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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COMMITTEE OF THE WHOLE (II)

Ninth session

SUMMARY RECORD OF THE 5th MEETING

Held at Headquarters, New York,
on Wednesday, 14 April 1976, at 3 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 3.05 p.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 8

1. The CHAIRMAN said that the Committee had already decided on article 7, and article 8 must clearly follow that article as far as possible since it was related to it. Article 8, paragraph 1, was straightforward. In paragraph 2, the formula that was used for article 7, paragraph 2, could be followed, so as to provide for impartiality in cases where an appointing authority appointed the arbitrators. Paragraph 3 provided for a system of notification like the system which would be followed in choosing a sole arbitrator.

2. Mr. JENARD (Belgium) said that if paragraph 3 was to be modified in accordance with his delegation's proposals and with the compromises reached on article 7, the means by which the claimant was notified should be left to the discretion of the respondent; there should thus be no reference to telegram and telex. It had been agreed at the previous meeting that the procedure should begin after receipt of the claimant's notification of the appointment of an arbitrator, rather than after the receipt of the notice of arbitration. The wording of paragraph 3 (b) should be changed so that either party could apply to the authorities mentioned in article 7, paragraph 4.

3. The CHAIRMAN said that the question of the nationality of the appointing authority also arose. It was not very practicable to model paragraph 3 on the procedure for the choice of a sole arbitrator and allow the party which named one arbitrator to have the second arbitrator named by a national authority. Thus under article 8, paragraph 3 (b), the claimant would be able to apply to the international authority, and if that was the Permanent Court of Arbitration at The Hague, the Court would designate an appointing authority which would designate an arbitrator, without, of course, using a list-procedure.

4. He asked whether the 15-day time-limit provided for in article 8, paragraph 4, was acceptable to delegations.

5. Mr. MANTILLA-MOLINA (Mexico) suggested that the time-limit should be extended to 30 days so as to facilitate negotiations.

6. Mr. TSEGAH (Ghana) supported that suggestion; communications were often very slow, especially in developing countries.

7. The CHAIRMAN said that if he heard no objection he would take it that the proposal to extend the time-limit to 30 days was acceptable.

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(The Chairman)

8. The rest of article 8 was straightforward as it was in line with the rules for the appointment of a sole arbitrator.

9. Mr. PIRRUNG (Federal Republic of Germany), referring to article 8, paragraph 4, said that his delegation did not consider it useful to provide that parties should endeavour to reach agreement on the choice of the presiding arbitrator in cases where the two arbitrators could not agree. He therefore proposed that the second sentence of the paragraph should be omitted, so that if the two arbitrators could not agree on a presiding arbitrator the appointing authority would take the decision. That would avoid the lengthy procedure entailed when two time-limits came into operation, one for the arbitrators and one for the parties.

10. Mr. SZÁSZ (Hungary) agreed that the procedure provided for in paragraph 4 would be too lengthy; if the two arbitrators appointed by the parties could not agree on a presiding arbitrator, there was no reason to go back to the parties. Although they could, of course, give advice, it would prolong the procedure too much to allow them to choose the presiding arbitrator.

11. The CHAIRMAN said that it would be logical in the light of article 7 to give the parties the possibility of agreeing on an appointing authority; that would avoid constant recourse to the Permanent Court of Arbitration at The Hague.

12. Mr. SZÁSZ (Hungary) said he was concerned about the length of the procedure provided for in article 8, paragraph 4. If after 30 days two arbitrators could not decide on the presiding arbitrator, even after consulting the parties, there was no point in setting a further 30-day time-limit.

13. The CHAIRMAN said that the Committee could follow article 7 and provide that, if within 30 days the arbitrators could not agree on a presiding arbitrator and the parties could not agree on an appointing authority, the matter could be referred to the Permanent Court of Arbitration at The Hague.

