

UNITED NATIONS
GENERAL
ASSEMBLY



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A/CN.9/9/C.2/SR.7
19 April 1976

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 7th MEETING

Held at Headquarters, New York,
on Thursday, 15 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.

ELECTION OF OFFICERS (continued)

1. Mr. DZIKIEWICZ (Poland) said that, in view of the inability of Mr. Jakubowski (Poland) to assume the duties of Rapporteur, he wished to nominate Mr. Szász (Hungary) for that office.
2. Mr. MELIS (Austria) seconded the nomination.
3. Mr. Szász (Hungary) was elected Rapporteur.

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

Article 17

4. The CHAIRMAN said that a compromise had been reached whereby the procedure provided for in articles 4 and 17 could be carried out simultaneously. That possibility should be mentioned expressly in the text, but it would not be obligatory and article 17 could therefore remain independent.

Article 17, paragraph 1

5. Mr. GUEST (United Kingdom) said that, pursuant to the compromise, the opening words of paragraph 7 should be prefaced by a phrase such as "Unless the statement of claim has been delivered in the notice of arbitration,".
6. The CHAIRMAN said that, if there were no objections, he would take it that paragraph 1, amended as necessary in accordance with the United Kingdom suggestion, should be adopted.
7. It was so decided.

Article 17, paragraph 2

8. Mr. DEY (India) said that subparagraph (b) seemed to leave it to the claimant or respondent to decide whether sufficient particulars had been given. He asked whether the arbitrators would be able to reject any statement they regarded as insufficient.
9. Mr. RUZICKA (Czechoslovakia) said that, in order to accelerate the arbitration proceedings and clarify the position of both parties, it would be preferable for the statement of claim also to refer to the documents which the claimant intended to present in support of his claim, as was suggested in article 17, paragraph 2 (e), in document A/CN.9/H3.

10. Mr. ST. JOHN (Australia) said that, instead of stating that the claimant might annex to his statement all documents which he deemed relevant, the paragraph should require him to do so, in the terms used in article 17, paragraph 2 (e), in document A/CN.9/113. In addition, the statement of claim should be required to indicate whether the claimant wished to seek interest on damages and whether he would claim costs if he were successful.

11. Mr. HOLTZMANN (United States of America) said he too preferred the wording of article 17 in document A/CN.9/113, in particular paragraph 2 (b) and (e), rather than the final sentence of the paragraph under consideration. The alternative text would enable evidence to be made available as soon as possible, thus providing maximum advance knowledge of the case and reducing the time and money spent on the hearing.

12. Mr. SZÁSZ (Hungary) supported the view of the United States representative. He wondered whether, as well as referring to supporting documents, the text of articles 17 and 18 should not also refer to supporting evidence.

13. Mr. GUEST (United Kingdom) said he accepted the present text of paragraph 2. Until the statement of claim and statement of defence were made, it was difficult to know what points were at issue between the two parties and it was therefore premature to request the claimant to set out the supporting evidence for his statement of facts. Such evidence could be required at a later stage and lead to an exchange of evidence by both parties.

14. The same argument applied to the annexing of documents. There should be no obligation to list all supporting documents until the issues were finally decided. He therefore rejected proposals that the alternative wording of article 17 in document A/CN.9/113 be introduced into the text under consideration.

15. Mr. MANTILLA-MOLINA (Mexico) said there were three ways for the claimant to indicate what evidence he wished to use to support his claim. He could adduce that evidence in his statement, after his statement but before the hearing, or after the claim was answered, when 5 to 10 days might be given for both parties to produce relevant evidence. The third system was preferable since it prevented irrelevant evidence from being introduced and imposed limits on how much evidence was eventually adduced. In that way the legal position of each party would be clear and each party would be able to adduce the evidence it deemed relevant, and the arbitrators could decide when and how to consider that evidence. There was thus no need for evidence to be given at the time of the statement of claim, but it should be provided shortly afterwards.

16. Mr. HOLTZMANN (United States of America) said that, if he could be certain that an arbitrator might require parties to provide a summary of supporting evidence at a later stage, he would be satisfied with the present system. However, article 14 subjected the arbitrators to certain rules. It might happen that, if an arbitrator requested a summary of supporting evidence before a hearing, one or other party might argue that under articles 1 and 2 the arbitrator was entitled to obtain that evidence only at a hearing.

