

UN LIBRARY

APR 19 1976

UN/SA COLLECTION



UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
GENERAL

A/CN.9/9/C.2/SR.6
19 April 1976

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 6th MEETING

Held at Headquarters, New York,
on Thursday, 15 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS

International Commercial Arbitration (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages, preferably in the same language as the text to which they refer. They should be set forth in a memorandum and also, if possible, incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Department of Conference Services, room LX-2332.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.10 a.m.

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

Draft UNCITRAL Arbitration Rules

Article 13

1. Mr. MELIS (Austria) suggested that article 13 should be deleted.
2. Mr. TSEGAH (Ghana) suggested that it should be placed after article 8.
3. Mr. LEBEDEV (Union of Soviet Socialist Republics) expressed a desire to retain the article, particularly in view of the decision taken the previous day concerning articles 7 and 8. The order of the articles could, however, be rearranged as suggested by the representative of Ghana.
4. Mr. DEY (India) agreed that the article should be retained and that it should follow article 8.
5. Mr. HOLTZMANN (United States of America) suggested that the substance of article 13 might not need to constitute a separate article but could be merged with either article 7 or article 8.
6. The CHAIRMAN pointed out that since the provisions of article 13 applied to both articles 7 and 8 that might entail needless repetition in those two articles.
7. Mr. JENARD (Belgium) said that in the French text it might be more appropriate to end the sentence with the words "accompagnés si possible d'une description de leur titre" instead of the present lengthier wording.
8. The CHAIRMAN said that article 13 would be referred to the drafting group which would take all the comments that had been made into account.

Article 14

9. Mr. PIRRUNG (Federal Republic of Germany) said that article 14, paragraph 1, should state clearly that both parties had an equal right to be heard even though that was already implied in the present wording.
10. Mr. RUZICKA (Czechoslovakia) agreed that the notion of impartiality of treatment of the two parties should be developed.
11. Mr. DEY (India) suggested that the concern expressed by the representative of the Federal Republic of Germany might be met by stipulating in paragraph 1 that the parties should also be treated with equality with regard to the opportunity to be heard.

/...

12. The CHAIRMAN suggested that the representatives of the Federal Republic of Germany, Czechoslovakia and India should draft a formula for insertion in paragraph 1.

13. Mr. DOMKE (Observer for the International Chamber of Commerce) pointed out that the issue of arbitration solely on the basis of documents, dealt with in article 14, paragraph 2, was an important one and he suggested that the following sentence should be added: "Both parties should be given a full possibility of presenting their case."

14. Mr. TSEGAH (Ghana) said that the first sentence of paragraph 2 was unnecessary, for the arbitrators were the persons best qualified to determine how the proceedings should be conducted. Moreover, it should not be for the parties to choose whether to be heard orally or not.

15. Mr. JENARD (Belgium) agreed with the representative of Ghana that the arbitrator should be able to determine whether or not an oral hearing was necessary. If the choice was left to the parties, they might opt for an oral hearing in order to delay the proceedings.

16. Mr. SZÁSZ (Hungary) said that he considered the first sentence very important since oral hearings were the usual practice in Hungary. His delegation could go along with the addition proposed by the representative of the International Chamber of Commerce.

17. Mr. GUEVARA (Philippines) said that in the Philippines the normal practice in arbitration cases was to have oral hearings. Accordingly, he suggested that the ideas in paragraph 2 be reversed; thus, arbitrators would hold hearings as a normal practice but, if the parties so requested, they could conduct the proceedings solely on the basis of documents.

18. Mr. DZIKIEWICZ (Poland) said that his delegation preferred the alternative wording contained in article 14, paragraph 3, in document A/CN.9/113.

19. Mrs. BELEVA (Bulgaria) said it was essential that the parties be summoned to present their arguments orally since the national legislation of most countries and the international conventions on the recognition and execution of arbitral awards contained clauses stipulating that an arbitral award must be accompanied by proof that the parties had been summoned and given an opportunity to present their arguments orally.

20. Mrs. OYEKUNLE (Nigeria) stressed that flexibility and the ability to call on expert testimony was crucial to the arbitration proceedings. The first paragraph, which pointed to the need for equal treatment of the parties, was very important. It should also be stipulated somewhere in paragraph 2 that parties should be given every opportunity to present their arguments either orally or in writing.

