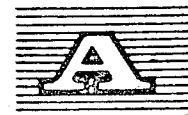


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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 19th MEETING

Held at Headquarters, New York,
on Friday, 23 April 1976, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

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International commercial arbitration (continued)

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76-85673

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The meeting was called to order at 3.10 p.m.

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

Draft report to the Commission (A/CN.9/IX/C.2/CRP.30 and Add.1-9)

1. Mr. SZASZ (Hungary), Rapporteur, said that the draft report had been prepared as the Committee's discussions proceeded, so that later modifications to decisions might not be fully reflected. He would therefore welcome comments from members of the Committee.

Paragraphs 1-3

2. Paragraphs 1-3 were adopted.

Paragraph 4

3. Mr. HOLTZMANN (United States of America) said that paragraph 4 gave only one of the reasons why the Committee had been of the view that the title of the Arbitration Rules should be modified. He therefore suggested that the first sentence should read: "The Committee was of the view that the title should be modified in order to reflect more accurately various possible future uses."

4. Paragraph 4 was adopted as amended.

Paragraphs 5-9

5. Paragraphs 5-9 were adopted.

Paragraph 10

6. Mr. HOLTZMANN (United States of America) suggested that in the first sentence the words "arbitral proceedings" should be replaced by "arbitration" in order to accord with the final version of the Rules.

7. Paragraph 10 was adopted as amended.

Paragraphs 11-28

8. Paragraphs 11-28 were adopted.

Paragraph 29

9. Mr. HOLTZMANN (United States of America) suggested that the paragraph should be amended to read:

/...

(Mr. Holtzmann, United States)

"After consideration, the Committee decided to introduce an element of flexibility and to replace article 7, paragraph 1, by a provision to the effect that the appointment of a sole arbitrator shall be made having regard to such considerations as were likely to secure the appointment of a sole arbitrator who would be impartial and independent, taking into account as well the advantage of appointing an arbitrator of a different nationality than the parties."

10. Paragraph 29 was adopted as amended.

Paragraphs 30 and 31

11. Paragraphs 30 and 31 were adopted.

Paragraph 32

12. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that the second sentence of paragraph 32 should be amended to read "... decided to refrain from specifying a method of communicating such proposals".

13. Paragraph 32 was adopted as amended.

Paragraphs 33 and 34

14. Paragraphs 33 and 34 were adopted.

Paragraph 34 bis

15. The CHAIRMAN asked whether there was objection to the new paragraph 34 bis proposed by the delegation of the Soviet Union and contained in a paper circulated during the meeting.

16. Paragraph 34 bis was adopted.

Paragraphs 35 and 36

17. Paragraphs 35 and 36 were adopted.

Paragraph 37

18. Mr. HOLTZMANN (United States of America) suggested that a sentence should be added, reading as follows: "The Secretary reported that he had received a telegram from the Secretary-General of the Permanent Court of Arbitration stating that no fees would be charged for this service but that reimbursement of expenses would be required."

19. Paragraph 37 was adopted as amended.

/...

Paragraphs 38 and 39

20. Paragraphs 38 and 39 were adopted.

Paragraph 40

21. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that the second sentence of paragraph 40 should be deleted, since it did not reflect the text which had actually been adopted.

22. Paragraph 40 was adopted as amended.

Paragraphs 41 and 42

23. Paragraphs 41 and 42 were adopted.

Paragraph 43

24. Mr. HOLTZMANN (United States of America) suggested that the words "to the extent possible" should be deleted and that the end of the paragraph, after the words "appointing authorities", should be replaced by the following: "should use the list procedure unless the parties agreed otherwise or the appointing authorities determined that the list procedure was not appropriate to the case".

25. Paragraph 43 was adopted as amended.

Paragraphs 44-47

26. Paragraphs 44-47 were adopted.

Paragraph 48

27. Mr. HOLTZMANN (United States of America) suggested that the end of the first sentence should be amended to read: "without having the parties try again to agree on the choice of presiding arbitrator". In the second sentence, the words "giving such an opportunity to the parties" should be replaced by "such a procedure".

28. Paragraph 48 was adopted as amended.

Paragraphs 49-73

29. Paragraphs 49-73 were adopted.

Paragraph 74

30. Mr. HOLTZMANN (United States of America) suggested that the word "secretarial" should be changed to "secretariat" and that a sentence should be added at the end of the paragraph, reading: "It was noted that the Rules did not preclude such delegation."

31. Paragraph 74 was adopted as amended.

/...

