UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/9/C.2/SR.4
16 April 1976

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 4th MEETING

Held at Headquarters, New York,
on Wednesday, 14 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

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The meeting was called to order at 10.05 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION

Draft UNCITRAL Arbitration Rules (A/CN.9/112 and Add.l, A/CN.9/113, A/CN.9/114) (continued)

Article 7 (continued)

1. The CHAIRMAN, recalling that agreement had been reached on article 7, paragraph 1, of the integrated text of the draft rules prepared by the Secretariat (A/CN.9/112), invited the Committee to consider paragraph 2 in conjunction with paragraph 1 of the proposal submitted by the representative of Belgium at the previous meeting.

2. Mr. JENARD (Belgium) said that his delegation's proposal was designed to provide all available means of enabling the parties to communicate and reach agreement. Furthermore, in order to reduce the period of time in which the parties must act, it stipulated that the period would commence on the date on which the notice of arbitration was received. It also left the parties full discretion regarding the means of choosing an arbitrator. A proliferation of communications would give rise to delay.

3. The CHAIRMAN pointed out that paragraph 1 of the Belgian proposal made no mention of a proposal by the claimant. It was conceivable that no agreement would be reached on an arbitrator and it might be preferable for both parties to have the right to apply to the appointing authority.

4. Mr. JENARD (Belgium) acknowledged that such a possibility was conceivable, but pointed out that there was no reason why the respondent could not also propose the name of a person to serve as an arbitrator. Many claimants might agree with the respondent's proposal. The choice should be left to the parties.

5. The CHAIRMAN accordingly suggested that the words "the claimant" in article 7, paragraph 1, of the Belgian proposal should be replaced by the words "one of the parties".

6. Mr. HOLTZMANN (United States of America) felt that the broadest possible range of methods of communication should be provided for with regard to the choice of an arbitrator. He accordingly suggested that the words "by telegram or telex" in paragraph 2 of the integrated text should be replaced by the words "by telegram, telex, telephone or directly".

7. With regard to the commencement of the period of time prescribed for reaching agreement, his delegation took the view that it might not always be in the best interests of the parties to speed up the process, and that one party should be able to alert the other by means of a notice of arbitration without having to seek an arbitrator. His delegation accordingly preferred the version of paragraph 2 in the integrated text to the Belgian proposal.

8. Mr. GUEST (United Kingdom) agreed. Although a party should be permitted to propose the name of the sole arbitrator in the notice of arbitration, as was provided for in article 4, he should not be bound to do so. The procedure provided for in paragraph 2 of the integrated text appeared to be relatively sound. Consideration might, however, be given to the proposal to allow either party to propose an arbitrator; in that case, the parties would try to reach agreement within 30 days of the receipt of the first proposal.

9. The omission of specific reference to the means of communication to be used would make it possible to use any means of communication.

10. Mr. MELIS (Austria) said that he could accept paragraph 1 of the Belgian proposal, as amended by the Chairman. With regard to the means of communication, he supported the representative of the United Kingdom. In that respect, too, the Belgian proposal was preferable.

11. Mr. PIRRUNG (Federal Republic of Germany) agreed that the Belgian proposal, as amended by the Chairman, was much simpler and more practical than the version in the integrated text. The possibility that agreement might not be reached within 30 days after the receipt of the notice of arbitration was remote.

12. Mr. SZÁSZ (Hungary) expressed concern at the trend towards the introduction of new forms of communication, such as the telephone. In international arbitration, it was very important to have proof of the various steps taken.

13. Mr. DZIKIEWICZ (Poland) shared that concern, and suggested that a proposal made by telephone should subsequently be confirmed in writing.

14. The CHAIRMAN, summing up the discussion, noted that a majority favoured permitting the use of all means of communication, although two delegations felt that only those means which would easily allow of proof should be used.

15. With regard to the commencement of the period of time allotted for reaching agreement, three delegations felt that the period should begin upon receipt of the notice of arbitration, but that view was not shared by the majority.

16. Most delegations believed that paragraph 2 should be conceived on a bilateral basis, so that as soon as notification had been received a party might propose an arbitrator; the parties should then reach agreement on the choice of the arbitrator within 30 days after receipt, otherwise a party could apply to the appointing authority.

