UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/9/C.2/SR.3
15 April 1976

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE TOOLE (II)

SUMMARY RECORD OF THE 3rd MEETING

Held at Headquarters, New York,
on Tuesday, 13 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

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

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

Draft UNCITRAL Arbitration Rules

Article 6

1. Mr. MANTILLA-MOLINA (Mexico) asked why the arbitral tribunal should consist of three arbitrators. A single arbitrator was more effective and less expensive.

2. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that in international ad hoc arbitration it was common practice to appoint three arbitrators. In that way each party could appoint an arbitrator who fully understood his position in relation to the national legislation to which he was subject.

3. Mr. MANTILLA-MOLINA (Mexico) said it was clear that it had been decided to appoint three arbitrators for traditional and statistical reasons alone. It was not for the arbitrators to act as lawyers for the parties. A single arbitrator would therefore be preferable.

4. The CHAIRMAN said that in important disputes, a college of arbitrators was usually desirable.

5. Mr. MELIS (Austria) said that normally three arbitrators were appointed. However, in disputes between parties of differing economic strengths, the weaker party would be at an economic disadvantage if the stronger party insisted on a three-member tribunal. He therefore supported the view expressed by the representative of Mexico.

6. The CHAIRMAN said that since the majority of countries advocated the appointment of three arbitrators, that system should be maintained. If he heard no objection, he would take it that the Committee wished to retain the existing text of article 6.

7. It was so decided.

Article 9

8. Mr. MANTILLA-MOLINA (Mexico) said that paragraph 1 should be simplified to read: "Either Party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, regardless of the origin of his appointment, if circumstances exist that give rise to doubts as to the arbitrator's impartiality or independence." In paragraph 3 the word "justifiable" should be deleted. If those changes were not made, however, he would not oppose the article.

9. Mr. JENARD (Belgium) said that a party should be able to challenge an arbitrator appointed by him only if the reasons for the challenge were unknown at the time of appointment. If those reasons were known before the appointment, the party should no longer have the right to challenge the arbitrator.

10. Mr. MANTILLA-MOLINA (Mexico) said that the Belgian proposal was not practical, since it would then be necessary to prove that the party discovered the reasons for challenging the arbitrator after his appointment; that would be difficult and would hamper the challenging procedure.

11. Mr. JENARD (Belgium) emphasized that challenges should only be made in exceptional circumstances and that legitimate causes for challenging should be limited in number.

12. Mr. PIRRUNG (Federal Republic of Germany) supported the view of the Belgian representative. It should not be difficult for a party wishing to challenge an arbitrator to show that he had not known of the reasons for the challenge when the arbitrator was appointed.

13. In paragraph 2, reference was made to "any past or present commercial tie". Some trades were small and it would be difficult to find an arbitrator who knew the subject but who had no ties with the parties concerned. Accordingly, either paragraph 2 should be deleted entirely or the reference to past or present commercial ties should be omitted.

14. Mr. JENARD (Belgium) said that he would prefer to delete paragraph 2 in its entirety.

15. Mr. MANTILLA-MOLINA (Mexico) agreed that paragraph 2 should be deleted. It was important for the rules to be as simple as possible, and the general statement in paragraph 1 was sufficient.

16. Mr.GUEST (United Kingdom) said that paragraph 2 should be deleted. The Belgian proposal, namely that a party should not be able to challenge his arbitrator if the reasons for the challenge were known at the time of the arbitrator's appointment, was interesting but would lead to complications. Such matters should be left to the good sense of the parties.

17. Mr. HOLTZMANN (United States of America) said that it was important to retain paragraph 2. In a world where widely differing standards of impartiality existed, the Committee must provide some basic criteria. However, the reference to past or present commercial ties was too comprehensive and the text should be amended to read: "... any past or present commercial tie of a substantial nature ....". A reference to commercial ties was important since it was possible for corporate executives to have commercial ties with the party without having direct financial ties. In some court cases in the United States, such commercial ties had been disqualifying factors.

18. The CHAIRMAN, supported by Mr. PIRRUNG (Federal Republic of Germany) said that it would be difficult to define "substantial".

