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Ninth session

COMMITTEE OF THE WHOLE (II)

SUMMARY RECORD OF THE 2nd MEETING

Held at Headquarters, New York,  
on Tuesday, 13 April 1976, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

CONTENTS

International commercial arbitration

Draft UNCITRAL Arbitration Rules: Articles 3, 4, 5 and 6

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

INTERNATIONAL COMMERCIAL ARBITRATION

Draft UNCITRAL Arbitration Rules: Articles 3, 4, 5 and 6 (A/CN.9/112 and Add.1, A/CN.9/113, A/CN.9/114 (continued))

Article 3

1. Mr. MELIS (Austria) said that he had difficulties with regard to the concept of delivery. In many cases, it was not possible to prove delivery, or to prove that it had been effected within a reasonable time. The national legislation of most countries therefore made an assumption that, after a certain period of time, the communication had been delivered. He proposed that paragraph 1 should include such an assumption, along the lines of article 6 of the 1975 rules of conciliation and arbitration of the ICC whereby delivery was deemed to have been effected if the communication had been forwarded by registered post to the addressee. Such an assumption was normal in commercial arbitration.

2. Mr. SZÁSZ (Hungary) pointed out that neither the original nor the revised text of paragraph 1 made any mention of receipt of the communication by an agent, employee or member of the family of the addressee. He proposed that the words "in accordance with the legislation of the country in which such delivery is effected" should be added to paragraph 1.

3. Mr. GUEST (United Kingdom) took the view that such an addition would not be very helpful, since it would require the party delivering the communication to have some knowledge of the actual rules of law of the State in which the communication was delivered. It would be preferable to include the specific wording of the rule rather than merely include a reference to some applicable law.

4. Mr. ROGNLIEN (Norway) proposed that article 3 should be reworded to read:

"1. For the purposes of these Rules a notice, notification, communication or proposal by one party to the other party is deemed to have been

(a) sent [, made, communicated, submitted or requested] on the day when it is delivered to the public post office or telegraph station or sent by telex for transmission to the addressee,

(b) received on the day when it is placed in a regular letter (mail)box of the other party or delivered regularly at the habitual residence or place of business of the other party, or if that party has no such residence or place of business, at his last known residence or other place of business.

"2. For the purposes of calculating a period of time under these Rules the day of dispatch or receipt respectively is not counted as the first day of the period. A period expressed in weeks or months is calculated in such a way that it expires at the end of the day which corresponds to the week-day

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(Mr. Rognlien, Norway)

or the date when the period commences to run. If there is no such corresponding date, the period expires at the end of the last day of the last month of the limitation period.

"3. If the last day of the period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

5. In his delegation's view, any new period should start from receipt of a notification, but the notice or reply should be regarded as having been given in time whenever it had been sent in an appropriate manner within the specified period. It was not necessary, however, to spell that principle out in a general provision. Furthermore, the period should in general be expressed in weeks or months rather than days, and should preferably expire on the same day of the week or date of the month as that on which it had commenced.

6. Mr. HOLTZMANN (United States of America) felt that the Austrian proposal might create ambiguities.

7. As to the Hungarian proposal, he agreed with the view expressed by the representative of the United Kingdom. The task of ascertaining provisions regarding notification embodied in foreign legislation might delay the arbitration process. He agreed, however, that it would be useful to extend the provision to cover the authorized representative of the addressee.

8. He considered that the current wording of paragraph 1 was too restrictive in that, in certain cases, it placed the onus on the sender to prove that the other party had no habitual residence or place of business. Notice should be permitted to the last known address if the party who desired to give notice could show that he had made reasonable efforts to inquire as to the address but could not find it. He accordingly proposed that paragraph 1 should be amended to read:

"1. For the purposes of these Rules, a notice, notification, communication or proposal by one party is deemed to have been received on the day on which it is delivered at the habitual residence or place of business of the other party, or if such residence or place of business cannot be found after making reasonable enquiry, then at his last known residence or place of business."