Paragraphs 75-82

32. Paragraphs 75-82 were adopted.

Paragraph 83

33. Mr. HOLTZMANN (United States of America) suggested that paragraph 83 should be deleted, because it raised a number of serious legal questions which the Committee had been unable to answer and could constitute a basis for overturning arbitral awards in the courts.

34. Mr. GUEST (United Kingdom) said that he would prefer to retain paragraph 83 as a reflection of the discussions in the Committee.

35. Mr. HOLTZMANN (United States of America) suggested that at least the last sentence of the paragraph should be omitted.

36. It was so decided.

37. Paragraph 83 was adopted as amended.

Paragraphs 84-105

38. Paragraphs 84-105 were adopted.

Paragraph 106

39. Mr. HOLTZMANN (United States of America) said that, as he recalled it, the Committee had later decided to restore the second sentence of article 19, paragraph 3. The words "should not" should therefore be inserted before the words "be deleted".

40. The CHAIRMAN said that the Secretariat would check the final decision and amend the paragraph if necessary.

Paragraphs 107-115

41. Paragraphs 107-115 were adopted.

Paragraph 116

42. Mr. HOLTZMANN (United States of America) suggested that the paragraph should mention the fact that, when the Committee had decided not to include a second sentence in article 21, it had been understood that a reference to the right of arbitrators to ask for further information would be added in a later paragraph.

43. The CHAIRMAN pointed out that the words in brackets should be omitted.

44. Paragraph 116 was adopted as amended.

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Paragraph 116 bis

45. Mr. HOLTZMANN (United States of America) suggested the insertion of a paragraph 116 bis, reading as follows:

"The Committee agreed that in order to prevent surprise at hearings the arbitral tribunal may require delivery of a summary of documents and other evidence which parties intend to present."

46. Paragraph 116 bis was adopted.

The meeting was suspended at 3.55 p.m. and resumed at 4.15 p.m.

Paragraphs 117-120

47. Paragraphs 117-120 were adopted.

Paragraph 121

48. Mr. HOLTZMANN (United States of America) suggested that the following sentence should be added at the end of the paragraph: "Although the words 'verbatim record' were changed to 'records', it was agreed that verbatim records were not precluded."

49. Paragraph 121 was adopted as amended.

Paragraphs 122-124

50. Paragraphs 122-124 were adopted.

Paragraph 125

51. Mr. HOLTZMANN (United States of America) felt that the reference to written statements being less expensive than the calling of witnesses in person should be omitted.

52. The CHAIRMAN suggested that the words "was less expensive than the calling of those witnesses in person" should be replaced by "may sometimes be advantageous".

53. Paragraph 125 was adopted as amended.

Paragraphs 126-135

54. Paragraphs 126-135 were adopted.

Paragraph 136

55. Mr. HOLTZMANN (United States of America) suggested that the word "fiction" in the first sentence should be replaced by the expression "rule of construction".

/...

56. Mr. MANTILLA-MOLINA (Mexico) said that he too disliked the use of the word "fiction", and suggested that it might even be desirable to delete the first sentence entirely.

57. The CHAIRMAN suggested that the sentence should be amended to read: "The Committee considered that the rule of construction set forth in this paragraph was unnecessary."

58. Paragraph 136 was adopted as amended.

Paragraphs 137-165

59. Paragraphs 137-165 were adopted.

60. The CHAIRMAN pointed out that the last two paragraphs of document A/CN.9/IX/C.2/CRP.30/Add.4 had both been numbered 165 and that document A/CN.9/IX/C.2/CRP.30/Add.5 began with paragraph 168; the paragraphs would be correctly renumbered in the final version of the report. Conference room paper No. 30/Add.5 was not yet available in Russian, and he asked whether the Soviet representative would be willing to continue the consideration of the draft report on the basis of the English text.

61. Mr. LEBEDEV (Union of Soviet Socialist Republics) said it was his delegation's position of principle that official documents should be available in all the working languages before they were considered. Nevertheless, in the interest of expediting the Committee's work, he was willing to continue on the basis of the English text.

Paragraphs 168-170

62. Paragraphs 168-170 were adopted.

Paragraph 171

63. Mr. HOLTZMANN (United States of America) said that, while the paragraph as it stood accurately reflected the debate in the Committee, the question of the conflict of laws rules was a complicated one involving nuances which could not be conveniently captured in a brief sentence or two. He therefore suggested that the whole of the second sentence, and everything after the word "applicable" in the third sentence, should be deleted.

