In addition, he considered it necessary, in a set of rules of a universal nature, to incorporate a provision permitting the arbitrators to act as "amiables compositeurs".

Lastly, with regard to paragraph 4, he mentioned that under Chilean law the intention of the parties had to be taken into account in the interpretation of contracts. In his opinion, paragraph 4 made it possible to give effect to that provision of a general nature, which existed in the legislation of many countries.

Mr. GORBANOV (Bulgaria) said that article 27 seemed to be acceptable, but he supported the proposal to delete the word "expressly" from paragraph 1, since the arbitrators must also take into consideration the implicit choice of the parties. Paragraph 2 was also satisfactory, but the working group should consider whether it was possible to determine the applicable conflict-of-laws rule in advance.

10/ The commonly used name for clauses which incorporate the Hague Rules in bills of lading.

He had no objections to paragraph 3, but considered that a certain hierarchy of sources of law should be re-established in paragraph 4; in other words, the applicable law should be taken into account first, then the contract and then the usages of the trade. The usages should not prevail unless the applicable law so provided.

Mr. SZASZ (Hungary) supported the Belgian representative's proposal to delete the word "expressly" from paragraph 1.

Hungarian legislation allowed the parties to choose an applicable law which had no lien de rattachement with the subject of the contract. That freedom was granted to the parties only, and arbitrators had to base their choice of the applicable law on objective factors. He considered that the freedom of the arbitrators to choose the applicable law should be limited, and that the objective factors in that case might be the place of arbitration, the place of habitual residence of the claimant or of the respondent, or the place where the award was to be enforced. Personally, he would prefer the place where the arbitral award was to be enforced.

Mr. KRISPIS (Greece) pointed out that certain representatives were discussing article 27 as if it were an article of a convention, whereas it was simply a contractual clause which would not have the force of law. Accordingly, the provision might be misleading to the parties if it was left as it stood.

With regard to paragraph 1 of article 27, he thought that the working group should consider the four ways of determining the applicable law on the basis of the choice of the parties. There was the law expressly designated, the implicit law, the presumed law and the hypothetical law.

Mr. ADESALU (Nigeria) said that paragraph 1, which stressed the free will of the parties, was satisfactory. Paragraphs 2 and 3 did not raise any problems for his delegation either, and he shared the United Kingdom representative's view, namely that trade usages, mentioned in paragraph 4, were important sources of law.

Mr. SAM (Ghana) said he agreed with the Indian representative that the word "expressly" in paragraph 1 should be deleted, an amendment which would make it possible to take into account the wishes of the parties to a greater extent. He also thought that the words "to their contract" in paragraph 1 should be replaced by the phrase "to the substance of the dispute". In view of the link between paragraphs 2 and 4, he thought it would be best to follow the wording of article VII of the 1961 European Convention. Finally, he shared the view on paragraph 3 expressed by the representative of the Federal Republic of Germany at the 166th meeting, and suggested that the working group should consider the possibility of using the wording which appeared in article VII of the 1961 European Convention.

Mr. CHAFIK (Egypt), referring to the phrase "the arbitrators shall apply the law" in paragraph 1, said that it was essential to provide assurances to businessmen in the developed countries, and that businessmen in the developing countries would benefit from those assurances because they would encourage the development of trade. The parties sometimes referred to rules which were not laid down by law; he cited the example of a transaction concluded between a

party of a developed country and a party of a developing country, who referred to a draft law which had not yet been submitted to the parliament of the developing country. He therefore proposed that the words "or rules" should be inserted after the words "shall apply the law" in paragraph 1.

The CHAIRMAN observed that the exchange of views on article 27 had confirmed the trends which had emerged at the 166th meeting. The Australian representative had, incidentally, been wrong in believing that the Polish representative thought that article 27 applied to procedure; in fact, all members of the Commission were agreed that article 27, with the exception of its paragraph 3, applied to the substance.

One representative wished to broaden the meaning of the term "law" by inserting the phrase "or rules" in paragraph 1. Many representatives were in favour of deleting the word "expressly" and had suggested that the notion of "contract" should be widened. Several representatives had referred, in connexion with paragraph 1 and other paragraphs, to article VII of the 1961 European Convention. They considered that article to be well drafted and believed that its wording should be followed.

With regard to paragraph 2, two representatives had raised the question of the basis on which the applicable law could be determined.

The members of the Commission found paragraph 3 to be generally satisfactory, but one representative had proposed the deletion of the phrase "of the country where the award is rendered".

Finally, several representatives asked that paragraph 4 should be placed immediately after paragraph 2, in order to place the provisions in the same order as they were in article VII of the 1961 European Convention; the representative who had advocated the deletion of article 27 at the 166th meeting had given additional reasons in support of his argument. Article 27, he had said, resembled the provision of a convention rather than a clause in a contract or in a set of rules.

Article 28 (Settlement)

Mr. GUEIROS (Brazil) said he thought that the problem raised by article 28 lay in the wording of paragraph 1, since it was impossible to give the arbitrators authority to say "no" when the parties said "yes". To meet the requirements of public policy referred to in paragraph 2 of the commentary on the article, he proposed that the words "and accepted by the arbitrators" should be deleted from paragraph 1 and that a new paragraph 2 should be added, reading as follows: "If the arbitrators are of the opinion that the settlement would be against public policy or against the rights or interests governed by the statutes of mandatory trade rules, they should refuse to record the settlement in the form of an arbitral award. In this case, the arbitrators would confine themselves to issuing an order for the discontinuance of the arbitral proceedings". Paragraphs 2 and 3 should be renumbered accordingly. He believed that such a new paragraph would serve to avoid serious difficulties.