9. Mr. ST. JOHN (Australia) felt that paragraph 1 was generally acceptable. With regard to the question of delivery, he shared the view that the problem of proving delivery might be resolved by some additional wording. He also agreed that the Hungarian proposal might create problems. The Austrian proposal had some merit, but should be more specific. His delegation would prefer a provision of the kind found in the original draft rules, which specified a period of days for a presumption that a notice had been delivered. Only by a specific provision of that kind would the doubts be removed.

10. Mr. GUEVERA (Philippines) pointed out that the words "deemed to have been received" in paragraph 1 constituted receipt by presumption. He believed that in

(Mr. Guevera, Philippines)

order for receipt to be valid, it must be based on actual delivery rather than on a presumption of delivery. Paragraph 1 did not state whether the delivery was actual or constructive. He therefore suggested that the word "actually" should be inserted before the word "delivered" in paragraph 1.

11. Mr. ROEHRICH (France) took the view that it would be wrong to spell out the provisions in too much detail, as in the Norwegian proposal. He agreed that provision should be made for cases where a party had no habitual address, but the remaining provisions could be left to the legislation of the country concerned.

12. Mr. PIRRUNG (Federal Republic of Germany) supported the view expressed by the representative of France, but emphasized the need to protect the addressee. It was in the interests of the claimant to effect notification in a simple and effective way. He recalled that, under article V, paragraph 1 (b), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the person against whom an arbitral decision was made must be aware of the procedure. It was therefore necessary to know whether the notification was effective. With regard to references to national legislation, he considered that it was necessary to include them in cases where no other express provision was made. If a simpler notification, such as notification by registered letter, was required, it must be specifically included. Thus, it was necessary to choose between a rule which ensured that a decision was made known in all cases and one which was simple for the claimant but which did not necessarily ensure that the decision was known by the respondent. Where the respondent's habitual residence was not known to the claimant, he wondered whether the notification was deemed to have been effected if it had been delivered to the respondent's former residence. In such a case, there was no way of knowing whether he had actually received the notification. Such a provision would not be in keeping with article V, paragraph 1 (b), of the 1958 New York Convention. His delegation had stated at the eighth session that it opposed such an assumption. It maintained that position.

13. Mrs. BELEVA (Bulgaria) said that her delegation supported the proposal that the day on which notification was deemed to have been effected should be the day on which, under normal arbitration procedures, it was considered to have been received. As to the calculation of the period of time, her delegation felt that the period should begin from the first day following the day on which the notice was delivered.

14. Mr. MANTILLA-MOLINA (Mexico) observed that, if no reference to the local rules was included, many more details must be specified. For example, it was not clear what was meant by delivery to the habitual residence or place of business, which might be a large building containing many separate apartments or offices of different companies. Neither was it clear what was meant by delivery to the last known residence or place of business, which might have since been demolished. Clearly, the question of notification was a complicated one. Another problem was whether the provision would be at all applicable in cases where the notification could not be made. Another problem was whether the provision would be at all applicable in cases where the notification could not be made.

15. He felt that the Norwegian proposal merited further study.

16. Mr. GUEST (United Kingdom) suggested that paragraph 1 as currently worded might constitute a reasonable compromise between those who considered that actual notice should be required and those who also desired to ensure protection for the party who had done all in his power to ensure that a communication was delivered. Furthermore, such rules could be modified by agreement between the parties. If a party had moved, he must expect the communication to arrive at his former address, unless he communicated his new address to the other party.

17. Mr. JENARD (Belgium) agreed that no perfect solution could be found and that it was necessary to choose between the concept of sending and the concept of receiving the notification. On balance, he agreed with the representative of the United Kingdom that paragraph 1 as currently worded might be the best solution. His delegation therefore supported it.

