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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 1st MEETING

Held at Headquarters, New York,
on Monday, 12 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS

Election of officers

International commercial arbitration

Draft UNCITRAL Arbitration Rules: Articles 1 and 2

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The meeting was called to order at 3.55 p.m.

ELECTION OF OFFICERS

1. The ACTING CHAIRMAN invited the members of the Committee to nominate candidates for the office of Chairman.
2. Mr. ROEHRICH (France) nominated Mr. Loewe (Austria).
3. Mr. SZÁSZ (HUNGARY) seconded the nomination.
4. Mr. Loewe (Austria) was elected Chairman.
5. Mr. Loewe (Austria) took the Chair.
6. The CHAIRMAN invited the members of the Committee to nominate candidates for the office of Rapporteur.
7. Mr. RUZICKA (Czechoslovakia) nominated Mr. Jakubowski (Poland).
8. Mr. HOLTZMANN (United States of America) seconded the nomination.
9. Mr. Jakubowski (Poland) was elected Rapporteur.

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

Draft UNCITRAL Arbitration Rules: Articles 1 and 2

10. Mr. SANDERS (Consultant to the UNCITRAL secretariat) said that there were a number of differences between the preliminary draft set of arbitration rules contained in document A/CN.9/97 and the revised draft set of arbitration rules contained in document A/CN.9/112. Article 2 (Modification of the Rules) had been added to the more recent document in response to the wishes expressed at the eighth session of the Commission, and was to be read in conjunction with article 26 (Waiver of Rules). Article 32 was new in the formal rather than in the material sense; it was in substance similar to article 30, paragraph 3, of document A/CN.9/97.
11. The most striking difference between the two documents was that the two-column system used in articles 6, 31 and 32 of the preliminary draft set of arbitration rules had disappeared as a result of the decision taken at the eighth session to exclude administered arbitration from the scope of the rules.
12. One crucial question concerned the establishment of the arbitration machinery in cases where one of the parties was reluctant to co-operate in the appointment procedure. Arbitration rules should include safeguards to ensure the smooth functioning of the machinery from the outset. It was therefore indispensable to have an appointing authority which could intervene when the respondent failed to appoint an arbitrator or when the two arbitrators could not agree on a presiding arbitrator. The appointing authority could be designated by the parties themselves,

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(Mr. Sanders)

preferably prior to the commencement of arbitral proceedings, as recommended in document A/CN.9/112 (introduction, para. 15).

13. The question as to how the appointing authority would be constituted would still remain if the parties failed to reach agreement on the designation of that authority. At its eighth session, the Commission had given overwhelming support to the establishment of a single appointing authority under United Nations auspices. That matter would have to be settled when the Committee considered article 7, paragraph 4. The question at issue was not the appointment of an arbitrator, but the designation of an appointing authority which, in practice, would be an arbitral institution or a chamber of commerce experienced in the appointment of arbitrators. There was little danger that, under those circumstances, UNCITRAL or the United Nations would bear the blame for unsatisfactory arbitration.

14. The revised draft set of arbitration rules made provision for the designation of an arbitral institution as the appointing authority. It was also possible under the rules to designate a physical person, but it was unlikely that frequent recourse would be had to that procedure.

15. The use of an appointing authority to designate arbitrators or to make a decision on the challenge of an arbitrator would have financial implications; in that connexion, he drew attention to article 33, paragraph 1 (f).

16. It was possible, under article 2, for parties to modify the arbitration rules to allow the appointing authority to provide additional services with respect to costs and deposit of costs. Such services, however, would be more appropriately provided by an arbitral institution than by a physical person.

17. The revised draft set of arbitration rules had been prepared mainly for the use of businessmen engaged in international trade. Though they could never be perfect in the absolute sense, they had been improved and could still be improved. What was essential was that they should be comprehensible to the ordinary businessman and that the entire arbitration machinery should function smoothly.

18. Mr. MELIS (Austria) said that the scope of application of the rules should not be limited to the settlement of disputes arising out of international trade transactions. For that reason, the words "relating to international trade" should be deleted from the subtitle appearing on the cover page of document A/CN.9/112.

19. Mr. HOLTZMANN (United States of America) said that the Committee must discuss the model arbitration clause, but should do so after discussing the draft set of arbitration rules. Concerning a title for those rules, he preferred "UNCITRAL Arbitration Rules".

