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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 8th MEETING

Held at Headquarters, New York,  
on Friday, 16 April 1976, at 10 p.m.

Chairman: Mr. LOEWE (Austria)

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International commercial arbitration (continued)

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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 18, paragraph 4

1. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) expressed reservations with regard to the United Kingdom proposal to include in article 18, paragraph 4, a provision giving the respondent a right to change his statement of defence. Such a measure would constitute an innovation. The respondent should be required to answer the claim completely at the outset. In that respect there was no question of the respondent being on an equal footing with the claimant.
2. Mr. GUEST (United Kingdom) said that, in common law countries, the respondent was usually given the opportunity to change his defence. The respondent should be accorded the same rights as the claimant in that respect. His delegation found it difficult to accept the view that the respondent could not change his position in appropriate circumstances, subject to the control of the arbitrators.
3. The CHAIRMAN said that, if no specific provision regarding the respondent's right to change his defence was inserted in article 18, paragraph 4, the question could be considered as falling within the general discretion of the arbitrators, as provided for in article 14. He wondered whether the inclusion of a specific provision in article 18, paragraph 4, might not enable the respondent to prolong the arbitration procedure unduly.
4. Mr. JENARD (Belgium) said that, although he understood the reasoning behind the United Kingdom proposal, he felt that the inclusion of such a specific provision might encourage abuse of the arbitral proceedings. Consequently, it might be appropriate to make the Rules a little more stringent.
5. Mrs. OYEKUNLE (Nigeria) supported the views expressed by the representative of the United Kingdom. Referring to the observations made by the Special Consultant, she said that the Committee's main concern should not be to avoid innovation but to ensure that the Rules were as useful and as clear as possible.
6. Mr. HOLTZMANN (United States of America) said that, while he agreed with the representative of the United Kingdom that the Rules should not preclude the right of a respondent to change his defence in good faith, he shared the concern that had been expressed with regard to the possible misuse of such a right. Consequently, he proposed that the Rules should permit a change of defence, but make it quite clear that the arbitrators should permit such a change only if it was demonstrated that it was being made for legitimate reasons.

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7. Mr. ST JOHN (Australia) said that the respondent should have the right to amend his defence. The rules should be made either less specific regarding the right of the claimant to amend the statement of claim - in which case the question could be considered as being covered by the provisions of article 14 - or more specific with regard to the right of the respondent to change the defence.
8. Mr. DEY (India) agreed with the views expressed by the representative of Australia. As they stood, the Rules could be construed as meaning that the respondent had no right to change the statement of defence, in spite of the provisions of article 14. The arbitrators should be allowed to permit a change of defence if circumstances so demanded.
9. Mr. TSEGAH (Ghana) agreed with the representative of the United Kingdom that the rights of the respondent should be stated more explicitly in article 18, paragraph 4. It could be assumed that the arbitrators would be sufficiently experienced to be able to prevent the abuse of those rights.
10. Mr. PIRRUNG (Federal Republic of Germany) felt that the draft Rules should be kept as simple as possible. Questions such as the right of the respondent to change his defence should be left to the discretion of the arbitration tribunal. Consequently, he proposed that article 18, paragraph 4, should be left as it stood and that any provision regarding the right of the respondent to change his defence might be incorporated in article 20, relating to further written statements.
11. The CHAIRMAN suggested that, in the light of the views expressed in the Committee, a small drafting group should be formed, consisting of the representatives of the Federal Republic of Germany, India and the United Kingdom, to prepare a text based on the United Kingdom proposal and to draft provisions simplifying the possibilities for amending or supplementing the various elements of the procedure.
12. It was so decided.

#### Article 19

13. Mr. ST JOHN (Australia) said that article 19, in particular, raised the question of the relationship between the Rules and national legislation. It might be misleading to leave article 19 in its present form without any reference to the fact that national legislation might call for some result other than that indicated therein. Consequently, he proposed the inclusion of a provision along the lines of article 18 of the ECE Arbitration Rules, to the effect that the Rules were subject to any control provided for under the law applicable to the arbitration proceedings.
14. Mr. JENARD (Belgium) said that, while he agreed with the substance of the Australian proposal, it related to all the provisions of the Rules. If it was inserted in article 19, it might give rise to an argumentum a contrario.
15. Mr. SANDERS (Special Consultant to the UNCITRAL secretariat) said that it had been precisely for the reasons stated by the representative of Belgium that the secretariat had decided to omit such a provision from the articles.