18. The CHAIRMAN, summing up the discussion, noted that there appeared to be four main problems. Some delegations found that the conditions laid down in paragraph 1 for delivering notification to the last known residence or place of business of the other party were not sufficiently clear. Another group of delegations, including the Norwegian delegation, felt the need for a more detailed set of rules, but because of the difficulty of formulating detailed provisions to cover every possibility, that view did not appear to have the support of the majority. The Hungarian proposal to include a reference to the legislation of the country of the recipient had not received general support; some delegations felt that the sender would be placed in a difficult position if he was required to be familiar with the provisions concerning notification applicable in other countries. Another important question was whether greater protection should be given to the sender or to the recipient. He noted that it was extremely difficult to include provisions that allowed for delays in the postal system. If provisions protected the sender, a case might arise where arbitration was initiated without the respondent's knowledge, a situation which would not be in keeping with the 1958 New York Convention and which might give rise to an action for invalidity. He had the impression that a slight majority favoured protection of the addressee, in which case it was necessary to go into greater detail concerning the question of the last known residence or place of business. In other respects, paragraph 1 could remain as it stood.

19. He suggested that the redrafting of the paragraph should be entrusted to a small drafting group, which would include the representatives of the Federal Republic of Germany and the United States.

20. It was so decided.

21. Mr. ROGNLIEN (Norway) agreed as to the need to defend the interests of the recipient. It might be sufficient, however, to provide for delivery of the notification to a particular address. The case where the other party could not be

(Mr. Rognlien, Norway)

reached was a marginal case and need not be emphasized. In his view, the usual case should be covered, as in the proposal he had submitted earlier in the meeting. It might, however, be necessary to refer to the actual delivery to the other party, in other words, to his office or his agents. The case in which the other party could not be reached could be left to the applicable law; alternatively special provisions could be included in the contract.

22. The CHAIRMAN suggested that the representative of Norway should join the drafting group. He urged the group to remember that the majority of members did not wish the article to be too detailed and that no reference should be made to national legislation.

23. Mrs. OYEKUNLE (Nigeria), while agreeing that no reference should be made to specific national legislation, said that the drafting group might consider the possibility of serving notification of arbitration by means of a newspaper advertisement in cases where the country of residence of a party was known.

2k. Mr. ROEHRICH (France) pointed out that the representatives of Norway and Nigeria were proposing different things. His delegation was in favour of the Norwegian proposal concerning the principle of actual delivery and reliance on the proof accepted in the country where the delivery was made.

25. Mr. ROGNLIEN (Norway) said that he did not wish to make any specific reference to national legislation but simply to know whether the language used in article 3, paragraph 1, would be part of the standard contract between parties, in which case the commentary should point out that article 3 did not exclude the possibility of relying on rules relating to communications under the national legislation applicable.

26. The CHAIRMAN referring to paragraph 2, pointed out that the representative of Bulgaria had suggested that the day on which notification was received should not count as the first day of the period.

27. Mr. ROGNLIEN (Norway) agreed with that suggestion. The difficulty could be obviated by stating that the period would expire on the same day of the week or date of the month - depending on the length of the period - as that on which it had commenced. That would be easier than specifying the exact number of days in each case. In addition, the reference to official holidays or non-business days could then remain. Naturally, if, under article 17, an arbitration tribunal were to fix a period in days, the rules should make that clear that the day of receipt did not count as the first day of that period.

28. The CHAIRMAN pointed out that the method of calculating periods of time should be uniform in all UNCITRAL conventions. He urged the drafting group to prepare a text as far as possible along the lines of the similar provision in the Convention on Prescription (Limitation) in the International Sale of Goods. The group might prepare an alternative version in brackets giving the period in weeks and months in case the Committee decided that it needed to adopt that method of calculation.

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29. Mr. GUEST (United Kingdom) said that article 3, paragraph 2, was satisfactory, subject to the slight amendment concerning the dies a quo.
30. Mr. MANTILLA-MOLINA (Mexico) said that the drafting group might wish to consider whether there was in fact any difference "between the Spanish terms día feriado oficial and día no laborable, which seemed to him interchangeable.
31. The meeting was suspended at 11.25 a.m. and resumed at 11.40 a.m.