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(Mr. Holtzmann, United States)

17. A possible solution might be to add at some point a clause stating that, if the arbitrators saw fit, they might request that a summary of supporting evidence be given at any time after the statement of claim had been received.

18. The CHAIRMAN noted that there was not majority support for the suggestion that reference to a summary of evidence supporting the facts be added to subparagraph (b).

19. Regarding the idea of deleting the final sentence of paragraph 2 and using the wording of article 17, paragraph 2 (e), in document A/CN.9/113, he suggested a possible compromise whereby the final sentence would be retained - perhaps as a new paragraph - but a new sentence would be added which would read "The arbitrators or the arbitral tribunal may request the claimant to submit all relevant documents within a time-limit to be set by the arbitral tribunal."

20. Mr. GUEST (United Kingdom) said the same should apply to supporting evidence for the statement of defence. It would therefore be more appropriate to make that addition nearer article 20 so that it was clear that the arbitrators could require both parties to state what evidence they intended to adduce in support of their statement of claim or defence.

21. The CHAIRMAN said that, if there were no objections, he would take it that paragraph 2 should remain unchanged and article 20 should, when the time came, be amended to empower the arbitrators to speed up the adducement of evidence by both parties by imposing a time-limit.

22. It was so decided.

Article 17, paragraph 3

23. Mr. MANTILLA-MOLINA (Mexico) said he strongly disagreed with the system established in paragraph 3. If the claim were altered or supplemented, unnecessary difficulties might arise. All supporting evidence should be adduced in the claim and answered in the respondent's statement of defence.

24. Mr. PIRRUNG (Federal Republic of Germany) noted that article 17 did not restrict the possibility of altering the claim. Only the words "with the permission of the arbitrators" gave the arbitral tribunal the choice of accepting a change or not. The arbitral tribunal must be able to use its discretion in determining whether a change was useful or not and some indication might be given in the commentary that those words did in fact have such force.

25. The rules should expressly state that any change in the claim must be within the framework of the initial arbitration agreement. Otherwise there was a risk that, if a point not covered in the original agreement was covered by the arbitral proceedings, the arbitral award might not be recognized. He therefore proposed that the wording in the second sentence of the alternative article 17, paragraph 3, in document A/CN.9/113 be added to the paragraph under consideration. There must

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(Mr. Pirrung, Federal Republic of Germany)

be a link between the subject-matter of the claim and the change requested, so that the arbitral agreement and the original claim were adhered to.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that the reference to the need to obtain the arbitrators' permission in order to alter or supplement the claim should be deleted, since in practice that requirement could be detrimental to legal proceedings. If permission were refused, the claimant would have to recommence the arbitration proceedings and that would require further expense and time. Alternatively, the reference in question could be replaced by the words "provided that this altered or supplemented claim does not go beyond the framework of the arbitration agreement on the basis of which the arbitration proceedings were initiated". In fact, the whole paragraph could be deleted, since the question of supplementing or altering the claim would be resolved on the basis of the general principle stated in article 14.

27. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that the representative of the Federal Republic of Germany had made an appropriate distinction between an amended claim which fell outside the scope of the arbitration clause or separate arbitration agreement and one which fell outside the scope of the subject-matter of the claim raised in the notice of arbitration. Those who had prepared document A/CN.9/112 had considered it unnecessary to mention the first type, since the respondent would be sure to notice, and draw to the attention of the arbitrators, any attempt by the claimant to go beyond the scope of the arbitration clause or separate arbitration agreement. Further, article 19, paragraph 1, gave the arbitrators the power to rule on objections that they had no jurisdiction. They would cease to have jurisdiction the moment the amended claim fell outside the scope of the arbitration clause or separate arbitration agreement.

28. As to the objection that the amended claim might fall outside the scope of the subject-matter of the claim raised in the notice of arbitration, those who had prepared document A/CN.9/112 felt that the arbitrators should be given full discretionary powers in that regard. That was why they had included the phrase "with the permission of the arbitrators" in article 17, paragraph 3.

