

SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-EIGHTH MEETING

held on Monday, 14 April 1975, at 3.15 p.m.

Chairman: Mr. LOEWE Austria

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

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

Article 31 (Costs)

Mr. JAKUBOWSKI (Poland) said that the provision contained in paragraph 1 (e), on compensation for legal assistance to the successful party, was not in accordance with existing practice. In practically all the cases in which Polish enterprises had been involved, the expenses in question were not included in the costs awarded by the arbitrators.

Mr. KRISPIS (Greece) pointed out that the main justification for the institution and continued existence of international commercial arbitration was that it was less protracted and less costly than litigation. He accordingly suggested that a separate article should be included which would require arbitrators to render their award without delay and to keep expenses as low as possible. That proposed new provision would not constitute a mere recommendation; it would establish a guiding rule.

The proposed article would also deal with certain specific points, in line with the principles he suggested. It would specify, for example, that no additional remuneration would be due to the arbitrators if they were subsequently called upon to interpret their award or to correct any mistakes in it.

Turning to the text of article 31, he proposed that in the first sentence of paragraph 2 the words "in general" be deleted. The words "in principle" were perhaps preferable but his own feeling was that the rule embodied in that first sentence should be stated without any qualification.

The CHAIRMAN pointed out that the qualifying expression used in the French text of the first sentence of paragraph 2 was "en principe".

Mr. CHAFIK (Egypt) proposed that some scale should be laid down for the fee of arbitrators, which was referred to in paragraph 1 (a). For example, a ceiling equivalent to 10 or 15 per cent of the amount in dispute could be specified.

Mr. HOLTZMANN (United States of America) said that, where the parties had designated an appointing authority, it would be appropriate to include a rule that such authority would consult with the arbitrators on the subject of fees. That remark applied equally to the question of the deposit of costs, which was the subject of article 32.

In paragraph 1 (e), he proposed the deletion of the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case". It was right that arbitrators should be empowered to determine the amount of their own fees but it was wrong that they should be enabled to deny the parties their right to legal assistance.

Lastly, he recalled the suggestion, made by the Australian delegation in connexion with article 16 (165th meeting), to the effect that if, during the course of the arbitral proceedings, the claim was supplemented or altered, the additional cost involved should be borne by the claimant who thus supplemented or altered his claim.

Mr. KHOO (Singapore) said that he favoured the suggestion that the appointing authority should consult with the arbitrators on the subject of fees in the case of non-administered arbitration.

Mr. GUEIROS (Brazil) supported the United States proposal to delete the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case" from paragraph 1 (e).

He also supported the suggestion to include a special rule on the subject of the appointing authority.

Lastly, he saw a contradiction between the rule in paragraph 2 that the costs of arbitration should be borne by the unsuccessful party and the text which had been adopted by the Commission at the 167th meeting for the second sentence of paragraph 2 of article 28 and which stated that, unless otherwise agreed by the parties, costs would be borne equally by them.

Mr. GORBANOV (Bulgaria) said that he could not accept the second sentence of paragraph 2, which was in contradiction with the rule set forth in the first sentence of the same paragraph. The best course would seem to be to retain the rule stated in the first sentence and to express it in unconditional terms.

Mr. GOKHALE (India) supported the Egyptian proposal for a scale of fees and also the United States proposal for the deletion of certain words from paragraph 1 (e).

With regard to paragraph 2, he agreed that the words "in general" should be omitted from the first sentence. He suggested that the word "Ordinarily" be inserted at the beginning of that sentence.

Mr. JENARD (Belgium) supported the idea of making provision for a scale of fees for arbitrators.

He reserved his position regarding paragraph 1 (e), the text of which was not at all clear.

Mr. EYZAGUIRRE (Chile) said that he was generally in favour of the ideas contained in article 31 but supported the suggestion to provide for a scale of fees. One argument in favour of that suggestion was that most arbitration institutions did have such a scale of arbitrators' fees.

Regarding paragraph 1 (e), he shared the view that it was not for the arbitrators to determine whether legal assistance was necessary. He therefore favoured the United States proposal to delete the clause relating to that point.

Lastly, with regard to paragraph 2, he preferred a rule to the effect that arbitration costs should be borne by the unsuccessful party, without prejudice to the right of the arbitrators to apportion costs between the parties if there were valid reasons for doing so.