64. Paragraph 171 was adopted as amended.

Paragraph 172

65. Paragraph 172 was adopted.

Paragraph 173

66. Mr. HOLTZMANN (United States of America) said that, in using the words "allowed for", the Committee was construing the 1958 New York Convention in a particular way. The words "appeared to envisage", which had been suggested by the United Kingdom representative, would be more appropriate.

67. Paragraph 173 was adopted as amended.

Paragraphs 174-176

68. Paragraphs 174-176 were adopted.

Paragraph 177

69. Mr. MANTILLA-MOLINA (Mexico) said that, as the representative referred to in the second sentence of paragraph 177, he wished to propose that the word "especially" should be added after the word "arbitrations", since he had not limited his comments to ex aequo et bono arbitrations alone but had cited, for instance, the Italian Civil Code, which permitted non-performance of a contract if its terms would prove to be unduly onerous to one of the parties. He therefore also proposed the addition of the following words at the end of the sentence: "which, if carried out literally, might prove unconscionable because unduly onerous".

70. Paragraph 177 was adopted as amended.

Paragraphs 178 and 179

71. Mr. HOLTZMANN (United States of America) said that paragraphs 178 and 179 should be completely redrafted in the light of the discussion which had taken place at the 18th meeting of the Committee. With regard to paragraph 178, he suggested that it should be specified that the expression "shall take into account" in article 28, paragraph 3, was based on a former draft of the proposed rule.

72. It was so decided.

Paragraphs 180 and 181

73. Paragraphs 180 and 181 were adopted.

Paragraph 182

74. Mr. PIRRUNG (Federal Republic of Germany) said that, as worded, the paragraph seemed to convey a negative view of conciliation. He therefore suggested that the last part of the text, beginning with the words "in order to", should be replaced by the words "because of systematical reasons".

75. Paragraph 182 was adopted as amended.

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Paragraphs 183-185

76. Paragraphs 183-185 were adopted.

Paragraphs 186-198

77. The CHAIRMAN informed the Committee that Conference room paper No. 30/Add.6 was not yet available in Russian and Spanish. The Soviet representative had already expressed his willingness to continue on the basis of the English text, and he asked whether the representative of Mexico was willing to do likewise.

78. Mr. MANTILLA-MOLINA (Mexico) replied in the affirmative.

79. Paragraphs 186-198 were adopted.

Paragraph 199

80. Mr. HOLTZMANN (United States of America) suggested that the words "as a result of their own action" should be added after the words "their original award" in the first sentence.

81. Paragraph 199 was adopted as amended.

Paragraphs 200 and 201

82. Paragraphs 200 and 201 were adopted.

Paragraph 202

83. Mr. HOLTZMANN (United States of America) suggested that the word "all-inclusive" should be changed to read simply "inclusive".

84. Paragraph 202 was adopted as amended.

Paragraphs 203-205

85. Paragraphs 203-205 were adopted.

Paragraph 206

86. Mr. HOLTZMANN (United States of America) suggested that the second sentence should be amended so as to reflect more accurately the feelings which had been expressed in the Committee. Accordingly, it should read: "The Committee decided, however, to add a separate article explaining in detail that arbitrators should fix their fees in reasonable amounts and consider certain factors in so doing."

87. Paragraph 206 was adopted as amended.

Paragraph 207

88. Mr. HOLTZMANN (United States of America) suggested that the second sentence should be amended to read: "... the arbitrators should take into account, to the extent appropriate in the circumstances of the case, any schedule of fees ...". He also suggested that the words "under certain circumstances" should be deleted from the third sentence, which should then be further amended to read: "Paragraph 1 bis also permits a party to request that the arbitrators consult with such appointing authority before fixing their fees."

89. Paragraph 207 was adopted as amended.

Paragraphs 208-211

90. Paragraphs 208-211 were adopted.

Paragraph 212

91. Mr. HOLTZMANN (United States of America) suggested that the words "per diem" should be replaced by the word "other".

92. Paragraph 212 was adopted as amended.

Paragraphs 213-219

93. Paragraphs 213-219 were adopted.

Paragraph 220

94. Mr. HOLTZMANN (United States of America) felt that the parenthetical reference to article 33, paragraph 1, subparagraph (e), was cumbersome and unnecessary, and suggested that it should be deleted.

95. Paragraph 220 was adopted as amended.

Paragraph 221

96. Paragraph 221 was adopted.

Paragraph 222

97. Mr. HOLTZMANN (United States of America) proposed that the second sentence should be replaced by the following: "It was noted that some appointing authorities may charge fees for their services and others may not."