16. The CHAIRMAN suggested that it might be possible to insert such a provision in the first paragraph of article 1.
17. Mr. PIRRUNG (Federal Republic of Germany) supported the Chairman's suggestion.
18. Mr. ST. JOHN (Australia) said that such a general warning in the early part of the Rules might be worth while since the question of the requirements of national law did not arise exclusively in connexion with article 19. It might also be useful, however, to include some sort of warning in article 19.
19. Mr. MELIS (Austria) agreed that it would be better to place such a warning in article 1 if possible, since it was applicable to the draft Rules as a whole.
20. The CHAIRMAN suggested that a drafting group consisting of the representatives of Australia, Austria and Belgium should prepare a text for article 1, incorporating the provision proposed by the representative of Australia.
21. It was so decided.
22. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said he understood that local law was superseded by international conventions in countries acceding to them. He wondered, therefore, whether the inclusion of such an omnibus statement in article 1 might not create some conflict.
23. The CHAIRMAN said that in many countries any international instruments adopted were considered as constituting national law. However, the drafting group might consider the question.
24. Mr. HOLTZMANN (United States of America) suggested that the drafting group might be authorized to insert the warning provision in article 2 if they considered it more appropriate.
25. The CHAIRMAN said that they would be free to insert it wherever they wished.
26. The Committee decided to retain the existing text of article 19, paragraph 2.
27. Mr. PIRRUNG (Federal Republic of Germany) said that the second sentence of article 19, paragraph 3, was unnecessary since such a question could be left to the discretion of the tribunal.
28. The CHAIRMAN said that it might have been possible to delete the sentence if article 17, paragraph 3, and article 18, paragraph 4, had been radically simplified. As that was not the case, the deletion of the sentence could give rise to an argumentum a contrario. However, the drafting group set up to prepare a text for article 18, paragraph 4, might also consider providing for a coherent system covering all cases in which various stages of the procedure were not accomplished within the appropriate time-limits.

29. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the second sentence of paragraph 3 was of a special character and should be retained, particularly in the light of the provisions of article 26. The drafting group should take those factors into account.
30. Mr. DEY (India) pointed out that the plea as to an arbitrator's jurisdiction was special and should be raised as early as possible and considered no later than the statement of claim or the statement of defence. He wondered whether the drafting group was going to take a decision on that matter.
31. The CHAIRMAN said that the matter would be referred to the drafting group. If the latter was unable to agree on the substance it would, of course, refer the question back to the Committee.
32. Mrs. OYEKUNLE (Nigeria), referring to article 19, paragraph 4, said that her delegation objected to the second part of the sentence since it felt that pleas as to the arbitrator's jurisdiction should be decided as a preliminary question, not during the final award; if the arbitrators ultimately decided that they did not have jurisdiction, unnecessary expenses would have been incurred. Perhaps it would be better to delete the paragraph.
33. The CHAIRMAN pointed out that paragraph 4 had nothing to do with the time when such pleas might be raised. If the arbitrators felt that the grounds for the plea were sound, they would so rule immediately. However, if they were not sure, they might wait until the end and then render the two decisions simultaneously, starting with a rejection of the plea and then going on to decide on the claim.
34. Mr. DZIKIEWICZ (Poland) said that paragraph 4 was very useful, since arbitrators should have full powers to rule on matters of jurisdiction.
35. Mr. BOSTON (Sierra Leone) said that his delegation shared the concerns expressed by the representatives of Nigeria and India. While paragraph 4 was essential, the second half of the sentence was confusing. It should be quite clear that the question of jurisdiction was a preliminary question which must be decided prior to the hearing.
36. Mr. JENARD (Belgium) said that he would prefer to delete the paragraph.
37. Mr. MANTILLA-MOLINA (Mexico) said it was important that the paragraph should remain, otherwise doubts might arise as to what action the arbitrators should take in the event of a plea being raised during the proceedings. Parties might insist on an immediate ruling merely in order to delay the proceedings. In such cases, the ruling should be left until the final award.
38. Mr. RUZICKA (Czechoslovakia) expressed support for retention of the paragraph, but suggested that the version contained in document A/CN.9/113 might be more satisfactory.