14. Mr. HOLTZMANN (United States of America) said that that compromise solution could be very impracticable since the arbitrators and the parties would be trying to reach agreement at the same time.

15. Mr. JENARD (Belgium) said that the analogy between article 8 and article 7 should not be taken too far because that could make the procedure envisaged unnecessarily long. He therefore considered it better to allow the parties to apply directly to the supreme authority if the two arbitrators could not agree on a preisiding arbitrator.

16. Mr. PIRRUNG (Federal Republic of Germany) said that his delegation was anxious to avoid setting two time-limits.

17. The CHAIRMAN said that that would mean that the two arbitrators had 30 days to find a presiding arbitrator and if they failed to do so within that time application would be made either to an appointing authority, if the parties had agreed on one, or to the Secretary-General of the Permanent Court of Arbitration at The Hague. The appointment procedure would therefore be the same as for a sole arbitrator, and of course the recommendations regarding impartiality would be the same.

18. Mr. GUEST (United Kingdom) said that article 8 was not in accordance with English law in which there were mandatory rules which prescribed that in a case where three arbitrators were to be appointed, each party appointed one arbitrator and the third was an umpire. It could well be that other systems of law deriving from English law would also not be in accordance with article 8. He would not, however, ask for any change in the text.

19. The CHAIRMAN said that it was always a problem to draft rules which did not conflict with national laws; as far as possible, it was best to avoid creating difficulties for the parties.

20. He suggested the drafting group set up to redraft article 7 should also redraft article 8, since the two articles were related.

21. It was so decided.

Article 11

22. The CHAIRMAN, speaking as a member of the Austrian delegation, noted that article 11 was not in accordance with Austrian law, which did not allow any person other than the judge to decide on a challenge to an arbitrator.

23. Mr. PIRRUNG (Federal Republic of Germany) said that article 11 also conflicted with the law of his country, under which the final decision on a challenge to an arbitrator must be made by a State judge. It would not, however, ask for any change to be made in the text.

2k. The CHAIRMAN said that under article 11 the decision on a challenge would be made by the appointing authority, where one existed, or by the Secretary-General of the Permanent Court of Arbitration at The Hague. He took it that article 11, paragraph 1, was acceptable to the Committee.

25. With regard to paragraph 2, he pointed out that the phrase "in the cases mentioned under subparagraphs (a), (b) and (c) of paragraph 1" was unnecessary. In accordance with that paragraph, there would be no need to refer to the Secretary-General of the Permanent Court of Arbitration at The Hague since the appointing authority had already been designated.

26. If he heard no objection, he would take it that article 11 was acceptable to the Committee, with the deletion of the phrase he had mentioned in paragraph 2.

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27. Mr. PIRRUNG (Federal Republic of Germany) said that he did not think it necessary to include the exception made at the end of article 11, paragraph 2.

28. The CHAIRMAN said that that phrase was designed to avoid recourse to the Secretary-General of the Permanent Court of Arbitration at The Hague.

29. Professor SAUNDERS (Special Consultant to the UNCITRAL secretariat) confirmed that the phrase had been included so as to avoid a lengthy procedure. Its inclusion was, moreover, explained in the commentary to article 11, (A/CN.9/112/Add.1).

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) observed that his delegation had already indicated that it wished to discuss the evidence that should be given when an arbitrator was challenged. That matter could be discussed in connexion with article 22, but if no decision was reached when article 22 was discussed, his delegation reserved the right to revert to article 11.

Article 12, paragraph 1

31. Mr. MANTILLA-MOLINA (Mexico) said that if an arbitrator resigned, he should have to give good reasons for his resignation, and if those reasons were not satisfactory, he should become responsible for damages to the parties.

32. The CHAIRMAN said that even if the reasons for resigning were unsatisfactory, it would be difficult to oblige an arbitrator to fulfil his functions, since the arbitration rules constituted nothing more than a private agreement between two parties. He therefore proposed that the present text of paragraph 1 should be retained.