98. Paragraph 222 was adopted as amended.

Paragraphs 223-228

99. Paragraphs 223-228 were adopted.

/...

Paragraph 229

100. Mr. HOLTZMANN (United States of America) said it should be made clear that the model arbitration clause contained in paragraph 229 was the former clause, and a reference should be made in that paragraph to the new version of the clause which had been approved.

101. The CHAIRMAN said that the new model arbitration clause would be annexed to the Committee's report.

102. Paragraph 229 was adopted.

Paragraphs 230 and 231

103. Paragraphs 230 and 231 were adopted.

Paragraph 232

104. Mr. HOLTZMANN (United States of America) suggested that the words "in order to make clear that the applicable rules are those in effect on the date of the agreement to arbitrate" should be added at the end of the third sentence.

105. Paragraph 232 was adopted as amended.

Paragraph 233

106. Paragraph 233 was adopted.

Paragraph 234

107. Mr. HOLTZMANN (United States of America) said that the wording of paragraph 234 was no longer accurate, in view of the discussion at the preceding meeting, and should be redrafted.

108. The CHAIRMAN said that the Committee could leave the redrafting of the paragraph to the Secretariat.

Draft decision (A/CN.9/IX/C.2/CRP.30/Add.9)

109. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the first preambular paragraph of the draft decision should be broader in scope. He therefore proposed that the words "international commercial transactions" should be replaced by the words "various types of contracts in the field of international trade".

110. It was so decided.

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111. Mr. HOLTZMANN (United States of America) proposed that the word "indispensable" should be replaced by the word "valuable".

112. It was so decided.

113. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, since the Rules had been established for commercial circles rather than for countries as such, the words "business circles in" should be inserted before the word "countries" in the second preambular paragraph.

114. Mr. HOLTZMANN (United States of America) observed that the expression "business circles" was not widely used in Western economies. Furthermore, the Rules should allow for the possibility of States becoming parties to a contract. He therefore proposed that the words "those engaged in trade in" should be inserted before the word "countries" in the second preambular paragraph.

115. It was so decided.

116. Mr. DZIKIEWICZ (Poland) proposed that in the third preambular paragraph the word "extensive" should be replaced by the word "full".

117. It was so decided.

118. Mr. ST. JOHN (Australia) said that the first operative paragraph was not sufficiently clear. He proposed that the words "particularly by reference to the UNCITRAL Arbitration Rules in commercial contracts" should be replaced by "particularly by the inclusion in commercial contracts of reference to the UNCITRAL Arbitration Rules".

119. Mr. TAKAKUWA (Japan) said that he preferred the existing text.

120. Mr. ST. JOHN (Australia) said that he would not press his amendment.

121. Mr. HOLTZMANN (United States of America) said the draft decision should indicate that the Arbitration Rules had actually been adopted. There should also be some indication of the date on which the Rules would become effective.

122. The CHAIRMAN observed that the words "Having prepared" in the third preambular paragraph implied that the Rules had been adopted. They would become effective as soon as they had been adopted, but their widespread use would clearly depend on the recommendation of the General Assembly.

123. Many representatives had referred to a commentary for the Rules. While UNCITRAL itself could not prepare such a commentary, the Secretariat could do so, with the help of the Special Consultant, if the Committee so desired.

124. Mr. GUEST (United Kingdom) said that he would be reluctant to ask the Secretariat to prepare a commentary, which might be regarded as the definitive explanation of the Arbitration Rules. The Committee's report would be adequate.

/...

125. Mr. HOLTZMANN (United States of America) said the Committee had often assumed that a commentary would appear, and it was only because of lack of time that none had been forthcoming. Existing commentaries prepared by the Secretariat could be revised to take account of the Committee's work at the current session. He had full confidence in the integrity of the Secretariat and its ability faithfully to reflect views expressed in the Committee.

126. Mr. GUEST (United Kingdom) said that the existing commentaries had been prepared to help the Committee in its deliberations, and were therefore different from a definitive commentary. While he had no doubt about the integrity of the Secretariat, he did not think it was practical for it to prepare a commentary which would then have to be discussed at the next session of UNCITRAL to make sure that it faithfully reflected the views of representatives. In any case, when in the course of the discussions representatives had mentioned the "commentary", they had often merely been referring to the Committee's report.

127. The CHAIRMAN suggested that no mention of a commentary should be made in the report.

128. It was so decided.

129. The draft decision, as amended, was adopted.

130. The CHAIRMAN announced that the Committee had thus completed its work for the ninth session.

The meeting rose at 5.50 p.m.