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39. Mr. GUEVARA (Philippines) suggested that the application of the paragraph should not be limited only to pleas as to jurisdiction, referred to in paragraph 3, but also to the existence or validity of the arbitration clause and the existence or validity of the contract, referred to in paragraphs 1 and 2 respectively. All such pleas should be considered as preliminary questions and decided before the arbitration tribunal went on to consider the dispute.

40. Mr. STRAUS (Observer for the International Commission for Commercial Arbitration and Inter-American Commercial Arbitration Commission) said that the question had been discussed recently by the Inter-American Commercial Arbitration Commission which had concluded that, owing to the unnecessary expense that would be incurred if arbitration proceedings continued for several weeks following the raising of a plea as to jurisdiction which was finally accepted, UNCITRAL should be requested to consider placing the earliest possible time-limit on the consideration of pleas as to jurisdiction.

41. Mr. TSEGAH (Ghana) supported the formulation proposed in document A/CN.9/113 which set forth a general rule followed by a provision for exceptional circumstances. He suggested that article 19, paragraph 4, should be retained but should be amended to include the stipulation that pleas as to jurisdiction should be considered as soon as possible.

42. The CHAIRMAN suggested that, since a majority seemed to be in favour of retaining article 19, paragraph 4, a drafting group, consisting of the representatives of Ghana, Mexico and Poland, should be requested to prepare a text combining the two versions appearing in documents A/CN.9/112 and A/CN.9/113.

43. It was so decided.

#### Article 20

44. The CHAIRMAN recalled that, when the Committee had been discussing article 17, several matters had been deferred until the discussion of article 20.

45. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that a new paragraph should be added before the present paragraph 1, setting forth clearly the general principle that each party was obliged to present the evidence referred to in the claim or objection.

46. Mr. GUEST (United Kingdom) pointed out that attention had already been drawn to the importance of giving the arbitrators the power to require the parties to disclose in advance the documents on which they intended to base their claim. He read out the text of a proposed new paragraph which would provide for such powers.

47. The CHAIRMAN suggested that the USSR and United Kingdom representatives should form a drafting group to prepare a text of the additional paragraphs.

48. It was so decided.

49. Mr. PIRRUNG (Federal Republic of Germany) suggested that the second sentence of article 20, paragraph 1, was limiting in that it implied that unless the parties agreed on a further exchange of written statements they would be able to send only the statement of claim and the statement of defence. It might be useful, particularly in connexion with problems relating to matters arising out of article 17, paragraph 3, and article 18, paragraph 4 to provide for the possibility of a further exchange. However, if the Committee felt that that point was covered elsewhere by the stipulation concerning equality and fairness, it might be wise to state in the commentary that a further exchange was not contrary to the Rules.

50. Mr. BERGSTEN (Secretary of the Committee) pointed out that the commentary in document A/CN.9/112/Add.1 contained primarily justifications for the sources of the Rules and only partially explained the Rules themselves. If a commentary was to be published after the Rules had been adopted it would have to be a completely new document and UNCITRAL would have to make a specific request to the Secretariat. At present, no such commentary was envisaged; moreover, the Secretariat would have some hesitation in preparing a commentary which interpreted the Rules after they had been adopted by the Commission.

51. The CHAIRMAN urged members to reflect upon the question of a commentary, adding that his own view was that it would be preferable to have one.

52. Mr. PIRRUNG (Federal Republic of Germany) suggested that the problem he had raised could be solved by simply deleting the second sentence, thus leaving any further exchange to the discretion of the arbitrators.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed to that suggestion.

54. It was so decided.

55. Mr. JENARD (Belgium), referring to the French text, pointed out that the word "autorisation" in the second line did not exactly express the idea contained in the original English text and suggested that another wording should be found.

56. The CHAIRMAN suggested that the representative of Belgium should propose an alternative wording and that he and the representative of Mexico should see to it that the French and Spanish texts of the paragraphs to be prepared by the USSR and United Kingdom representatives were in line with the original.

57. Mr. ROEHRICH (France) proposed that article 20, paragraph 2, should be deleted, for two reasons: firstly, because a written reply to a counter-claim was not a supplementary document or an exhibit and its presentation was merely a stage in the arbitral proceedings; and, secondly, because a counter-claim was covered by article 18 and, in general terms, by article 14, concerning equality of treatment of the parties, and the opportunity to present a written reply to a counter-claim was self-evident.