21. Mr. GUEST (United Kingdom) said that paragraph 2 seemed a reasonable compromise between the views of those who wished to emphasize the priority of oral proceedings and those who wished to leave the choice of whether or not to have oral hearings entirely up to the arbitrator. His delegation therefore agreed with the representative of Nigeria that, in principle, the wording of paragraph 2 should be retained.

22. Mr. HOLTZMANN (United States of America), Mr. MELIS (Austria) and Mr. ST. JOHN (Australia) said that they, too, believed that paragraph 2 represented a reasonable compromise.

23. Mr. STRAUS (Observer for the International Commission for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) pointed out that the matter had been discussed at length at the Fifth International Arbitration Congress and article 14, paragraph 2, essentially reproduced the consensus which had been reached at that time.

24. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that although, in principle his delegation supported the views of the representatives of the Philippines, Poland and Bulgaria regarding the preference for oral hearings, it recognized that paragraph 2 represented an attempt to reach a compromise solution. He proposed an amendment to the effect that a party might request an oral hearing at any stage in the proceedings, not just at the beginning.

25. The CHAIRMAN, summing up, said that, in view of the differences of opinion, the best course would seem to be to retain the existing text.

26. Mr. PIRRUNG (Federal Republic of Germany) said that the additional sentence proposed by the representative of ICC could be included in article 14, paragraph 1.

27. The CHAIRMAN suggested that the representative of ICC should join the drafting group composed of the representatives of the Federal Republic of Germany, Czechoslovakia and India to work out a wording for that paragraph.

28. If he heard no objection, he would take it that the USSR proposal was acceptable and that it should be referred to the drafting group. The Soviet representative might also wish to join the group.

29. It was so decided.

30. Mr. HOLTZMANN (United States of America) said that his delegation had difficulty with the stipulation in article 14, paragraph 2, that the arbitrators should decide whether the proceedings should be conducted solely on the basis of documents and other written materials; in some cases it might also be necessary to inspect goods. Although that right was implied under other articles of the Rules a party might try to use article 14 to prevent the arbitrator from doing so. He suggested that a provision should be added to the effect that in any case, the arbitrator might provide for an inspection of goods or other property during the course of the arbitration proceedings.

/...

31. Mr. ROEHRICH (France) said that the problem could be overcome by adding the words "or partially" after the word "solely".
32. Mr. PIRRUNG (Federal Republic of Germany) suggested that the word "solely" should simply be deleted.
33. Mr. MANTILLA-MOLINA (Mexico) suggested that the matter was already covered by article 20, paragraph 3.
- 3k. Mr. GUEST (United Kingdom) said that since article 15 implied that the arbitrators could inspect goods and property, article 14, paragraph 2, should simply provide for a choice between holding a hearing or having the proceedings conducted without a hearing.
35. The CHAIRMAN suggested that the drafting group set up to redraft article 14, paragraph 1, should also try to work out an acceptable solution to article 14, paragraph 2.
36. It was so decided.
37. Mr. HOLTZMANN (United States of America) said that it should be made clear in draft article 14 that the arbitrators had the power to delegate to others the performance of certain secretariat functions. That was in fact a very frequent practice. Accordingly he proposed that the following paragraph should be added at the end of draft article 14: "The arbitrators may arrange to obtain secretariat services in connexion with the arbitration to be performed by the appointing authority, if it is an institution and consents to do so, or by a secretary of the tribunal to be chosen by the arbitration tribunal." It would be reassuring to parties using the draft rules to know that such delegation of functions would only be of an institutional nature and would involve a member of the secretariat under the control of the tribunal.
38. Mr. ROEHRICH (France) said that, since arbitrators were free to organize the administrative aspects of their work as they saw fit, it was not necessary to include a provision relating specifically to the delegation of functions. Furthermore, such a provision might have the opposite effect to that foreseen by the United States representative, since parties to a dispute agreed to place themselves in the hands of arbitrators and not of some unknown institution or persons.
39. Mr. PIRRUNG (Federal Republic of Germany) agreed with the views expressed by the representative of France. The draft rules under consideration related to an ad hoc arbitration procedure, and the provision proposed by the representative of the United States would be inconsistent with such a procedure.