Mr. MANTILLA-MOLINA (Mexico) said that he too supported the idea of a scale of fees but thought that it would be very difficult to lay down any guiding principles in the matter.

The whole question was in practice closely bound up with that of the deposit which the arbitrators could require in equal amounts from each of the parties. The deposit was intended primarily for the payment of the fees of the arbitrators. If the amount fixed by the arbitrators was considered excessive by the parties, they could object and perhaps come to an agreement among themselves on the amount to be deposited.

On the whole, he found the ideas embodied in article 31 useful as a basis for future work, but the question involved would have to be more thoroughly examined in order to arrive at fair solutions.

Mr. SAM (Ghana) supported the suggestion for a scale which would set a ceiling for the fees of arbitrators. He recognized, however, that it would be difficult to fix precise figures, because the fee would depend on the circumstances of each particular case.

With regard to paragraph 1 (e), he strongly supported the United States proposal for the deletion of the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case".

Regarding paragraph 2 of article 31, he found no contradiction between the provisions contained therein and the contents of the second sentence of paragraph 2 of article 28.

Mr. SUMULONG (Philippines), referring to paragraph 1 (e), said that the rule in most systems of legal procedure was that each party paid the fees of the lawyer it had engaged. Compensation for such fees was only awarded to a party where the loser was a claimant who had made a frivolous claim in bad faith, or a respondent who had used dilatory tactics and had invoked frivolous arguments in a case in which he had no real defence.

The CHAIRMAN, summing up the discussion on article 31, noted that several representatives had supported the suggestion for establishing a ceiling for the fees of arbitrators, possibly based on a percentage of the amount claimed. On that question it was appropriate to remember that the amount involved in the dispute should perhaps not be the only criterion; allowance should also be made for such matters as the length of the proceedings.

With regard to paragraph 1 (e), some representatives had pointed out that under most procedural systems each party paid the fees of the lawyer it engaged. At the

same time, there had been considerable support for the proposal to delete the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case".

The wording of paragraph 2 had attracted considerable criticism on the grounds that the paragraph first stated a rule and then authorized the arbitrators to derogate from that rule. Other representatives took the view that some link should be established between article 31, paragraph 2, and article 28, paragraph 2, where reference was also made to a division of the costs between the parties.

The question of a claim being supplemented or altered during the course of the arbitral proceedings had been mentioned during the discussion and it had been urged that the claimant should bear the costs resulting from the alteration or increase of his claim.

Lastly, there had been a suggestion for a new article which would specify that the arbitrators had a duty to render their award without delay and to keep the costs of arbitration as low as possible.

#### Article 32 (Deposit of costs)

Mr. MELIS (Austria) said that he was in full agreement with the wording of article 32, but did not see in it any answer to the problem which would arise if a party did not comply with the request of the arbitrators for a deposit. If the claimant failed to pay a deposit when required to do so, was his failure to be construed as tantamount to a waiver of the claim?

Mr. MANTILLA-MOLINA (Mexico) said that he, too, would wish for some clarification on that point.

In addition, he did not find the text of paragraph 3 of article 32 at all clear. The French version seemed to indicate that it was open to a party to pay not only his own deposit but also that of the other party, in order to ensure that the arbitration proceedings could go ahead. That possibility was explained in the last sentence of paragraph 1 of the commentary. However, the actual text of the article, in its English and Spanish versions, did not lend itself to that interpretation.

The CHAIRMAN said that he understood paragraph 3 of article 32 as meaning that, if the respondent did not pay the deposit required of him, the claimant could pay both deposits in order to ensure that the arbitration could proceed to a conclusion.

Of course, if the whole amount required by the arbitrators was not deposited, the arbitrators would not perform their duties. Arbitrators performed their duties under a contract of service, and, if the deposit was not paid, the contract was not complete and the arbitrators were entitled to refrain from organizing the arbitration.

#### Establishment of a working group

The CHAIRMAN said that the Commission had now concluded its consideration of the preliminary draft of the international commercial arbitration rules; it would have to consider, next, whether it wished to set up a working group on the subject.

Mr. CHAFIK (Egypt) said that, if a group were to be set up, it should be more in the nature of a drafting group, because the members of the Commission had already stated their views on the substance of the various articles.