33. It was so decided.

Article 12, paragraph 2

34. Mr. JENARD (Belgium) said that a time-limit should be fixed, otherwise it would be difficult to know at what stage an arbitrator could be judged to have "failed to act".

35. The CHAIRMAN said that, once the challenging procedure had been initiated, the appropriate authority would decide whether an arbitrator had failed to act. Establishing a time-limit would lead to a lack of flexibility.

36. Mr. HOLTZMANN (United States of America) said that it should be for a party to initiate the challenging procedure by claiming that an arbitrator had failed to act. He therefore proposed that the paragraph should read: "In the event of a claim by a party that an arbitrator is incapacitated or has failed to act, the procedure ...".

37. Mr. MANTILLA-MOLINA (Mexico) said that the word "incapacitated" was confusing, since it had two meanings. In a legal context, it referred to someone who could

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(Mr. Mantilla-Molina, Mexico)

not act for himself, while in general usage it meant a person who lacked adequate knowledge or education. It should be made clear that in paragraph 2 the word "incapacitated" was being used in its legal sense.

38. Mr. ROEHRICH (France) agreed that the word was being used in its legal sense. However, the arbitration rules did not constitute an international convention and the word "incapacitated" would therefore be interpreted differently according to which set of national laws was involved. The word "incapacitated" should therefore be deleted or replaced.

39. Mr. GUEVARA (Philippines) said that the word "incapacitated" should refer to the inability of an arbitrator to fulfil his functions for mental or physical reasons. "Failure to act" would be difficult to establish if no time-limit was stipulated. Clarification was necessary.

40. Mr. MANTILLA-MOLINA (Mexico) proposed that the words "serious or prolonged illness" should be inserted after the word "death" in article 12, paragraph 1. Paragraph 1 would therefore cover the inability of an arbitrator to fulfil his functions for mental or physical reasons.

41. Mr. PIRRUNG (Federal Republic of Germany) said that in paragraph 1 the reasons for appointing the substitute arbitrator were objectively verifiable and indisputable. Paragraph 2, however, covered reasons which, in objective terms, would be more difficult to establish. The distinction was important and should be maintained.

42. With respect to paragraph 2, the word "incapacitated" was vague; it would, however, allow some flexibility, and any uncertainty would be removed by the decision of the appointing authority.

43. Mr. MANTILLA-MOLINA (Mexico) proposed that, in view of the explanation offered by the representative of the Federal Republic of Germany, a reference to "serious or prolonged illness or accident" should be included in paragraph 2. The reasons for a challenge should be subject to proof, otherwise the challenge would constitute a serious censure of the arbitrator.

44. The CHAIRMAN proposed that the Committee should establish a drafting group composed of the representatives of France, Mexico and the United States, and request it to redraft article 12, paragraph 2.

45. It was so decided.

Article 12, paragraph 3

46. The CHAIRMAN said that the provisions of paragraph 3 also applied to challenges of arbitrators (articles 9 to 11).

47. Mr. GUEST (United Kingdom) said that he disagreed with the underlying principle of the paragraph. If any arbitrator was replaced, any hearings should

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(Mr. Guest, United Kingdom)

be repeated, unless otherwise agreed by the parties. It should not be possible for the arbitral tribunal to decide, against the will of one or both parties, that hearings should not be repeated. The paragraph should therefore read: "If an arbitrator is replaced, any hearings held shall be repeated."

48. Mr. SZÁSZ (Hungary) said that paragraph 3 should be treated as a separate article, since it also applied to challenges of arbitrators. With respect to the wording, either the United Kingdom proposal should be accepted or the paragraph should be amended to provide that the new arbitrator alone had the right to insist that hearings be repeated, even if the two other arbitrators were opposed to such a repetition.