20. Mr. SZÁSZ (Hungary) agreed that the model arbitration clause should be discussed at a later stage.

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21. Mr. MELIS (Austria) said that the title proposed by the representative of the United States was acceptable.

22. The CHAIRMAN said that if there were no objections, he would take it that the title "UNCITRAL Arbitration Rules" should be adopted.

23. It was so decided.

24. Mr. BROCHES (World Bank), referring to article 1, paragraph 1, said that in view of the insertion of the new article 2, the word "rules" was ambiguous. Article 1, paragraph 1, should therefore read: "These rules, modified as the case may be pursuant to article 2, shall apply ...", thereby making it clear that the "rules" included any modifications.

25. Mr. GUEST (United Kingdom) said that the general tenor of article 1 was more appropriate to a convention than to a set of rules to be applied by mutual consent. The concept of agreement should be emphasized more. Secondly, it was debatable whether the rules should only apply to contracts which referred "expressly" to the UNCITRAL Arbitration Rules. For example, in cases where parties who normally used the UNCITRAL Arbitration Rules made only an implicit reference to those rules, the rules should still apply. Accordingly, the requirement that agreements should refer "expressly" to the UNCITRAL Arbitration Rules should be omitted. Thirdly, the applicability of the rules should not depend on the existence of an "agreement in writing"; an oral agreement should suffice.

26. Articles 1 and 2 could therefore be combined in the following formula: "Where the Parties to a contract have agreed that disputes arising out of that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these rules, subject to such modification thereof as the parties mutually agree." Article 1, paragraph 2, and article 1, paragraph 3, could then be omitted; article 1, paragraph 4, could be retained if it was thought useful to do so.

27. Mr. JENARD (Belgium), referring to article 1, paragraph 1, emphasized that the arbitration rules would be subordinate to national laws, and the question as to whether a written agreement would be necessary or not would be decided by those national laws. In connexion with the text proposed by the United Kingdom representative, he said that the new text should stipulate that the rules to be applied would be those in effect when the contract was signed.

28. Mr. MELIS (Austria) said that article 1, paragraph 4, contributed nothing, since the arbitrator alone could decide which disputes should be included. Paragraphs 2 to 4 of article 1 should be deleted.

29. Mr. HOLTZMANN (United States of America) said he was reluctant to waive the requirement that agreements be in writing, since the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the laws of most

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(Mr. Holtzmann, United States)

countries called for agreements to be in writing, and consistency was desirable. Article 1, paragraph 3, should therefore be retained. Article 1, paragraph 2, was also useful, in that it conformed to the trend of encouraging States and legal persons of public law to enter into arbitration agreements.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that article 1 in its current form satisfactorily reflected the opinion expressed by the majority of countries at the eighth session of UNCITRAL. A requirement that agreements be in writing would make the rules more universally acceptable and would introduce a new degree of certainty into relations between parties. Considerable difficulties would arise if, in a dispute, one side asked the appointing authority to appoint an arbitrator while the other side claimed that no arbitration agreement had been made. The existence of a written agreement made such disputes easier to settle. Article 1 should therefore be retained in its current form.

31. Mr. PIRRUNG (Federal Republic of Germany) said that the text proposed by the United Kingdom representative was preferable to the existing text. However, if it was decided that agreements should be "in writing", the form of the written agreement should not be defined. In that respect, the rules should follow the precedent of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which allowed parties to follow the requirements of national legislation.

32. Mr. ROEHRICH (France) said that he favoured the text proposed by the representative of the United Kingdom. Reference to an "agreement in writing" was ambiguous and should be deleted. Parties should know that if no written document existed, their agreement might not be recognized, but the absence of a written document should not automatically render an arbitration agreement null and void.

33. The UNCITRAL Arbitration Rules did not constitute an international convention but a guide to the parties concerned. The text proposed by the representative of the United Kingdom provided the necessary flexibility.

34. Mr. SUMULONG (Philippines) said that the requirement that agreements be in writing should be retained, as a degree of certainty was vital in international trade.