There were also a number of questions which had not been dealt with in the draft articles and it would be appropriate for the group, if one was appointed, to formulate additional provisions to cover such questions. For example, it was desirable to make provision for a partial award which would deal only with the actual merits of the case in dispute, leaving all secondary questions - such as that of costs - to be dealt with in a subsequent award. Such a provision would be useful, because parties to an arbitration were often very anxious to have a decision as quickly as possible and did not wish to see the awards delayed by the consideration of secondary issues.

Mr. GUEST (United Kingdom) suggested that the question of the possibility of setting up a working group should be deferred until the next meeting, in order to allow more time for informal consultations.

Mr. VIS (Secretary of the Commission) asked whether the Commission wished the Secretariat to prepare a revised text of the arbitration rules, based on the trends that had emerged in the discussion and, if so, whether it wished the Secretariat to send the revised text to Governments for their comments.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he did not think the procedure mentioned by the Secretary of the Commission was the correct one. The draft arbitration rules could be distributed to Governments only after the Commission had finished its consideration of them.

He suggested, therefore, that the Secretariat should carry out the basic work of preparing new articles and should submit them to the working group for consideration and modification. When the working group had completed its work, the text would then be submitted to the Commission, perhaps at its eleventh session. After the Commission had completed its consideration of the articles, they could be sent to Governments for their observations.

Mr. SONO (Japan), speaking on behalf of the group of Asian States, suggested that the working group should be very small, since its functions would consist mainly of drafting work. If possible, it should be limited to one representative from each region.

Mr. ROGNLIEN (Norway) said that, in view of the difficulty of reconciling the ideas of representatives from the common-law and the civil-law countries, it would not be possible to have such a small working group. In his opinion, the group would have to include at least two representatives from each region.

The suggestion by the Secretary of the Commission that the Secretariat - in co-operation with the Special Consultant - should do some preliminary work on the text for the working group was an excellent one. The working group would then consider the text prepared by the Secretariat, modify it as appeared appropriate, and submit it to the Commission.

Mr. SAM (Ghana) said the suggestion of the Secretary of the Commission was a very sound one. The revised draft would greatly ease the task of the working group.

Although his delegation would prefer a small working group, it regretfully agreed that one representative from each region would not be enough. He therefore suggested a membership of 14, with the seats distributed on a geographical basis.

Mr. MANTILLA-MOLINA (Mexico) suggested a membership of eight, the same as that of the Working Group on International Negotiable Instruments.

Mr. MELIS (Austria) said that the working group, irrespective of its size, should be an open one, so that observers from other States members of the Commission could attend. It would also be useful if observers from the appropriate non-governmental organizations were able to attend.

Once the working group had completed its examination of the text, the draft arbitration rules should be sent to Governments and to international arbitral institutions for their comments.

Mr. KRISPIS (Greece) said that, while the title of the body was immaterial, its powers and its terms of reference were not. For that reason, the Commission should establish a working group rather than a drafting group. He agreed with the representative of the Union of Soviet Socialist Republics that the text should not be submitted to Governments until the working group had completed its revision.

Mr. KEARNEY (United States of America) said that he agreed with representatives who had concluded that a working group would have to be established. The Commission had been discussing the draft arbitration rules for about a week, and differences in views had emerged on almost every article. In the circumstances, the group would not be dealing merely with drafting matters. It would have to be sufficiently large to be able to produce a revised text representing a reasonable compromise acceptable to the Commission as a whole.

With regard to the time-table for the work, it was true that the Commission did not have a time-limit. Nevertheless, it had become clear at the Fifth International Arbitration Congress and at other international meetings that there was widespread interest in having generally acceptable arbitration rules adopted as soon as possible. He thought, therefore, that the Commission should not postpone its consideration of the draft rules until its eleventh session.

Mr. JENARD (Belgium) said that, in the past, it had sometimes proved very difficult to establish an inter-sessional working group. He, therefore, wished to ask the Secretary of the Commission whether there would be any technical objections to dealing with the arbitration rules at the Commission's ninth session, as well as the draft convention on the carriage of goods by sea, the session to be divided into two parts for that purpose.

