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Twenty-seventh session

SUMMARY RECORD OF THE 531st MEETING

Held at Headquarters, New York,
on Tuesday, 7 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

CONTENTS

The meeting was called to order at 3.20 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (A/CN.9/396/Add.1)

1. Mr. SEKOLEC (International Trade Law Branch) recalled that the item had been included in the agenda of the Commission's twenty-sixth session. On that occasion, it had been noted that the rules governing arbitral proceedings should be flexible so that they could be adapted to the particular circumstances of each dispute and should allow for the fact that the legal and cultural traditions of the parties and the arbitrators were often different, particularly in the case of international arbitration. Yet flexibility could be synonymous with uncertainty and unpredictability. It had therefore been recommended that guidelines should be prepared to avoid the negative consequences of flexibility.

2. The document before the Commission (A/CN.9/396/Add.1) was intended not to modify but to reaffirm the principles underlying arbitration, especially flexibility and discretion; it outlined and highlighted various aspects of arbitration practice, particularly with regard to the planning and coordination of arbitral proceedings. The secretariat had borne in mind the Commission's instructions to avoid guidelines that were overly complex or entailed overly detailed rules and to avoid any wording that might make the arbitration seem like judicial proceedings.

3. The secretariat had met with several experts, who had expressed great interest in the draft, although they had noted that its scope would have to be broadened to include, for example, planning meetings at the outset of the proceedings. The Commission could accept that suggestion without making any substantive changes in the draft and might wish to consider the possibility of changing the title to "Guidelines for the Preparation of Arbitral Proceedings".

4. Mr. HERRMMANN (Secretary of the Commission) said that once the Committee had examined the draft Guidelines, it could consider what course of action to follow. Specifically, the Committee would have to decide whether to adopt the Guidelines at the current session or leave their adoption for later. If the Commission did the former, it could take into account the results of the Congress of the Internal Council for Commercial Arbitration to be held at Vienna in November, at which the Guidelines would be considered in depth. If the Commission did not adopt the Guidelines at the current session, it would have to decide whether or not to transmit them to a working group, in which case there would be no need to devote much time to their consideration at the next session, whose full agenda was posing problems for some delegations. That was particularly true for those from small countries, especially when the three working groups each held two-week sessions. Moreover, the secretariat did not feel it was essential for a working group to review the draft Guidelines. In any case, even if work on the draft could not be completed at the current session, it would still be possible to transmit the text to a meeting of experts.

5. Mr. LEVY (Canada) said that his delegation had discussed the draft Guidelines with the Canadian centres for international commercial arbitration in

Vancouver and Quebec and with experts on arbitration, who had unanimously praised the work done by the secretariat.

6. The preparatory conferences afforded an excellent opportunity for the parties to avoid the cost and delays of appeals. Under the British Columbian Commercial Arbitration Act (article 34), once arbitration had been initiated, the parties could agree in writing to rule out recourse to a higher court. That could be done only if authorized by the legislation in force, but it should in any case be mentioned in the Guidelines.

7. Similarly, in international commercial arbitration, preparatory conferences could allow the parties to agree on stipulations with regard to questions covered by articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration, which provided the basis for applications for setting aside or suspending an arbitral award. Such stipulations could give the parties a greater sense of security with regard to the enforceable nature of the award.

8. Another question was how to deal with the disclosure of confidential or privileged information in the context of the lawyer-client relationship. The disclosure of confidential or privileged information was always a sensitive issue, particularly because, under some legal systems, once a disclosure took place, the right to confidentiality was lost forever. The Guidelines should therefore state that the parties could agree on a procedure to prevent that possibility.

9. Given that it was incumbent on the parties to set the parameters of the dispute and that, in the absence of any agreement, the arbitrator would set them, a preparatory conference could be risky if conducted by an inexperienced arbitrator. Nor should such a preparatory conference be held without an arbitrator. It must also be ascertained that the Guidelines corresponded to the rules actually applied when the arbitration took place in arbitral institutions that had their own rules.

10. Lastly, there must be a list of possible topics for preparatory conferences, and the Commission ought to consider the possibility of preparing a pamphlet to accompany the Guidelines that would highlight procedural problems with which the participants in any type of arbitration should be familiar.

11. Mr. CHOUKRI SBAI (Morocco) said that the draft Guidelines were very important because they favoured the institutional settlement of a dispute, whether by free or regulated arbitration, and made it possible to save time by so doing.

12. The draft Guidelines reaffirmed the basic principle of arbitration, which was to find a solution through conciliation of the parties. However, more specific reference should be made to some important questions, such as free arbitration, the death or illness of an arbitrator, or a changing of arbitrators, for which preparatory conferences might lead to different solutions.