#### Article 4

32. Mr. JENARD (Belgium) said that the procedure currently outlined, which included the notification referred to in article 4, as well as the other steps described in article 17, could give rise to delaying tactics on the part of the respondent. He therefore proposed that the two articles should be combined.
33. Mr. MELIS (Austria) supported that proposal and suggested that the Committee might also consider requiring the parties at the same time to indicate their choice of arbitrator, as currently provided for under article 7, paragraph 2, and article 8, paragraph 1.
34. Mr. SZÁSZ (Hungary) pointed out that if a party included in the notice of arbitration the information requested under article 17, paragraphs 2 (b), 2 (c) and 2 (d) relating to the statement of claim, he should not be required to send a separate statement of claim. Parties should, however, be free to decide whether to submit such information at the same time as the notice of arbitration or subsequently. It should also be remembered that a notice of arbitration usually followed a certain amount of correspondence and did not necessarily repeat all the information contained in such correspondence.
35. Mr. GUEST (United Kingdom) said that he preferred the existing text of article 4, paragraph 3 of which listed the matters which must be included in a notice of arbitration without, however, placing any limitation on the amount of information to be supplied. The existing text seemed to be a reasonable compromise between those who wished the statement of claim to be delivered at the outset and those who preferred a two-tiered system, namely, the notice of arbitration followed by the statement of claim. If it was not clear from the present text that parties were free to choose between the two, the Committee might consider specifying in article 4 that a party could submit a statement of claim in the form given in article 17, paragraph 2, and indicating in article 17 that if a statement of claim had already been delivered there was no need to take the action spelled out in that article.
36. Mr. HOLTZMANN (United States of America) fully agreed with the United Kingdom pointing out that the two-tier system constituted a bridge between the civil law and the common law systems. Referring to the suggestion that certain provisions of articles 7 and 8 should also be merged with article 4, he pointed out that parties should feel free to include the names of their chosen arbitrator in their notice of arbitration but should not be required to do so.

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37. Mr. ST. JOHN (Australia) supported the views expressed by the United Kingdom and United States representatives. His delegation would welcome a reference in article 4 to the possibility of sending an early statement of claim.

38. Mr. MANTILLA-MOLINA (Mexico) said that he was in favour of keeping articles 4 and 17 separate, since complications might otherwise arise. In many cases, the mere sending of a notice of arbitration was sufficient to make a party initiate steps leading to a solution of the dispute.

39. Mr. MELIS (Austria) proposed that, as a compromise solution, article 4 should state specifically that the claimant could also include the statement of claim and indicate his choice of arbitrators.

40. Mr. GUEST (United Kingdom) noted that article 4, paragraph 3, contained no explicit reference to a demand that the dispute should be referred to arbitration. He proposed, therefore, that paragraph 3 (f) should read: "A demand that the dispute should be referred to arbitration".

41. Mr. HOLTZMANN (United States of America) noted that paragraph 1 duplicated some of the material which appeared, more logically, in subparagraph 3 (b). He proposed, therefore, that paragraph 1 should read: "The party initiating recourse to arbitration (hereinafter called the 'claimant' ) shall give to the other party (hereinafter called the 'respondent' ) notice of arbitration."

42. Moreover, since article 4, paragraph 2, related to matters already discussed under article 3, it would be necessary to make the appropriate changes in paragraph 2 to accord with the final version of article 3.

43. Mr. PIRRUNG (Federal Republic of Germany) proposed that, in order to avoid unnecessary repetition of article 3, article 4, paragraph 2, should be abbreviated to read: "Arbitral proceedings shall be deemed to commence on the date on which such notice (hereinafter called 'notice of arbitration' ) is received by the respondent." It would also be preferable to retain the existing wording of paragraph 3 (c).