Mr. VIS (Secretary of the Commission) said that it would be technically possible to do so. Another possibility would be to establish two committees of the whole which would deal with the subjects concurrently.

Mr. EYZAGUIRRE (Chile) said that his delegation agreed in principle with the programme proposed by the Secretary of the Commission, whereby the Secretariat would prepare a new draft of the rules - in co-operation with the Special Consultant - on the basis of the comments made by representatives during the discussion. In his view, the new draft should be sent to the Governments of

States members of the Commission for their comments, which the Secretariat would then summarize in a report for submission to the working group.

As the operation would be time-consuming, he did not think that the final draft could be considered by the Commission at its ninth session, which would be primarily concerned with the draft convention on the carriage of goods by sea.

Mr. PAREJA (Argentina) said that his delegation felt that the working group should be concerned basically with drafting. All the members of UNCITRAL had made their opinions known during the discussion.

As for the suggestion that the Secretariat should redraft the arbitration rules for the working group's consideration, he thought that such a procedure could lead to confusion. It would be far better for the working group - which should be a relatively small one - to base its work on the existing text and on the observations made during the current session.

After the working group had met at least once, a questionnaire should be sent to Governments for their comments, but no such action should be taken before the group had begun its work.

Mr. GUEST (United Kingdom) said that he agreed with the Belgian representative that some of the problems involved in setting up inter-sessional working groups in UNCITRAL would be by-passed if, for the ninth session, the Commission were to divide into two committees of the whole. In the interim, the Secretariat could produce a new draft text, where necessary giving alternative forms for the articles.

Like the United States representative, he thought that it would be satisfactory if the Commission were able to report to the Sixth Committee in the fairly near future that it had reached agreement on the rules for international arbitration.

Mr. GUEIROS (Brazil) said that, although the Belgian proposal would certainly save time, it should not be forgotten that a single representative could only be in one place at one time. The majority of countries sent only one representative to the Commission and many countries might have difficulty in sending more than one.

In view of the discussion that had just taken place, it was most unlikely that the working group could produce agreed texts for most of the articles. It would undoubtedly have to produce alternative versions for many of them.

Mr. ROEHRICH (France) said that so many divergent views had been expressed that the work involved went far beyond mere drafting. Although his own delegation would like the working group to be as small as possible, there could be little doubt that it would have to be widely representative. In the circumstances, he was much attracted by the Belgian proposal. It was certainly a matter for each member State to decide how many representatives it would send to the Commission's ninth session, but the problem was not a serious one. The two committees of the whole need not meet simultaneously.

The CHAIRMAN said he thought that the members of the Commission needed more time to think the situation over. Two ideas had been put forward on the subject. The first suggestion was that the matter should be taken up by the Commission at its ninth session. In that connexion, he did not share the optimism of the French representative that two committees of the whole could meet at different times, since the meetings on the subject of the carriage of goods by sea would take up virtually the whole session.

The other solution put forward was the establishment of a working group consisting of from 8 to 14 members. The working group would, of course, be an open one and observers could attend.

FUTURE WORK (agenda item 11) (continued<sup>\*/</sup>):

Sessions of working groups

The CHAIRMAN invited the Commission to consider the dates and places for the sessions of its working groups.

Mr. VIS (Secretary of the Commission) said that, with regard to the seventh session of the Working Group on the International Sale of Goods, which was scheduled to meet at Geneva, the Working Group had itself suggested the dates 5 to 16 January 1976.

The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved that suggestion.

It was so decided.

Mr. VIS (Secretary of the Commission) said that the Working Group on International Negotiable Instruments was scheduled to meet in New York. It had made no suggestions concerning the dates of its fourth session, but had left the decision to the Commission. In that connexion, the Commission should bear in mind that it might not be necessary for the Working Group to meet prior to the Commission's ninth session.

Mr. SAM (Ghana) asked whether the Secretariat could inform the Commission of the possible dates available.

Mr. VIS (Secretary of the Commission) suggested that it would be convenient to hold the session in January or February 1976 in New York.

The CHAIRMAN asked whether the period 19 to 30 January 1976 would be acceptable to the members of the Working Group. If there was no objection, he would take it that that period would be scheduled for the fourth session of the Working Group.

It was so decided.

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<sup>\*/</sup> Resumed from the 152nd meeting.