13. Mr. OLIVENCIA (Spain) said that in dealing with the item under consideration the Commission had to adopt a new approach to arbitration; it was

not a question of formulating norms for legislators to adopt, nor of rules or a model law, but of a non-binding manual whose contents were essentially expository and intended for arbitrators, practitioners of arbitration, attorneys and the parties to an arbitration.

14. The draft should also serve to promote arbitration and help the user solve any questions that might arise in the preparatory conferences. In particular, the preparatory conferences should demonstrate the basic advantage of arbitral proceedings over judicial proceedings: direct contact between the arbitrator, the parties and the proceedings. A judge was remote, intervening only to render a verdict. In judicial proceedings there was no direct contact with the parties, the proceedings or the admission or use of evidence.

15. Referring to the title of document A/CN.9/396/Add.1, he said that the word "Guide" should be used instead of "Guidelines" and that the word "meetings" and not "meeting" should be used in the Spanish text, as the number of preparatory conferences was not fixed. It was in fact useful to hold a number of preparatory conferences, although that would depend on the nature of the arbitration or its subject, among other things. According to the draft (A/CN.9/396/Add.1, para. 31), "in exceptional cases", i.e. in complex arbitrations, more than one preparatory conference might be held; however, in his opinion the holding of additional conferences should not be exceptional and could help define the issue to be resolved, outline the areas of agreement, bring the positions of the parties closer and define the area of dispute.

16. The preparatory conference before the hearing was of the greatest importance, as it served to establish the procedure and might be followed by other conferences dealing with the use of evidence, the timetable, the means of proof and/or the elements of fact or law on which the parties were agreed. The holding of an adequate preparatory conference could result in considerable savings of time, money and complications. With regard to the fear expressed by the representative of Canada, the risk was not that the preparatory conferences would be directed by an inexperienced arbitrator but that he would make an arbitral award.

17. The current session should constitute a good preparatory conference for the adoption process, and from that point of view he favoured establishing a working group so that the text could be adopted at the next session.

18. Mr. GILL (India) said that the draft Guidelines should help ensure that arbitral proceedings, in particular international arbitral proceedings, were conducted quickly and expeditiously. The document contained guidelines intended to reduce the scope of disputes, establish the facts not in dispute, analyse areas on which the parties could agree, determine the questions to be decided and fix the dates by which the parties must fulfil the obligations imposed by the arbitration. In that connection, it should be noted that the arbitration rules of India's Arbitration Council had been amended in 1993 in order to include some provisions similar to those which were being considered by the Commission. In particular, it should be noted that article 42 of those rules provided for optional conciliation before the hearing and article 43 established the rules for summary arbitration.

19. He agreed that it would be useful to have a list of topics for the preparatory conference, which should be the subject of detailed examination.

20. Mr. ABASCAL ZAMORA (Mexico) said that the Guidelines were of great educational and practical value as they clarified many doubts the commercial parties might have in entering on arbitral proceedings.

21. He pointed out that in the Spanish text of the draft Guidelines the arbitral tribunal was sometimes referred to only as "the tribunal", which might lead to confusing it with an ordinary judicial body. Moreover, the title referred to a preparatory conference although, according to paragraph 31, more than one ought to be held - something that should be made clear from the beginning of the document. It should also be made clear that it was not always necessary to hold preparatory conferences, as in the case of simple arbitral proceedings. A guide explaining how to plan arbitral proceedings might accordingly be prepared in the future.

22. Mr. ZHANG Qikun (China) said that it was only necessary to hold preparatory conferences in very complex cases and it was the arbitral tribunal that should decide when it was necessary to hold them. Preparatory conferences were very useful, as they made it possible to establish what facts were in dispute and thus to save time and money. Some of the subjects which, according to the draft Guidelines, should be taken up in the preparatory conference could also be considered by the arbitral tribunal.

23. It was necessary to examine carefully the items to be taken up in the preparatory conferences in order to avoid the danger of any prejudging of the question by the arbitrators; he also favoured substituting the word "Guide" for the word "Guidelines", as only recommendations were involved.

The meeting was suspended at 4.45 p.m. and resumed at 5.10 p.m.

24. Mr. FOUCHARD (France) said that although the draft Guidelines were clear and specific, he was against establishing the systematic holding of preparatory conferences as a principle. Such meetings were not necessary in most arbitration cases - for example, when matters were taken up which could be resolved easily or when the interests at stake were not very large; nor were they necessary when it was clear that the case would be difficult and complex. In the latter case, given the tension between the parties, preparatory conferences would not serve to bring the respective positions closer but would harden them, which would make concessions more difficult.