19. Mr. HOLTZMANN (United States of America) said that he would not press his amendment.

20. The CHAIRMAN suggested that a drafting group on article 9 composed of the representatives of Belgium, Mexico and the United Kingdom should be established and requested to present a redraft of that article.

21. It was so decided.

Article 10

22. Mr. JENARD (Belgium), referring to paragraph 2, said that a challenge should also be notified to the arbitral tribunal, or at least to the presiding arbitrator.

23. Mr. PIRRUNG (Federal Republic of Germany) supported the Belgian proposal. It was essential that the whole tribunal should be informed.

24. Mr. MELIS (Austria) agreed that a challenge should be notified to all members of the arbitral tribunal. With reference to paragraph 1, a time-limit of 30 days would mean that a party who had learned of circumstances justifying a challenge could legitimately delay making the challenge while arbitration procedures continued. Reference to a time-limit should therefore be deleted and parties should be required to make a challenge as soon as the reasons for that challenge become known.

25. Mr. PIRRUNG (Federal Republic of Germany) said that even when reasons for a challenge became known, parties needed time to decide whether to make the challenge or to gather additional information. A time-limit of 15 days would give the parties the time required and would avoid the possibility of a party awaiting the completion of the arbitration procedure before making his challenge.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics), referring to paragraph 2, said that the notification in writing should include proof of the reasons for making the challenge. In paragraph 3, it was not clear which procedures were "applicable". For example, in a case where the respondent's arbitrator was to be replaced and where that arbitrator had been appointed not by the respondent but by the appointing authority, would the substitute arbitrator be appointed by the respondent or by the appointing authority? In other words, did the word "applicable" refer to the procedure already used or to any procedure allowed by the rules?

27. The CHAIRMAN said it was clear from the French version of paragraph 3 that in the event of removal of an arbitrator as a result of a challenge, the original procedure would be started anew. That meant that the respondent would be entitled to appoint an arbitrator even if in the first instance he had not done so.

28. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that while the language of article 10 was not sufficiently clear, his intention in drafting it had been that the appointing authority should choose the new arbitrator in the event of the removal of its original choice as a result of a challenge by the respondent. Such a provision was sensible since the fact that the appointing authority had been called upon to make the original appointment indicated that the respondent had not co-operated in the first place by making a nomination of his own.

29. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation had no preference regarding the procedure to be followed as long as the language of the article was sufficiently clear.

30. Mr. PIRRUNG (Federal Republic of Germany) said that he did not see why the respondent should be penalized for the fact that he had not originally appointed an arbitrator. The fact that an arbitrator chosen by the appointing authority was challenged indicated that the latter had failed in making its choice. There was, therefore, no good reason why it should automatically be given the opportunity to choose the new arbitrator. The original procedure set out in articles 7 and 8 should be repeated, giving both parties the possibility of nominating an arbitrator, even if they had not done so in the first instance.

31. Mr. MELIS (Austria) said that it might be desirable to require a party who was contemplating making a challenge to notify the other party and the arbitrator as soon as he became aware of a reason for challenge. The 30-day period provided for in paragraph 1 could then be used for negotiations between the arbitrator and the challenging party. At the expiration of the 30 days the latter would have to decide whether he intended to formalize his challenge or, alternatively, to abandon his intention to make a challenge.

32. The CHAIRMAN suggested that, in light of the views expressed by a number of representatives, paragraph 3 should be redrafted so as to spell out more clearly that in the event of the removal of an arbitrator as a result of a challenge the original procedure was to be repeated, including the right of each party to appoint an arbitrator.

33. The provision that the notification of challenge should simply state the reasons for the challenge did not seem adequate. Additional evidence should be produced, including supporting documents, and a provision to that effect should be included in article 10.

34. With regard to the time-limits allowed for the notification of a challenge, the Austrian suggestion tended to complicate matters, and he therefore suggested a reduction of the time-limit to 15 days. A new drafting group would not be required to incorporate those changes in article 10 since they were sufficiently straightforward for the Special Consultant to do so on his own.