29. Mr. HOLTZMANN (United States of America) said that the arbitrators should be given some limited degree of discretion in order to prevent situations in which one party, seeking to delay arbitration for dubious purposes, presented a series of amendments at the eleventh hour. It might be advisable to delete the phrase "with the permission of the arbitrators", thus making it clear that, in principle, the parties were entitled to amend, and then add the phrase "unless the arbitrators determine that the amendment is inappropriate under the circumstances of the arbitration". Such a wording was likely to give article 17 greater flexibility.

30. Mr. MANTILLA-MOLINA (Mexico) said that to delete the phrase "with the permission of the arbitrators" would be to invite chaos. He noted that paragraph 3 did not indicate how often and within what period of time the claimant would be allowed to supplement or alter his claim. It was possible that a particular

(Mr. Mantilla-Molina, Mexico)

claimant might prolong the entire dispute by supplementing or altering his claim. It was the claimant's responsibility to prepare his claim carefully; it was for him to suffer the consequences of any error or omission in the original claim.

31. Article 14, paragraph 1, provided that the parties should be treated with equality and with fairness. Yet article 17, paragraph 3, gave the claimant an entitlement that was denied to the respondent. His delegation maintained that the entire paragraph should be deleted.

32. Mr. MELIS (Austria) said that paragraph 3 was too restrictive as it stood. It should be reworded to indicate that the claimant would be given permission to supplement or alter his claim if he could prove that the alteration had not been possible at the time when the claim had been originally presented.

33. Mrs. BELEVA (Bulgaria) associated her delegation with the proposal made by the representative of the Federal Republic of Germany. Paragraph 3 should include a provision that the amended claim should not fall outside the scope of the arbitration clause or separate arbitration agreement.

34. Mr. GUEST (United Kingdom) said that paragraph 3, although satisfactory to his delegation, could benefit from the United States proposal. It was also true, as the representative of Mexico had stated, that the power of amendment should be given to claimant and respondent alike.

35. Mr. JENARD (Belgium) supported the views expressed by the representative of the Federal Republic of Germany.

36. Mr. DZIKIEWICZ (Poland) said that paragraph 3 should include the whole of the second sentence of article 17, paragraph 3, in document A/CN.9/113.

37. The CHAIRMAN said he had the impression that the majority did not want the words "or of the subject-matter of the claim raised in the notice of arbitration" (A/CN.9/113, article 17, para. 3) to be incorporated into paragraph 3.

38. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that since paragraph 3, in the form proposed by the United States representative, gave the arbitrators the power to determine whether the amended claim was appropriate, the provision in the second sentence of paragraph 3 of alternative article 17 was superfluous.

39. The CHAIRMAN said that paragraph 3 of alternative article 17 envisaged two cases where the amended claim would of necessity have to be rejected as inappropriate by the arbitrators. The question still remained whether paragraph 3 should indicate that the arbitrators would automatically reject the amended claim only if it fell outside the scope of the arbitration clause or separate arbitration agreement, or also if it fell outside the scope of the subject-matter of the claim raised in the notice of arbitration.

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation would support the inclusion of a provision that the amended claim would be rejected if it fell outside the scope of the arbitration clause or separate arbitration agreement.

41. Mr. GUEST (United Kingdom) suggested that paragraph 3 might read as follows: "During the arbitral proceedings, the claimant or the respondent may supplement or amend his claim or defence as the case may be, provided that the arbitrators may disallow any alterations which they consider to be inappropriate for the purposes of the proceedings."
42. Mr. PIRRUNG (Federal Republic of Germany) said that article 18, paragraph 4, gave the respondent the same entitlements given to the claimant in article 17, paragraph 3. The question of unequal treatment did not arise.
43. His delegation was in favour of the text proposed by the United States representative.
44. The CHAIRMAN suggested that the text of paragraph 3 should provide that the claim might be supplemented or altered, during the course of the arbitral proceedings, except where the amended claim fell outside the scope of the arbitration clause or separate arbitration agreement or where the arbitrators deemed the amended claim inappropriate under the circumstances of the arbitration, provided the respondent was given the opportunity to exercise his right of defence in respect of the change.
45. It was so decided.
46. Mr. MANTILLA-MOLINA (Mexico) requested that the report of the Committee should indicate that one delegation had disagreed with the course followed.