35. The CHAIRMAN said that the UNCITRAL Arbitration Rules could not change existing national legislation or international agreements, and any reference to "an agreement in writing", as defined in article 1, paragraph 3, might therefore contradict the laws of some countries. On the other hand, if the rules referred to an agreement without stipulating that such an agreement be in writing, the parties might think that oral arbitration agreements could lead to internationally enforceable settlements, which was not the case according to the New York Convention. It should be for the parties themselves to decide on the form of agreement which would be accepted by both sides.

36. Mr. MELIS (Austria) said that the requirement that agreements be in writing should be waived. It was ambiguous and in any case, most disputes were settled by

(Mr. Melis, Austria)

arbitration and very few required enforcement procedures. Furthermore, the requirement that agreements be in writing would contradict the laws of some countries.

37. Mr. JENARD (Belgium) said that article 1, paragraph 3, might lead to misunderstandings and article 1, paragraph 2, was in contradiction with the laws of some countries, including his own. The Committee should therefore seek a common denominator and avoid definitions which were unacceptable to some countries.

38. The CHAIRMAN, summing up the discussion, recalled that only the representative of the United States had expressed an interest in retaining article 1, paragraph 2. Consequently, if the Committee agreed to entrust the redrafting of article 1 to the representatives of Belgium and the United Kingdom, paragraph 2 could be omitted from the new text. Paragraph 3, whose future depended on the fate of the words "in writing" in paragraph 1, and the words "in writing" in paragraph 1 should be placed between square brackets. The Committee could then decide whether to retain or delete the wording in square brackets during its second reading of the articles.

39. He invited delegations to elaborate their views on paragraph 4. The representative of Austria had argued in favour of its deletion, while one or two delegations had expressed interest in retaining it.

40. Mr. ROGNLIEN (Norway) said that he would prefer to retain paragraph 4, which performed a useful function by virtue of its reference to disputes relating to a contract as well as to those arising out of a contract. That elaboration was necessary because, logically, claims related to the invalidity of a contract were not, strictly speaking, disputes arising out of the contract, particularly if the contract was null and void. Moreover, a similar provision had been included in the Convention on the Limitation Period in the International Sale of Goods. That having been said, he did not see the need to spell out "existing or future" disputes in paragraph 4, because it was self-evident that the dispute might either already exist or arise in the future.

41. Mr. GUEST (United Kingdom) said that he was in favour of deleting paragraph 4 because the true scope of the application of the arbitration agreement would rest on two matters: first, the actual wording of the model arbitration clause to be inserted in the contract; and, second, the rules of national law, which would determine whether a dispute as to the validity of the contract fell within the scope of arbitration in general - a circumstance which could not be changed by any rule of the parties to the contrary.

42. Mr. JENARD (Belgium) said he, too, was of the view that it would be preferable to delete paragraph 4. The representative of Norway had already criticized the drafting of part of that paragraph, while his argument concerning an invalid contract was taken care of in article 19, paragraph 1. That being so, paragraph 4 was redundant.

43. Mr. ROGNLIEN (Norway) suggested that the substantive element of paragraph 4 could be incorporated in paragraph 1 by replacing the words "disputes arising out of that contract" by "disputes relating to that contract". In the commentary on

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(Mr. Rognlien, Norway)

paragraph 1 it could be explained that disputes relating to the breach, termination or invalidity of a contract were also covered. While it might not, in a model contract of the type under consideration, be important to spell out what would happen in the case of an invalid contract, it would nevertheless be wrong to exclude the possibility of applying the UNCITRAL Arbitration Rules to disputes relating to invalid contracts. If, but only if, the wording of paragraph 1 was made more flexible, paragraph 4 could be deleted.

44. Mr. SANDERS (Consultant to the UNCITRAL secretariat) said that the wording of the model arbitration clause had a vital bearing on the current discussion. If that clause was drafted along the broad lines proposed in the Secretary-General's report (A/CN.9/112, para. 20), paragraph 4 was superfluous. However, if the parties simply made reference to the UNCITRAL Arbitration Rules without actually including a full arbitration clause in the contract, then it would be appreciated that paragraph 4 was of some importance.

45. The CHAIRMAN suggested that it might be worth while to include in the text of the rules themselves a reference to the content of the model arbitration clause.

46. He asked the representative of the United Kingdom whether the wording he had proposed for article 1, paragraph 1, rendered article 2 superfluous.