35. Mr. MANTILLA-MOLINA (Mexico) said that it was a good idea to specify in article 10 that supporting documents should be submitted with the notification of the challenge. Such evidence should, however, be limited to documents in the strict sense of the word.

36. Mr. SZÁSZ (Hungary) asked whether the first sentence of paragraph 1 referred to the sending of the notification of the challenge by the challenging party or its receipt by the other party.

37. The CHAIRMAN replied that the provision in question referred to the sending of the notification.

38. Mr. SZÁSZ (Hungary) suggested that the wording of article 10 might be revised so as to make it clearer that the 30-day time-limit applied only to the sending of the challenge.

39. Mr. PIRRUNG (Federal Republic of Germany) observed that the Mexican suggestion would have the effect of limiting the acceptable reasons for a challenge to those which could be substantiated by documents. He inquired whether the representative of Mexico intended to exclude the written testimony of witnesses. He pointed out that the challenging party might have difficulty in obtaining written proof in the 30-day period provided for in paragraph 1. It would therefore be preferable to say nothing in article 10 regarding the question of evidence.

40. Mr. MANTILLA-MOLINA (Mexico) emphasized that the submission of written testimony by witnesses would complicate the procedure and should be expressly excluded. It would, however, be permitted to submit a written affidavit from the arbitrator himself.

41. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that the question of evidence arose under article 11, which, as currently drafted, would permit the submission of any kind of evidence.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the question of evidence could be treated in article 10, 11 or 22.

43. Mr. MANTILLA-MOLINA (Mexico) said that he had serious doubts regarding the first sentence of article 10, paragraph 3, which provided that a party could agree to the challenge made by the other party. If the arbitrator himself accepted the reasons for the challenge, such a provision posed no problems. However, if one party challenged an arbitrator and the other, either through negligence or complicity, accepted a reason for the challenge which the arbitrator himself contested, the latter's honour would be compromised. The arbitrator had the right to deny the reasons for the challenge in order to protect his reputation. Thus, the Committee should not lightly accept the provision contained in paragraph 3.

44. The CHAIRMAN suggested that the secretariat should redraft article 10 in co-operation with the Special Consultant and with the assistance of the representative of Mexico.

45. It was so decided.

46. Mr. JENARD (Belgium) read out the following articles, which his delegation was proposing as alternatives to articles 7 and 8 as contained in document A/CN.9/112:

(Mr. Jenard, Belgium)

"Article 7

1. If a sole arbitrator is to be appointed and the parties have not agreed on the choice within a period of *[30]* days after the receipt of the notice of arbitration, the claimant may apply to the authority whom the parties have previously designated for that purpose.

2. If the parties have not named such an authority or if the authority has not acted within a period of *[15]* days after the receipt of the request, the claimant may apply for such designation to the authority mentioned in article 8 bis.

Article 8

1. If the arbitral tribunal is to be composed of three arbitrators, each party shall name one arbitrator and the arbitrators thus appointed shall name the third arbitrator who will act as the president of the arbitral tribunal.

2. If, within *[30]* days after the receipt of the notice of arbitration the respondent has not named the arbitrator of his choice, or when, within *[15]* days after the naming of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the claimant may request the authority previously designated by the parties to make these appointments.

3. If the parties did not designate such an authority or if, within *[15]* days after the receipt of the request, the authority fails to comply with the request, the claimant may apply to the authority mentioned in article 8 bis.

Article 8 bis

1. In the cases covered by articles 7 and 8, the claimant may apply to either

[- (the Secretariat of the Permanent Court of Arbitration at the Hague),
or

(the organ which will be created under the auspices of the United Nations).*]*

2. The claimant shall attach to his request a copy of the contract, of the arbitration agreement and of the notice of arbitration. *[*If these documents were not drafted in one of the official languages of the United Nations, they shall be accompanied by a translation into one of these languages.*]*

3. The authority concerned shall without delay make the appointment of the arbitrator requested of it."

(Mr. Jenard, Belgium)

47. His delegation's proposals were intended to simplify and accelerate the procedure for appointing arbitrators.

48. His delegation believed that the provision in the draft articles prepared by the Secretariat requiring arbitrators to be of a nationality other than that of the parties was unnecessary. It was, for example, possible to conceive of an arbitration between parties of the same nationality, in which case such a requirement would be meaningless. In the view of his delegation, the paramount considerations in selecting arbitrators were independence and impartiality, and nationality need not be taken into account.