49. Mr. STRAUS (Observer for the International Council for Commercial Arbitration and the Inter-American Commercial Arbitration Commission) said that the United Kingdom proposal would mean that if an arbitrator became incapacitated just before the completion of a procedure which had already lasted several months, the losing party could then insist on all the hearings being repeated in order to frustrate the procedure.

50. Mr. PIRRUNG (Federal Republic of Germany) said that to repeat a long arbitration procedure would cause difficulties. He therefore proposed that where lengthy procedures were involved, they should be repeated only if the arbitral tribunal wished.

51. Mr. JENARD (Belgium) said that the rule set out in article 12, paragraph 3, was appropriate in the case of the replacement of a sole arbitrator but not in the case of the replacement of a presiding arbitrator. In the latter case, there was no need to repeat hearings held previously, especially when accurate and complete records of any such proceedings were available. Thus, the rule should be applied only to the replacement of a sole arbitrator and in all other cases the decision to repeat hearings should be left to the discretion of the arbitral tribunal.

52. Mr. MELIS (Austria) pointed out that the obligation to repeat all hearings would entail considerable expense for the parties. He therefore supported the view expressed by the representative of Belgium.

53. Mr. MANTILLA-MOLIHA (Mexico) agreed that the decision to repeat hearings should be left to the discretion of the tribunal. The difference of opinion in the Committee with regard to that provision was based on the differing emphasis of the various world legal systems. In common law countries, procedure consisted of oral hearings, and it was therefore understandable that certain delegations should attach great importance to the repetition of such hearings in the event of the replacement of an arbitrator. In the Latin countries, on the other hand, procedure was chiefly written, and where it was not, documentary records existed for the judges to study and review a case. The Belgian proposal would seem, therefore, to offer the best solution to the problem.

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54. Mr. GUEST (United Kingdom) said that his delegation understood the word "hearings" in paragraph 3 to refer to the oral submission of evidence.

55. A number of delegations had argued that in the case of a long and drawn-out arbitration process during which an arbitrator had died or become otherwise incapacitated at a late stage in the proceedings, the repetition of previous hearings on the appointment of a replacement would entail undue expense for the parties. His delegation held the opposite view, namely that it was precisely in such cases that the need to repeat the hearings was greatest. If an arbitrator appointed late in the proceedings was to be able to direct his mind to the issues already presented orally he must be in the same position as his fellow arbitrators. Otherwise, they would have heard all the evidence and he would have heard only a part. If the parties were concerned with expense, they could, of course, agree to forego the repetition of hearings. His delegation stressed, however, that either party should be at liberty to request that all evidence presented earlier should be heard by a newly appointed arbitrator.

56. The CHAIRMAN said that the concern of some delegations regarding the requirement to repeat hearings was based on more than just a fear that it would entail expense and a loss of time. They also feared that the arbitration process might be sabotaged or frustrated by a party which could arrange in advance for an arbitrator to stall or to prolong the proceedings indefinitely at a particular stage. Some delegations viewed paragraph 3 as too restrictive, while others felt that it was too broad and would require the repetition of hearings in cases where that was not necessary. Those holding the latter view seemed to constitute a slight majority. He suggested, therefore, that the paragraph might be amended by the deletion of the reference to the "presiding arbitrator" in the first sentence and by the addition of a phrase in the second sentence that would permit the parties specifically to request the repetition of hearings, should they so desire.

57. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that, as currently positioned in the text, paragraph 3 would apply only to the cases of the death, resignation or incapacity of an arbitrator, or his failure to act. In actual fact, however, the provisions of that paragraph should also apply to the case of the removal of an arbitrator as a result of a challenge under article 11. Accordingly, it might be advisable to place the provisions of paragraph 3 in a separate article which would refer to both article 11 and article 12.

58. The CHAIRMAN observed that there seemed to be a consensus that the provisions of paragraph 3 should be placed in a separate article, perhaps to be numbered 12 bis, and he requested the representative of the Soviet Union to redraft it.

The meeting rose at 5 p.m.