47. Mr. GUEST (United Kingdom) said that it was his intention in his draft proposal to delete article 2 and to subsume its contents under article 1. It would be noted that the new language he had proposed for article 1 referred to "modification". Such modification need not necessarily be in writing and would, of course, include the modification of time-limits.

48. Mr. ROEHRICH (France) said that whereas a reference to an agreement in writing was not necessary in the case of the UNCITRAL Arbitration Rules, it was essential in the case of modifications of those rules, because if there was no written agreement there would be no means of ascertaining in what way the UNCITRAL Arbitration Rules had been changed - a circumstance which would create great uncertainty when questions of proof arose.

49. Mr. SZÁSZ (Hungary) felt that it would be very risky to make provision for oral modifications, especially as the original contract would be in writing. Moreover, it was essential to indicate that the parties need not expressly exclude a particular article of the rules, because in practice the parties would, in all likelihood, incorporate in their contracts solutions other than those expressly provided for in the UNCITRAL Arbitration Rules. Hence, the parties must be free, not only to modify the UNCITRAL Arbitration Rules, but also to insert clauses in the contract which deviated from or even conflicted with those rules.

50. Mr. ROGNLIEN (Norway), referring to article 1, paragraph 1, recalled that during the discussions held in 1975, some members had expressed the view that the arbitration agreement need not be in writing, while others had been of the opinion that an "in writing" requirement was essential because an oral agreement might be

(Mr. Rognlien, Norway)

considered invalid under some national laws. The reasoning of the second school of thought, although perhaps valid in respect of article 1, did not hold good for article 2. While there should be a written agreement establishing the arbitration proceedings, once those had been initiated, the parties should not be required to produce all the modifications in writing. Indeed, if the parties agreed to some point before a tribunal, it would be somewhat ridiculous to expect that they should also set out their agreement on it in writing. Consequently, he would suggest that article 2 should be deleted or, at the very least, that the words "in writing" in article 2 should be omitted.

51. Mr. DZIKIEWICZ (Poland) said he believed that the wording of article 1, paragraphs 1 and 4, would be satisfactory if the words "or in relation to it" were added after "disputes arising out of that contract" in paragraph 1. One could not separate the arbitration agreement from the commercial contract, without which the former could not exist. It should be borne in mind, moreover, that that paragraph, in its substance, was based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958.

52. The CHAIRMAN observed that opinion seemed to be equally divided as to whether article 2 was of great importance or of no importance at all. He would therefore welcome further comments on the substance of article 2.

53. Mr. PIRRUNG (Federal Republic of Germany) said he seemed to recall that the main view emerging from the Commission's past discussions on article 2 had favoured demonstrating that the most important point in all matters relating to arbitration was the will of the parties. Wording along the lines of the proposal made by the representative of the United Kingdom should prove adequate in that regard and, if some such wording was acceptable to the Committee, there would be no virtue in retaining a separate article concerning the modification of the UNCITRAL Arbitration Rules by the parties. Regarding the question of whether such modifications should be in writing, he had been impressed by the arguments advanced by the Hungarian representative, whose comments seemed to him to demonstrate that the "in writing" requirement was unnecessary, because any change in the UNCITRAL Arbitration Rules would have been agreed between the parties, although they might not have expressly stated that they wished to make such modification. He fully agreed with the representative of Hungary that, in the light of normal commercial practice, it was essential to enable the parties to deviate from the UNCITRAL Arbitration Rules without expressly stating that they were doing so. In that respect, the United Kingdom proposal, together with the deletion of article 2, seemed a fair solution.

54. The CHAIRMAN asked the representative of France whether he wished to retain article 2.

55. Mr. ROEHRICH (France) said that he would not insist on keeping article 2 in its current form but that he felt it necessary to emphasize that any departure by the parties from the UNCITRAL Arbitration Rules should be expressed unequivocally. It would be wrong to push the golden rule of international commercial arbitration,

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namely flexibility and the will of the parties, to the point of uncertainty and absence of regulation. The whole exercise of drawing up arbitration rules was designed to serve a useful purpose. Similarly, in the interests of both the parties to a contract, it must be spelled out somewhere how exactly the parties intended to deviate from the UNCITRAL Arbitration Rules.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to entrust the redrafting of articles 1 and 2 to the delegations of Belgium and the United Kingdom, with the assistance of the Consultant and the secretariat.

57. It was so decided.

The meeting rose at 5.50 p.m.