44. The CHAIRMAN suggested that the redrafting of article 4 on the basis of the proposals made by members of the Committee should be entrusted to a small drafting group -comprising the representatives of Austria, Mexico, the United Kingdom and the United States.

45. It was so decided.

#### Article 5

46. Mr. SZÁSZ (Hungary) said it was his understanding that, in cases of arbitration, it was necessary for the representative to provide evidence of power of attorney. Article 5 contained no such provision.

47. The CHAIRMAN said that proof of power of attorney was not a requirement in the civil law of most Western countries.

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48. Mr. DOMKE (Observer for the International Chamber of Commerce) suggested that the second sentence of article 5 should be deleted since it included a presumption of representation and since the powers conferred on an agent depended on national and local law rather than on UNCITRAL rules.
49. Mr. SZÁSZ (Hungary) supported the suggestion of the representative of the International Chamber of Commerce.
50. Mr. MELIS (Austria) agreed that it would be preferable to delete the second sentence in order to avoid confusion in cases of arbitration where parties were represented by more than one lawyer. By the same token, it might also be advisable to include a reference to the power of attorney as mentioned by the representative of Hungary.
51. Mr. MANTILLA-MOLINA (Mexico) said that there was some discrepancy between the words "counsel or agent" used in the English text and the words "abogado o un agente" used in the Spanish text. Although the error might simply be one of translation, there was a difference in the scope of the English concept of an agent and the Spanish concept of "agente". Similarly, the word "counsel" might be better rendered by "consejero" or "asesor" rather than by "abogado". As a result, the Spanish text suggested that a party must be represented by a lawyer, and such a provision would be too restrictive.
52. The CHAIRMAN said that a similar problem existed with regard to the French text, since it was not possible to be represented by a "conseil", but only by a "mandataire". Neither of those terms was necessarily equivalent to the term "avocat".
53. Mr. BERGSTEN (Secretary of the Committee) said that the original draft rules had been drafted in English and the other language versions had been produced by the Translation Services. He suggested, therefore, that members of the Committee should base their statements, as far as possible, on the English text. Naturally, it would be extremely important for the final text to have exactly the same meaning in all languages.
54. Mr. GUEST (United Kingdom) said that, if the purposes of article 5 were simply to establish the right of a party to be represented by a counsel or agent and to ensure that the other party was informed of the identity of such a representative, then the whole article could probably be deleted.
55. The word "counsel" also raised a problem for his delegation, since, in the United Kingdom, the term did not necessarily include all lawyers as it did in the United States.
56. Mr. SANDERS (Consultant to the UNCITRAL secretariat) said that the wording of draft article 5 had been based on the Commercial Arbitration Rules of the American Arbitration Association and of the Inter-American Commercial Arbitration Commission, although there were slight differences. For example, in the first sentence the secretariat had added the word "agent", and in the second sentence had used the terms "counsel or agent" instead of the term "attorney".

57. Mr. HOLTZMANN (United States of America) said that to omit any reference to representation by counsel might be construed as a departure from normal practice and as representing the views of the Commission with regard to the immutable right to counsel. In the United States, the word "attorney" meant an agent and not necessarily a lawyer. The term "counsel", however, included all lawyers, while the term "agent" signified a non-lawyer acting as a representative. It might therefore be preferable to try to find some generic term acceptable to all.

58. The CHAIRMAN suggested that article 5 should read: "The parties should have the right to be represented or assisted by persons of their choice."

59. Mr. ROEHRICH (France) said that, while the Chairman's proposal was generally acceptable, his delegation had reservations with regard to the use of the term "assisted".

60. Mr. HOLTZMANN (United States of America) proposed that the following sentence should be added to the sentence suggested by the Chairman: "The name and address of such persons shall be communicated in writing to the other party."

61. The CHAIRMAN suggested that the delegations of France and Mexico, together with the Secretariat, should draft a mutually acceptable text of article 5 and that the Soviet delegation should ensure that the Russian text reflected the original text.

62. It was so decided.

The meeting rose at 12.50 p.m.