49. With regard to the provisions of article 7, paragraph 2, of the Secretariat version, his delegation felt that they restricted the possibility for parties to reach verbal agreement by telephone or otherwise. His delegation also felt that the respondent should not necessarily be deprived of the opportunity to nominate a sole arbitrator, as the Secretariat draft article would do. The time-limit for the parties to reach agreement on the appointment of a sole arbitrator should commence on the date on which the notice of arbitration was delivered to the respondent in accordance with article 4, paragraph 2.

50. The major difference between his delegation's proposals and the draft articles prepared by the Secretariat was to bypass the intermediate appointing authority designated at the request of one of the parties either by the Secretary-General of the Permanent Court of Arbitration or the appropriate organ to be established under United Nations auspices. Article 8 bis proposed by his delegation would accomplish that by having the arbitrators appointed directly by the Permanent Court' of Arbitration or the United Nations body to be established.

51. Finally, his delegation considered the list-procedure outlined in article 7, paragraph 6, to be excessively cumbersome.

52. The CHAIRMAN inquired whether the Committee wished to base its discussion on draft articles 7 and 8 as they appeared in document A/CN.9/112 or on the versions submitted by the Belgian delegation.

53. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that every attempt to simplify the arbitration procedure should be welcomed. However, the appointment of arbitrators was the most delicate issue in the entire set of arbitration rules and the Secretariat had, after lengthy and thorough discussion, come to prefer the system outlined in articles 7 and 8 of document A/CN.9/112. He had doubts regarding the feasibility of the solution proposed by the Belgian delegation for bypassing the intermediary appointing authority provided for in the draft articles. In practice, it was difficult to think of a central authority which was in a position to find suitable arbitrators in every area of the world. That was why articles 7 and 8 provided for the designation by the Secretary-General of the Permanent Court of Arbitration or the body to be established under United Nations auspices of an appointing authority which would best be able to appoint suitable arbitrators in each specific case. Moreover, neither the Secretary-General of the

Permanent Court of Arbitration nor the United Nations body to be established would be willing directly to appoint such arbitrators because of the political risks involved. He therefore suggested that the Committee should base its discussion on the draft articles as contained in document A/CN.9/112.

54. The CHAIRMAN suggested that the Committee could base its discussion on the Belgian proposal for the procedure to be followed up to the point when the claimant might apply for designation of the appointing authority to the Secretary-General of the Permanent Court of Arbitration or the appropriate organ to be established under United Nations auspices, and for subsequent aspects of the procedure on the draft articles as contained in document A/CN.9/112.

55. Mr. MELIS (Austria) said that his delegation sympathized with the Belgian proposals since they would simplify the very cumbersome procedure provided for in the Secretariat's draft articles. It would be a good idea to follow the simple arbitration rules established in the European Convention on International Commercial Arbitration so as to avoid a long and complicated procedure. Clearly, as the Special Consultant had said, it would be difficult for an international organization to assume responsibility for the appointment of arbitrators since it would risk being blamed for the outcome of a case by the losing party; however, new article 8 bis proposed by Belgium suggested two possible appointing authorities. He recalled that at the eighth session of the Commission some delegations had questioned the inclusion of possibility of recourse to the Permanent Court of Arbitration at The Hague, since that Court was not concerned with commercial arbitration. As to the merits of an organ to be created under the auspices of the United Nations, that would depend on how such an organ was formed; it could for example be formed along the lines of the Special Committee provided for in article IV of the European Convention on International Commercial. Arbitration, which was an entity composed of groups of experts on arbitration. There would have to be a clear division between the United Nations and such a body, so that the United Nations could not be held responsible for the outcome of a case.