40. Mr. MELIS (Austria) agreed with the views expressed by the representatives of France and the Federal Republic of Germany. The adoption of the United States proposal might complicate the arbitration procedure, mislead the parties to a dispute and limit the freedom of the arbitrators. Consequently, the proposed provision would be contrary to the spirit of the draft rules.

41. Mrs. OYEKUNLE (Nigeria) associated herself with the views by the representatives of France, the Federal Republic of Germany and Austria. The adoption of the United States proposal might not serve the best interests of developing countries since it would mean that secretariat duties could be delegated only to the appointing authority and not to secretariat services available locally. Such a provision would mean extra costs which a developing country could ill afford.

42. Mr. SZÁSZ (Hungary) agreed with the views expressed by the previous speakers. He suggested that, if it was to be mentioned at all, the question of administration should be raised during the consideration of costs.

43. Mr. MANTILLA-MOLINA (Mexico) agreed with the views expressed by the previous speakers.

44. Mr. HOLTZMANN (United States of America) said that, in the light of the views expressed by a number of delegations, he would withdraw his proposal. He agreed with the representative of Hungary that the matter could be considered under the heading of costs.

45. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) informed the Committee that the Inter-American Commercial Arbitration Commission, which consisted of the United States and the Latin American countries, had agreed in principle to adopt the Draft Arbitration Rules when they came into effect. The Rules should not, however, preclude the delegation of administrative duties by the arbitrators.

46. Referring to the observation made by the representative of Nigeria, he said that, in the view of many Latin American countries, the use of an appointing authority would reduce rather than increase costs.

47. The meeting was suspended at 11.15 a.m. and resumed at 11.30 a.m.

48. Mr. DZIKIEWICZ (Poland) suggested that article 14, paragraph 3, should be replaced by article 14, paragraph 4, of the alternative draft provisions (A/CN.9/113), which was more explicit.

49. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) pointed out that article 14, paragraph 4, of the alternative draft provisions placed the onus on the arbitrators to ensure that the document or information in question had been communicated to the other party before they acted upon it. Failure to do so might be used as a pretext by one of the parties to initiate annulment proceedings. Article 14, paragraph 3, of the integrated text, on the other hand, constituted a warning to the parties; the arbitrators were accordingly entitled to presume that the provision had been implemented.

/...

50. Mr. PIRRUNG (Federal Republic of Germany) agreed with the Special Consultant, and felt that article 14, paragraph 3, should be retained as it stood.

51. Mr. MANTILLA-MOLINA (Mexico) pointed out that it was not always possible to comply with that paragraph when only one original version of a document existed. Additional wording should therefore be included in order to ensure that either the original document or a copy of it could be sent to the other party.

52. The CHAIRMAN replied that that point was covered by the principle of fairness, which could be assumed to apply to all paragraphs of article 14.

53. Mr. ST. JOHN (Australia) said that he was satisfied with the current text of paragraph 3. He pointed out that, under article 14, paragraph 4, of the alternative draft provisions (A/CN.9/113), the party supplying the material to the arbitrators might withhold it from the other party until a late stage in the proceedings. Furthermore, that provision did not ensure that all material supplied to the arbitrators by one party was communicated by that party to the other party, but merely that such material could not be acted upon by the arbitrators until it had been so communicated. He therefore suggested that article 14, paragraph 3, of the integrated text (A/CN.9/112) should be retained.

54. It was so decided.

Article 15

55. Mr. JENARD (Belgium) said that he preferred the wording of article 15, paragraph 1, contained in document A/CN.9/113 to that in the integrated text.

56. Mrs. OYEKUNLE (Nigeria) said that the arbitrators should not be given absolute power to decide on the place of arbitration. Consequently, she proposed that the words "having regard to the exigencies of the arbitration" should be added at the end of paragraph 1.

57. Mr. HOLTZMANN (United States of America) said that, while he had no objection to the substance of the Nigerian proposal, he felt that the word "exigencies" was unsuitable, since it meant urgent needs. He proposed, therefore, that the words "provided that the arbitrators determined this in the interests of the efficient conduct of the arbitration" would be preferable to those proposed by the representative of Nigeria.