Article 18, paragraph 1

47. Mr. GUEVARA (Philippines) said that the respondent should be given a minimum number of days in which to prepare his defence. Paragraph 1 should therefore be amended to read: "Within a period of time to be determined by the arbitrators, but not less than 15 days in any case, the respondent ...". That would ensure that the rights of the respondent were protected. Although article 17, paragraph 1, gave the arbitrators the same powers of discretion as article 18, paragraph 1, in the former case there was little likelihood that such powers could be used to the disadvantage of the claimant. The claimant would presumably be ready to present his case when he initiated proceedings, whereas the respondent might well be taken completely by surprise.
48. Mr. TSEGAH (Ghana) said that no time-limit should be prescribed in article 18, paragraph 1. The arbitrators, after reading the statement of claim, should be in a position to determine a reasonable period of time within which the respondent should communicate his statement of defence.
49. Mr. SZÁSZ (Hungary) supported the view expressed by the representative of Ghana. To establish a time-limit would be dangerous and might force the arbitrators to follow what might not always be the correct course. The matter should be left to their discretion.

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50. Mr. MANTILLA-MOLINA (Mexico) drew attention to article 21, which stated that the periods of time fixed by the arbitrators for the communication of written statements should not exceed 45 days, and in the case of the statement of claim, 15 days. Article 21 taken in conjunction with article 18, paragraph 1, seemed to indicate that there must be a minimum and maximum period of time within which the respondent should communicate his statement of defence. He therefore supported the views expressed by the representative of the Philippines.

51. Mr. DZIKIEWICZ (Poland) agreed with the representative of Mexico.

52. The CHAIRMAN pointed out that article 21 referred specifically to the statement of claim. In any event, he would suggest that the Committee consider article 21 at the appropriate time. It appeared to him that most members wished to retain the existing text of article 18, paragraph 1.

53. It was so decided.

Article 18, paragraph 2

54. Mr. HOLTZMANN (United States of America) said that paragraph 2 in its present form was satisfactory but that, when discussing article 20, the Committee should consider the question of enabling the arbitrators to require the presentation of evidence.

55. Mr. SZÁSZ (Hungary) proposed that the words "or other proofs" should be inserted after the word "documents" in the last line.

56. The CHAIRMAN said that if the Hungarian proposal was accepted, the same words should be inserted in article 17, paragraph 2.

57. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that there was a difference between article 17 and article 18. In article 17, it would be premature to refer to "other proofs", since the facts adduced by the claimant might not be disputed by the respondent and would therefore not require additional proof. However, if the respondent did dispute the evidence, he should be able, under the provisions of article 18, to refer to any "other proofs" that would help his case. The Hungarian proposals should therefore be adopted.

58. Mr. MANTILLA-MOLINA (Mexico) expressed sympathy for the point of view of the representatives of Hungary and the USSR, but said that no addition should be made to article 18, in order to maintain the symmetry between articles 17 and 18. The respondent would be able to introduce "other proofs" under the provisions of article 20.

59. Mr. GUEST (United Kingdom) said that he could accept the addition of the words "or other proofs", provided that it applied to both article 17 and article 18 and provided that the provision of further proofs was not mandatory. It would not be advisable to differentiate between articles 17 and 18 on the basis proposed by the representative of the USSR, since that might delay the

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(Mr. Guest, United Kingdom)

statement of defence. The question of "further proofs" might best be treated under the provisions of article 20, according to which arbitrators could compel the presentation of further evidence.

60. The CHAIRMAN suggested that articles 17 and 18 should be amended to allow parties to produce any evidence they wished. He proposed that a drafting group composed of the representatives of the United Kingdom and Hungary be requested to present a redraft of paragraph 2.