56. Mr. PIRRUNG (Federal Republic of Germany) said that the Belgian proposal had the merit of providing for a much simpler procedure than that envisaged in the Secretariat's version of article 7; he did not think that the doubts expressed by the Special Consultant on the practicability of article 8 bis were grounds for rejecting that article; indeed article 8 bis could provide that the claimant could apply to either of the two bodies named or an appointing authority, and it would thus be in line with the situation described by the Special Consultant. He had doubts about the practicability of direct nomination by an appointing authority as envisaged in the European Convention on International Commercial Arbitration, particularly as the Special Committee set up by that Convention had not yet had to decide any question. He would be interested to hear from the Secretariat whether or not the United Nations would be prepared to take the responsibility of creating an organ to act as an appointing authority - whatever the answer was, the Belgian proposal could be a useful basis for an attempt to simplify the rules so that arbitration time might be reduced.

57. Mr. GUEST (United Kingdom) felt that the Committee could leave aside the

(Mr. Guest, United Kingdom)

question of article 8 bis for later discussion. The new article 7 proposed by Belgium omitted the requirement in the Secretariat's version of article 7 that the sole arbitrator should be of a nationality other than the nationality of the parties, and he agreed with that omission. The new article 7 also abandoned the list system provided for in paragraph 3 of the Secretariat's article 7 and the Committee should discuss that change. The object of the Belgian proposals was clearly to streamline and simplify arbitration procedures.

58. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that since there were substantive differences between the Belgian proposals and the Secretariat's version of articles 7 and 8, it would be better for the Committee to proceed with its discussion on the basis of the existing draft, especially as that draft reflected the opinion of the majority of participants at the eighth session.

59. Mr. HOLTZMANN (United States of America) agreed with the approach suggested by the representative of the Soviet Union, as that would be the best way to proceed in an orderly fashion. The Committee should take the Secretariat draft as a basis and discuss the differences with the Belgian draft point by point.

60. The CHAIRMAN said that the Committee could discuss the differences between the two drafts on each question until it had at least agreed on the procedure to be followed before recourse was made to a supreme authority. He therefore invited comments on paragraph 1 of draft article 7.

61. Mr. HOLTZMANN (United States of America) said that his delegation considered that the provision for neutral nationality in the existing text was a helpful concept; moreover, it reflected the practice provided for in international rules adopted in the past, for example the ICC rules. The concept was a helpful guide to the appointing authority; in the case of rules administered directly by arbitration institutions, appointing authorities had a better idea of the expectations of the parties involved, and the parties had a better idea of the practices of appointing authorities. He recalled that the Final Act, which had been signed by Governments of many of the countries represented at the current meeting, provided for the possibility of arbitration in a third country and therefore included the concept of neutral nationality. However, his delegation felt that the parties should, if they wished, have the opportunity to appoint an arbitrator of the nationality of one of the parties in accordance with the general provisions in article 2 of the draft rules. He therefore suggested that the wording of the Secretariat's version of article 7, paragraph 1, should be modified so as to indicate that the neutral nationality requirement should apply in relation to an arbitrator appointed by an appointing authority.

62. With regard to the provisions of the Secretariat's version of article 8, paragraph 1, the two arbitrators appointed by the parties should not be limited by the neutral nationality requirement when choosing a third arbitrator to act as president of the arbitral tribunal.

63. Mr. ROERICH (France) said that his delegation was not in favour of a neutral nationality requirement, since neutral nationality was no guarantee of

(Mr. Roerich, France)

impartiality. Furthermore, there was no reason why parties of the same nationality should be required to find an arbitrator of a different nationality, and the criterion of nationality itself could give rise to problems, since the concept of nationality was a delicate question linked to the sovereignty of each State, which alone was able to determine who were its nationals.