Mr. JAKUBOWSKI (Poland), referring to the second sentence of paragraph 2, pointed out that settlement by agreement raised the question of costs. He suggested that the Commission might adopt the principle of proportionality between the amount agreed in the settlement and the amount requested in the statement of claim.

Mr. KRISPIS (Greece) said that article 28 gave the impression that the discontinuance of arbitral proceedings could result only from a settlement; in fact, the parties also had the option of deciding to discontinue the arbitral proceedings without having agreed on a settlement - for instance, if they had decided to bring the case before a court. A distinction should therefore be made between those two possibilities. He also agreed with the Polish representative that where an arbitration tribunal rendered an award on agreed terms, the costs of arbitration raised a problem.

Mr. MANTILLA-MOLINA (Mexico) said that the French version of article 28 was acceptable, but he questioned the use of the Spanish term "orden de suspensión" to translate the phrase "ordonnance de clôture".

Unlike the Brazilian representative, he considered that paragraph 1 should be retained in its existing form.

He was unable to support the Polish representative's suggestion concerning the costs of arbitration, since the provisions of paragraph 2 would have to be compatible with those of article 31 (Costs), which stated that the arbitrators were to fix the costs of arbitration in their award. It would in fact be difficult to establish a rule for the calculation and apportionment of costs which would be applicable in all cases.

The distinction proposed by the Greek representative was unnecessary, since the term "settlement" was applicable also in cases where the parties decided during the proceedings to submit their dispute to a court.

Mr. HOLTZMANN (United States of America) said he was in favour of retaining paragraph 1 as it stood, since the arbitrators should be left free to decide whether they agreed or refused to record a settlement in the form of an arbitral award, and the deletion of that provision would place the arbitrators at the mercy of possible abuses by the parties. He did not consider that the Brazilian proposal covered all the possibilities in that connexion, and he also recalled that article 43 of the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes and the Rules of Procedure of the Inter-American Commercial Arbitration Commission contained similar provisions.

Mr. GORBANOV (Bulgaria) said that article 28 took into account the difference between judicial or arbitral settlements and non-judicial or non-arbitral settlements. He thought it was justifiable to say in paragraph 1 that the arbitrators should accept the settlement before recording it in an arbitral award.

Mr. SONO (Japan) observed that the Commission's task was not to draft a law, but a model set of rules, and he stressed the need to take into account, in matters of procedure, the law of the place where the award was rendered. Paragraph 3 of article 28 should be developed to provide answers to the concern which had already been expressed in connexion with paragraphs 5 and 6 of article 26, and which his delegation had also felt in connexion with paragraph 2 of article 29 (Interpretation of the award). It would also be interesting to examine the interim measures provided for in other articles. All those considerations might be combined in a single article, but that was a drafting matter.

Mr. SUMULONG (Philippines) said he agreed with the Greek representative that an order for the discontinuance of the arbitral proceedings would be enough in cases where the parties decided during the proceedings to bring their dispute before a court. Nevertheless, in other cases where the arbitral proceedings were discontinued before an award was rendered - either because the claimant decided during the proceedings that his claim was insufficiently well-founded, or because the respondent considered that the other party's claim was well-founded, or because the two parties agreed on a settlement of the dispute - it was important to ensure that the time and effort already spent on the arbitral proceedings were not lost; the arbitrators should for that reason render an award which, in the last-mentioned case, would constitute a record of the settlement between the parties.

With regard to paragraph 2, he said that the rules should include provisions fixing the costs of arbitration, even in cases where arbitral proceedings were discontinued.

Mr. GOKHALE (India) said he was in favour of the existing wording of article 28, since the arbitrators should have the power to refuse to record, in an award, a settlement which they thought would be contrary to public policy. He wondered whether the procedure for the order for discontinuance might not be extended to cases where the claimant did not submit his statement of claim in the prescribed form or within the prescribed time-limit.

Mr. GUEST (United Kingdom) thought it would be better to leave it to the arbitrators to fix and apportion the costs of arbitration in cases where the apportionment was not specified in the settlement between the parties.

The CHAIRMAN observed that there seemed to be fairly broad agreement in the Commission on article 28. With regard to paragraph 1, doubts had been expressed concerning the right of arbitrators to refuse to render an award recording a settlement between the parties. One representative had submitted a text specifying the cases in which the arbitrators might refuse to do so. However, most representatives had indicated their preference for the existing text. It had been pointed out that arbitral proceedings might be discontinued otherwise than by a settlement between the parties - for example, by withdrawal or acknowledgment of debt - and that that possibility should also be taken into account.

In connexion with paragraph 2, doubts had been expressed concerning the equal sharing of the costs of arbitration between the parties. One representative had proposed a system of proportional sharing, while another had proposed that the apportionment should be left to the discretion of the arbitrators. Several representatives had declared themselves in favour of the text as it appeared in the preliminary draft.

Finally, one representative had expressed the view that the provisions of paragraph 3 should be made more specific.

Article 29 (Interpretation of the award)

Mr. CHAFIK (Egypt) thought that in paragraph 1 it would be better to delete the adjective "official", which might give rise to confusion.