58. Mr. MANTILLA-MOLINA (Mexico) said that, in his view, the proposal of the representative of Nigeria added little to the paragraph in question. In choosing the place of arbitration, the arbitrators must take account of their own interests.

59. Mr. SZÁSZ (Hungary) said that it might be useful to incorporate a general rule to the effect that arbitrators should always adopt the less expensive solution if it was not contrary to the interests of justice.

60. Mr. ROEHRICH (France) supported the Nigerian proposal and suggested that the word "besoin" in the French text should be replaced by "necessité", which would strengthen the provision.

/...

61. Mr. GUEST (United Kingdom) said that, rather than embark on a series of explicit provisions, it would be preferable to assume that the powers accorded under article 15 would be exercised in good faith and taking account of all considerations.

62. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that, while article 15, paragraph 3, provided that the parties should be given sufficient notice of the inspection of goods, other property or documents, paragraph 2 made no mention of such prior notice. Perhaps the Secretariat could provide some clarification. Moreover, it might be possible to deal with the question of hearings under article 22.

63. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the Secretariat had avoided going into detail with regard to the hearing of witnesses in article 15, since the subject was dealt with in detail in article 22. The question of inspection, on the other hand, was not dealt with elsewhere in the draft rules.

64. Mr. HOLTZMANN (United States of America) said he assumed that the drafting group would deal with the word "exigencies" in paragraph 2 in the same way as in paragraph 1.

65. Mr. MANTILLA-MOLINA (Mexico) noted that there was a discrepancy between the words "interim", "préparatoires" and "provisionales" in the English, French and Spanish texts respectively. Accordingly, it would be preferable to delete them.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to delete the words referred to by the representative of Mexico and to amend the end of paragraph 2 in the same way as paragraph I.

67. It was so decided.

68. The CHAIRMAN said that, if he heard no comment, he would take it that the Committee wished to retain article 15, paragraph 3, as it stood.

69. It was so decided.

70. Mr. GUEVARA (Philippines) pointed out that article 15, paragraph 4, could be interpreted to mean that the award must be written at the place of arbitration. He therefore suggested that, in order to avoid any question as to the validity of the award if it was written elsewhere, the word "made" should be replaced by the word "promulgated" or "issued".

71. Furthermore, it might be preferable to transfer the paragraph to article 27, which was concerned with the award itself.

72. The CHAIRMAN noted that the wording of paragraph 4 conformed to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

/...

73. Mr. MELIS (Austria) agreed with the representative of the Philippines. It was common practice for the award to be written by the chairman of the arbitral tribunal other than at the place of arbitration and then circulated by post to the arbitrators for their signature.

74. Accordingly, paragraph 4 should either be deleted or reworded in order to make it clear that that practice was permitted. He also agreed that the paragraph should be transferred to article 27.

75. Mr. STROHBACH (Observer for the German Democratic Republic) took the view that paragraph 4 should remain in article 15, since it was of great importance from the point of view not only of expense but also of the recognition and enforcement of the applicable law and acted as a guide to the parties and the arbitrators when determining the place of arbitration.

76. Mr. GUEST (United Kingdom) drew attention to article V of the 1958 New York Convention, which covered a situation in which recognition and enforcement of the award might be refused. If an award was formulated at a place other than the place of arbitration, there was a greater possibility of challenging it under article V of that Convention than if it had been made at the place of arbitration.

77. Clearly, it could be inconvenient to the arbitrators to have to reassemble at the place of arbitration in order to make the award, but in view of the problems that might arise with regard to the question of the applicable law, he felt on balance that paragraph 4 should be retained. Furthermore, it should be couched in the same terms as the equivalent provision of the 1958 New York Convention. The use of the word "promulgated" or "issued" might cause confusion; in that case, it would be better to delete paragraph 4, so that the arbitrators were not required to make the award at the place of arbitration.

78. Mr. MANTILLA-MOLINA (Mexico) felt that paragraph 4 should be retained. It should not, however, be interpreted to mean that the award must actually be written and signed at the place of arbitration, since it was a very reasonable practice to write and sign the award elsewhere. The rule should stipulate that the award must be made at the place of arbitration, without regard to the place where it had actually been written and signed.