64. Mr. GUEST (United Kingdom) said that his delegation, too, favoured the omission of the neutral nationality criterion, since the fact that an arbitrator was of a nationality other than that of the parties to a dispute did not necessarily guarantee independence or impartiality, any more than the fact that an arbitrator was of the same nationality as one or other of the parties meant that he would be impartial. It was more a question of expertise and independence than of nationality. It would therefore be better to redraft article 7, paragraph 1, along the lines of article 7, paragraph 1, in the alternative draft provisions (A/C.9/113), so as to provide that the appointment of a sole arbitrator should be made having regard to such considerations as were likely to secure the appointment of an independent and impartial sole arbitrator.

65. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation did not believe that a rigid principle of neutral nationality should be included in article 7, since parties should be free to choose an arbitrator of the same nationality as one of the parties. He also agreed that no neutral nationality requirement should be applied in cases where two arbitrators chose a third arbitrator to act as president of the arbitral tribunal, or where two parties to a dispute were of the same nationality. It would therefore be better to make no mention of nationality, as in the Belgian proposals; indeed, in cases where neutral nationality was desirable, the problem would certainly be settled satisfactorily by the appointing authority, since that authority would have to take into account the need for the neutrality of the third arbitrator or sole arbitrator. The ideas underlying article 7 could therefore be included in the commentary rather than in the article itself, and that would have the merit of simplicity. He noted that the ICC rules also made provision for parties involved in a dispute to nominate an arbitrator of the same nationality as one of those parties.

66. Mr. MANTILLA-MOLINA (Mexico) said he wished to record his delegation's abstention on the question of a neutral nationality requirement, since he did not have sufficient information on the experience and practice of arbitral institutions in Mexico to be able to approve the omission of the requirement. However, he personally noted that a neutral nationality requirement could obstruct arbitration and involve delays and additional expenditure, and there could also be problems in determining the nationality of parties.

67. The CHAIRMAN said it appeared that the majority of representatives were in favour of omitting any mention of the nationality of arbitrators; however the Committee should decide whether to provide that the appointing authority should take precautions to ensure the impartiality of arbitrators.

68. Mr. STRAUS (International Council for Commercial Arbitration) speaking at the invitation of the Chairman, recalled that the question of a neutral nationality

(Mr. Straus, ICCA)

requirement had been discussed at length at the time when the rules had first been drafted and that a number of proposals had been considered. Most participants had felt that neutral nationality did not necessarily guarantee impartiality; however, they had also believed that the appearance of impartiality was as important as impartiality itself, especially when establishing rules. The drafting group had therefore discussed another formulation which would provide that the nationality of the arbitrator should be other than that of either of the parties when one of the parties so requested.

69. Mr. SZÁSZ (Hungary) said he agreed with other representatives that neutral nationality did not necessarily guarantee the impartiality of an arbitrator; however, if the arbitrator was of the same nationality as one of the parties involved in a dispute, that party would have some advantages because of common legal and commercial traditions. He therefore considered that as a minimum the requirement proposed by the representative of the United States should be included in the rules so that neither an appointing authority nor individual arbitrators would be able to select an arbitrator of the same nationality as one of the parties; only the parties should have that right.

70. Mr. GUEVERA (Philippines) said that his delegation too, felt that neutral nationality was no guarantee of independence or fairness, but believed at the same time that it was important to prevent any suspicion of partiality where an arbitrator was of the same nationality as one of the parties. He therefore suggested that the words "unless the parties have expressly agreed otherwise" should be added at the end of article 7, paragraph 1 of the Secretariat's text.

71. The CHAIRMAN said that it seemed that the majority of representatives were opposed to a neutral nationality requirement and therefore that the approach suggested by the representatives of the United States and the United Kingdom could be followed. Thus the concept of neutral nationality could be omitted from article 7, paragraph 1, but in the case of an appointing authority appointing arbitrators the rules could draw attention to the need to ensure impartiality by referring to the question of nationality; that provision could be drafted at a later stage, when the Committee came to the question of the nomination of arbitrators by an appointing authority and could thus be omitted from the general part of the provisions.

72. He suggested that the Committee should establish a drafting group on article 7, paragraph 1, composed of the representation of the United Kingdom and the United States, and request it to present a redraft of that paragraph.

73. It was so decided.

The meeting rose at 5.55 p.m.