(The Chairman)

17. He then invited the Committee to consider the question of the appointing authority.

18. Mr. JENARD (Belgium) explained that paragraph 2 of his proposal was designed to reduce the delay that might arise if the appointing authority did not act to appoint an arbitrator.

19. Mr. MELIS (Austria) fully shared the reasons given by the representative of Belgium for shortening the procedure. Many businessmen and lawyers had little experience of arbitration, and found it difficult to designate another appointing authority. Further delay might thereby arise. The Belgian proposal made the procedure clearer and more practicable.

20. Mr. HOLTZMANN (United States of America) took the view that the integrated text possessed certain advantages over the streamlined procedure proposed by the Belgian delegation. He emphasized that it was a central principle of arbitration to give expression to the will of the parties; that was more important than reducing the delay by a few days. Preservation of that principle might also encourage compliance with the award itself.

21. He appreciated the difficulty to which the Austrian representative had alluded regarding the designation of an appointing authority. Considerable information on that matter would, however, be available from chambers of commerce.

22. Mr. GUEST (United Kingdom) felt that the streamlined procedure proposed by the Belgian delegation was at first sight very attractive. The argument adduced by the United States representative was, however, convincing. He therefore wondered whether article 7, paragraph 3, of the integrated text (A/CN.9/H2) was the result of consultations with arbitral associations or experts.

23. Mr. SAUNDERS (Special Consultant to the UNCITRAL secretariat), replying to the United Kingdom representative, confirmed that the Secretariat had had consultations with certain arbitral organizations. The general feeling had been that it was important to draw on their experience since they might be called upon to act as the appointing authority. He added that, throughout the integrated text of the draft rules prepared by the Secretariat (A/CN.9/112), the autonomy of the parties had been respected regarding the choice of an arbitrator.

24. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) added that such a system was used throughout the Americas as well as elsewhere.

25. Mr. MELIS (Austria) fully endorsed the view expressed by the United States representative that the will of the parties should be respected as much as possible. However, he saw no contradiction between the integrated text and the Belgian proposal. Under the latter, the parties also had the possibility, within the time-limit, of proposing an appointing authority if that had not been done in advance. There was therefore no need to make express provision for such a

(Mr. Melis, Austria)

possibility, as was done in the integrated text. Under the Belgian proposal, nothing hindered the parties from trying to reach agreement on an appointing authority.

26. Mr. PIRRUNG (Federal Republic of Germany) agreed that the autonomy of the parties was the most important principle in arbitration. On the other hand, care must be taken to avoid compelling the parties to exercise their autonomy. The parties must pass through certain stages for nominating an appointing authority; specific rules were being laid down as to the way in which they must proceed. He was not impressed by arguments in favour of autonomy. Under the Belgian proposal, the parties would have even greater freedom to designate an arbitrator or an appointing authority than under the version in the integrated text. The principle of simplicity was just as important. Under paragraph 2 of the Belgian proposal, the parties were free to name an appropriate authority, while at the same time the procedure was much more streamlined.

27. Mr. ROEHRICH (France) supported the Belgian proposal for the reasons given by previous speakers, principally that of simplicity. The arguments put forward in favour of the version in the integrated text were unconvincing. The principle of the autonomy of the parties could be used both ways. It should be remembered that the parties would have already agreed to accept the UNCITRAL Arbitration Rules. The provisions of article 8 bis of the Belgian proposal would be the determining factor in the final designation of the superior authority. He recalled that the Secretariat had been requested at the previous session to undertake preliminary studies on the question of which authorities could be designated and whether they would accept the task. The parties had as much interest in a speedy solution as they had in their autonomy of choice. Arbitral organizations felt that an intermediate stage was preferable, but the question arose as to whether the parties, having accepted the UNCITRAL Arbitration Rules, wished to have an intermediate, and very complicated, additional stage. He fully agreed that many businessmen did not understand arbitral procedures and therefore tended to avoid having recourse to them.

28. Mr. MANTILLA-MOLINA (Mexico) supported the Belgian proposal in general, since he felt that it sufficiently respected the autonomy of the parties. It should, however, be made a little more consistent with regard to the provision relating to the designation of the appointing authority.