61. It was so decided.

Article 18, paragraph 3

62. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, at the eighth session of UNCITRAL, no agreement had been reached concerning counter-claims. The existing text might give the impression that a counter-claim could be made only when the statement of defence was being presented. The first sentence of the alternative text of article 18, paragraph 3, provided in document A/CN.9/113, made it clear that a counter-claim could also be made at a later stage in the arbitral proceedings. The alternative text was therefore preferable and should replace the existing text.

63. Mr. ROEHRICH (France) said that, if counter-claims could be made at any time, that would delay and complicate the procedure. He could not, therefore, support the proposal made by the representative of the Soviet Union.

64. Mr. MANTILLA-MOLINA (Mexico) said that it should be possible to make a counter-claim only in the statement of defence, otherwise the arbitral procedure would become too complex.

65. Mr. HOLTZMANN (United States of America) said that the alternative text in document A/CN.9/113 was preferable, since it gave the parties more control over the proceedings.

66. Mr. SZÁSZ (Hungary), supported by Mrs. BELEVA (Bulgaria), said that he preferred the alternative text, since in practice there were often good reasons for making counter-claims at a later stage in the proceedings. The respondent should have the same rights as those given to the claimant under the provisions of article 17.

67. Mr. JENARD (Belgium) said that he preferred the existing text. Some limitations were necessary, and any mechanism that could be misused should be avoided.

68. Mr. TSEGAH (Ghana), supported by Mr. GUEST (United Kingdom) and by Mr. DEY (India), said that he preferred the alternative text in document A/CN.9/113.

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69. Mr. PIRRUNG (Federal Republic of Germany) said that the existing text would cover a claim arising out of the same contract and that the alternative text in document A/CN.9/113 would cover a set-off.

70. Mr. MELIS (Austria) said that he preferred the existing text.

71. Mr. HOLTZMANN (United States of America) said that, under United States law, a counter-claim arising out of the same contract and a set-off arising out of the same contract were identical. If those two concepts were differentiated under some legal systems, the text should be amended to read: "In his statement of defence the respondent may make a claim arising out of the same contract."

72. The CHAIRMAN said that, in Austria and elsewhere, the law did differentiate between the two concepts. A counter-claim could be higher than the initial claim, whereas a set-off could not. It would be wrong to refer to a "claim", since a set-off was not a claim.

73. Mr. HOLTZMANN (United States of America) said that he would not insist on his amendment.

74. Mr. MANTILLA-MOLINA (Mexico) said that, where no unanimity existed, it was normal practice to place the disputed paragraph between brackets.

75. The CHAIRMAN proposed that, since there was a slight majority in favour of the alternative text in document A/CN.9/113, the Committee should substitute the alternative text with slight modifications and place it in brackets.

76. It was so decided.

Article 18, paragraph 4

77. Mr. GUEST (United Kingdom) said that, while article 17, paragraph 3, allowed the claim to be supplemented or altered, article 18, paragraph 4, included no parallel provision for supplementing or altering the statement of defence. If, for example, the claimant had not altered his claim and the respondent had not made any counter-claim, the respondent should nevertheless be able, subject to the discretion of the arbitrators, to supplement or alter his statement of defence. The paragraph should be amended accordingly.

78. The CHAIRMAN suggested that the words "the statement of defence" be included after the words "shall apply to".

79. Mr. PIRRUNG (Federal Republic of Germany) said that the existing text treated the respondent more harshly than the claimant.

80. Mr. DEY (India) said that, if the claimant could amend his claim, the respondent should have the same right. He therefore supported the amendment suggested by the Chairman.

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81. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the United Kingdom proposal seemed attractive but required more thought. In most legal systems, the respondent had the right to change the basis of his defence or to present any evidence he wished, and that right should not be subject to the approval of the arbitrators. Furthermore, the claim and the statement of defence could not be treated on an exactly equal basis.

82. Mr. MANTILLA-MOLINA (Mexico) said that, if too many alterations were permitted in the course of arbitral proceedings, the system would prove unworkable. He requested that his objection to the relevance of article 17, paragraph 3, to article 18, paragraph 4, should be mentioned in the report.

83. The CHAIRMAN suggested that the Committee should defer a decision on article 18, paragraph 4, until its next meeting.

84. It was so decided.

The meeting rose at 5.50 p.m.