79. Mr. LEBEDEV (Union of Soviet Socialist Republics) felt that the substance of paragraph 4 should be retained, since it had an important bearing on the question of compliance with the award. He agreed with the representative of the United Kingdom that the wording should conform to that of the 1958 New York Convention. Perhaps the substance of paragraph 4 could be incorporated in paragraph 1, which could be reformulated in such a way as to lay down that the arbitration proceedings, including the award, must be held at the place agreed upon by the parties or, if they failed to reach agreement, then at the place determined by the arbitrators.

80. Mr. MELIS (Austria) acknowledged that the United Kingdom representative had put forward a convincing argument with regard to the question of compliance with article V of the 1958 New York Convention.

/...

(Mr. Melis, Austria)

81. On the other hand, he wondered whether paragraph 4 could be interpreted to mean that the physical presence of the arbitrators was required at the place of arbitration for the purpose of making the award. Such a requirement would give rise to additional costs for the parties and the possibility of delay before the award was actually made. There were a few countries where such a provision had been retained, with the result that many arbitrators refrained from choosing such countries as the place of arbitration. The great majority of awards were written at places other than the place of arbitration, yet he did not know of any cases of refusal to enforce the award under article V of the New York Convention.

82. The CHAIRMAN pointed out that, in cases where an award was written and signed in a place other than the place of arbitration, it was for the tribunal that enforced the award to decide where the award was deemed to have been made.

83. Paragraph 4 merely enabled the parties to hold the arbitrators responsible if they made the award other than at the place of arbitration, with the result that one of the parties might refuse to recognize or enforce it.

84. Mr. DEY (India) endorsed the views of the United Kingdom representative. Paragraph 4 was an important provision which should be retained.

85. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) agreed as to the importance of paragraph 4, especially in view of article V of the 1958 New York Convention, under which the place where the award was made was also the place where any request must be made for setting aside the award.

86. Replying to the representative of Austria, he said that the fact that an award stated that it had been made at a particular place did not mean that it had actually been signed there. It was a common practice for the award to be drafted elsewhere, and the 1975 ICC Rules of conciliation and arbitration gave expression to that practice by stating that the arbitral award would be deemed to be made at the place of arbitration.

87. He took the view that it was probably better to retain paragraph 4 as currently worded.

88. The CHAIRMAN suggested that, although a majority favoured retaining the current wording of article 15, paragraph 4, which conformed to the New York Convention, a drafting group composed of the delegations of Nigeria and France should consider the various suggestions that had been made for redrafting the paragraph.

89. It was so decided.

Article 16

90. Mr. PIRRUNG (Federal Republic of Germany) drew attention to the commentary on article 16 (A/CN.9/H2/Add.1) in which it was suggested in a foot-note that article 16, paragraph 1, should be replaced by a revised text.

91. Mr. GUEST (United Kingdom) took the view that the suggested additional wording was unnecessary, since any competent arbitrator would invariably consult with the parties before determining the language to be used. He therefore suggested that the additional stipulation should be confined to the commentary.

92. It was so decided.

93. Mr. ST. JOHN (Australia) suggested that it should be made clear either in article 16 or in a general provision elsewhere that the arbitrators were entitled to take majority decisions.

94. The CHAIRMAN agreed that such a provision was important, and suggested that the matter might best be dealt with by expanding the relevant provisions of article 27.

95. Mr. SAWDERS (Special Consultant to the UNCITRAL secretariat) suggested that such a provision could be inserted in article 14, paragraph 1.

96. The CHAIRMAN suggested that a special drafting group might be appointed to consider formulating a general provision to cover majority decisions, since decisions were dealt with not only in article 14 but also elsewhere.

97. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) suggested that, when such a provision was being formulated, it might be necessary to distinguish between procedural decisions and those relating to the award itself. He suggested that procedural decisions might be taken by the chairman rather than by a majority; such a procedure would be quicker and more efficient, and would probably be just as fair to the parties.

98. The CHAIRMAN suggested that the matter might be dealt with when the provisions relating to decisions were considered.

99. Mr. PIRRUNG (Federal Republic of Germany) suggested that consideration might be given to the possibility of replacing the word "arbitrators" by the words "arbitration tribunal".

100. The CHAIRMAN suggested that that matter should be considered after the Committee had concluded consideration of section III of the Draft Arbitration Rules.

The meeting rose at 12.45 p.m.