29. The CHAIRMAN suggested that the question of the choice of institution could be dealt with in one paragraph which might state that, after notification of arbitration, either party might propose the name of the person who should act as arbitrator or an appointing authority, or both, and that if, after 30 days, no agreement was reached, the matter should be referred to the supreme international authority.

30. Mr. JENARD (Belgium) said that that solution was acceptable to his delegation,

31. The CHAIRMAN suggested that a small drafting group comprising the representatives of France, the Federal Republic of Germany and either the United Kingdom or the United States should be formed to draft an appropriate text.

32. It was so decided.

The meeting was suspended at 11.05 a.m. and resumed at 11.15 a.m.

33. Mr. LEBEDEV (Union of Soviet Socialist Republics), referring to article 7, paragraph 4, of the integrated text, said that, if the Permanent Court of Arbitration at The Hague was prepared to carry out the functions described in the draft rules, then there was no real need to create an additional body. Any attempt to do so would create obvious difficulties and complications.

34. He asked whether the function of the proposed supreme authority would be to appoint arbitrators directly or simply to designate an appointing authority.

35. Mr. VIS (Secretary of UNCITRAL) said that the Secretary-General of the Permanent Court of Arbitration at The Hague had made it clear that he would be willing to designate an appointing authority but not to appoint an arbitrator.

36. Mr. GUEST (United Kingdom) and Mr. HOLTZMANN (United States of America) agreed with the views expressed by the representative of the Soviet Union.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that no additional organ or body should be established under United Nations auspices for the designation of the appointing authority.

38. It was so decided.

39. The CHAIRMAN said that the Secretary-General of the Permanent Court of Arbitration would presumably wish applications to be submitted in one of the official languages of the United Nations. Perhaps the Secretariat could contact the Secretary-General of the Permanent Court in that regard.

40. Mr. JENARD (Belgium) said it would be useful to have some indication of the costs that would be involved in the translation of applications and the designation procedure.

41. Mr. MELIS (Austria) said it should be made clear that such costs should be calculated on a nominal basis and not on the basis of the amounts involved in the dispute.

42. The CHAIRMAN said that the question of costs could be dealt with when the Committee considered draft article 33 relating to the other costs of arbitration.

43. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that article 8 bis, paragraph 2, as proposed by the representative of Belgium merely repeated the provisions of article 7, paragraph 5, of the integrated text (A/CN.9/112).

44. Mr. JENARD (Belgium) said that the procedure proposed by his delegation would involve sending the documents in question only to the Secretary-General of the Permanent Court of Arbitration, whereas, under the procedure proposed in document A/CN.9/112, documents would be sent to both the Permanent Court and the appointing authority, which would be a less practical procedure.

45. Mr. SAUNDERS (Special Consultant to the UNCITRAL secretariat) pointed out that article 7, paragraph 4, of the integrated text stated only that the authority _ in other words the Permanent Court - might require such information as it deemed necessary. Since the Secretary-General of the Permanent Court of Arbitration was reluctant to do anything more than designate an appointing authority, it was not logical to send all the documents concerned to him.

46. Mr. DEY (India) wondered whether the Permanent Court of Arbitration would be able to designate a suitable appointing authority without any knowledge of the dispute or of the laws which were applicable.

47. The CHAIRMAN said that the two-stage procedure avoided that problem, since the Permanent Court of Arbitration would merely designate an appointing authority, which would then study the case and appoint appropriate arbitrators.

48. Mrs. OYEKUNLE (Nigeria) said that she did not see the need for the two-step procedure. The Committee could draw up a list of the names of known appointing authorities, which could be amended later. Parties to disputes could then select from the list the appointing authorities which they considered most suitable.

49. The CHAIRMAN said that the existence of such a list would not guarantee agreement between the parties to a dispute. In the absence of agreement, a neutral body would be needed to appoint arbitrators.

50. Mr. HOLTZMANN (United States of America) said that article 7, paragraph 5 would be helpful and might, in fact, speed matters up by letting the claimant know from the outset what sort of information was needed.

51. Mr. MANTILLA-MOLINA . (Mexico) said that paragraph 5 should be simplified. The documents mentioned therein were very voluminous and it would be very expensive if they had to be translated. The important point was that the appointing authority should know what the dispute involved; accordingly, the claimant should enclose a summary of the dispute in the application and, possibly, a copy of the arbitration agreement.

52. Mr. GUEVARA (Philippines) said that, although the procedure set out in paragraph 5 might be useful, it should not be mandatory since the appointing authority's function was simply to designate an arbitrator.

53. The CHAIRMAN said that the question of simplifying paragraph 5 would be entrusted to the drafting group.

54. Mr. MELIS (Austria) suggested that article 7, paragraph 6, of the integrated text should be omitted so as to leave the appointing authority free to follow its own rules.

55. Mr. DOMKE (Observer for the International Chamber of Commerce) suggested that the version of article 7, paragraph 6, contained in document A/CN.9/113 should be adopted.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the drafting group should take into account the fact that the notification of the appointment of a sole arbitrator could come from either the claimant or the other party.

57. As far as article *7*, paragraph 6, was concerned, he said that adoption of the list-procedure would be useful since it would make the arbitration rules more attractive. Some drafting changes might be appropriate in order to simplify the procedure.

58. Mr. PIRRUNG (Federal Republic of Germany) said that since not all countries were familiar with the list-procedure, appointing authorities should be free to designate an arbitrator as they deemed fit.

59. Mr. ST. JOHN (Australia) welcomed the Belgian attempt to simplify the procedure but said he was reluctant to omit the reference to the list-procedure. The choice of arbitrator was one of the most important elements of the arbitration process and there' was therefore merit in giving the parties some say in the matter.

60. Mr. DEY (India) said that his delegation would be in favour of deleting article 7, paragraph 6. Since it had been agreed that the arbitrator designated by the appointing authority could not be a national of either party, the list-procedure would be pointless as it was probable that the parties would not know enough about the various candidates to make a choice.

61. Mr. ROEHRICH (France) said that his delegation would also prefer to delete the paragraphs thus leaving the appointing authority free to choose its method of appointment.

62. Mrs. OYEKUNLE (Nigeria) said that her delegation favoured retaining paragraph 6. Perhaps a compromise could be reached by redrafting the paragraph to cover the objections of those who favoured its deletion.

63. Mr. HOLTZMANN (United States of America) said that the list-procedure would be helpful in that it would greatly facilitate the appointing authority's task if parties could indicate at an early stage which individuals were wholly inappropriate from their viewpoint because of their lack of expertise in the specific matter involved. Secondly, by enabling parties to make challenges in advance rather than by the special and somewhat weighty challenge procedure, it would help to speed matters up.

6k. Mr. GUEVARA (Philippines) pointed out that the procedure outlined in paragraph 6 went against the principle of the autonomy of the parties, as the initiative for the selection of an arbitrator would come from the appointing authority. It would therefore be better if the parties were to submit the list to the appointing authority rather than the other way round.

65. Mr. JENARD (Belgium) said that his delegation preferred the alternative put forward in document A/CN.9/113, under which the appointing authority was free to appoint the arbitrator in such manner as it considered appropriate. That provision did not rule out the use of the list-procedure by those authorities which wished to use it.

66. The CHAIRMAN suggested that, in view of the differences of opinion, some compromise should be sought along the lines of that achieved in connexion with the nationality of arbitrators. Since the penultimate sentence seemed to imply that the paragraph was more recommendatory than mandatory in nature, a compromise might be reached by amending the first sentence along the following lines: "The appointing authority shall appoint a sole arbitrator so far as possible following consultations with the parties on the basis of a list."

67. Mr. ST. JOHN (Australia) said that, although it was somewhat unclear, the penultimate sentence would seem to apply more to cases in which the appointing authority was unable to reach a decision on the basis of the order of preferences stated by the parties and therefore had to resort to other measures. It was possible that the parties might dispense with the list-procedure if they had full confidence in the authority's judgement. However, his delegation would have difficulty in accepting any change that gave more freedom to the appointing authority than to the parties involved to dispense with the list-procedure.

68. The CHAIRMAN said that, if he heard no further comment, he would take it that the Committee was satisfied with the compromise he had suggested.

69. It was so decided.

The meeting rose at 12.50 p.m.