25. In reality, the draft Guidelines dealt not only with preparatory conferences but with the whole arbitration process. In that connection, it should be noted that it was the arbitrators who generally established timetables and discussed with the parties' legal counsel the question of hearing witnesses. In important arbitrations, it was impossible to persuade the attorneys to renounce in advance the submission of certain kinds of evidence, as they would be betraying the confidence of their clients if they did so.

26. The UNCITRAL Arbitration Rules provided an excellent text that had been used in every possible framework since 1976, had not created any difficulties

and was compatible with all legal systems. Accordingly, it had to be asked why the Commission wished, 18 years later, to burden and complicate it by creating additional procedures for which no need had appeared to date. The advantage of arbitration was its flexibility, its speed and its reduced cost, and he was afraid that the preparatory conference or conferences, as the possibility of holding more than one had been referred to, would create an excessive burden. It was better to allow the arbitrators and the parties in each case to establish, on the basis of the rules, the basic texts and applicable laws.

27. Ms. VERRALL (United Kingdom) said it was very important to bear in mind that the draft Guidelines were not intended to be either prescriptive or prohibitive, nor to change existing rules or introduce new ones. They were simply a reaffirmation of existing principles intended to help the parties and arbitrators solve some problems before the formal proceedings began.

28. After noting that the text prepared by the secretariat was excellent, she said that she had no objection to broadening the Guidelines to cover all kinds of planning meetings, whether they were called "pre-hearing conferences" or anything else; that could be done simply by changing the title of the draft. Nor would she object to waiting until 1995 to adopt the text formally; in fact, it might be well to take the opportunity provided by the Congress of the International Council for Commercial Arbitration to be held in November. However, as most of the items had already been well covered and set out in the draft, she did not think it would be necessary to establish a working group but simply to deal briefly at the 1995 session of the Commission with the additional points raised by the Congress.

29. Mr. HOLTZMANN (United States of America) said that the secretariat document provided a very useful framework for the discussion and established a firm foundation for the instrument which the Commission would adopt in due course.

30. Preparatory conferences would make a substantial contribution towards improving international arbitration practice. Although it was true that the UNCITRAL Arbitration Rules had been working well, it also was true that they left the arbitrators great flexibility in certain aspects of the procedure. Article 15 of the Rules stipulated that the Arbitral Tribunal could conduct arbitration in such manner as it considered appropriate, provided that the parties were treated with equality and that the other provisions of the Rules were observed. That very flexibility created the possibility of surprise, and it was for that reason that pre-hearing conferences had been so widely held. Such hearings were particularly useful when, as happened in so many international arbitrations, there were two or three legal systems represented among the parties and among the arbitrators. When those persons came from different cultural and legal backgrounds, pre-hearing conferences helped to clarify views and enable the arbitration to move along without misunderstandings. He agreed with the representatives of Spain, Mexico and China that it should be possible to hold more than one pre-hearing conference. The arbitral tribunal should have the option to determine, in the light of the particular circumstances of the particular case before it, whether it wished to hold any pre-hearing conference at all or whether it wished to hold more than one conference, as well as their timing. The tribunal also should be able to determine whether the parties should be given advance notice of the subjects to

be discussed at the conferences or whether that was unnecessary because the parties came from similar legal backgrounds, the same region or the same trade.

31. His delegation planned to suggest slight drafting changes to some of the draft provisions in order to make it clear that a flexible process was involved, that preparatory conferences were not mandatory and that the timing and number of the conferences would be left to the discretion of the arbitral tribunal in the light of the circumstances of the case and the comments of the parties. The text should also make it clear that the agreement of both parties was not required to establish procedures which were within the power of the arbitrators to establish, subject only to the rules which the parties might have agreed upon and the governing law of the place of the arbitration, or the procedural law that governed the arbitration.

32. The format selected by the secretariat was useful; first, an agenda, which he would prefer to call a "check-list", was established, and remarks then followed. The remarks should be explanatory and should be limited to those strictly necessary for an understanding of the agenda item. It would therefore be desirable to delete the remarks in square brackets, so that the text could be as simple and "user-friendly" as possible and in order to remove a number of items which might be contentious and give rise to different views in different parts of the world. As many of the provisions in brackets were extremely interesting and it would be unfortunate if they were lost, they might perhaps be the subject of a future work. The Commission might in the future also consider preparing a series of guidelines on the presentation of evidence or on certain ethical problems that at times arose in the course of arbitration and were touched upon peripherally in some of the bracketed material.

33. With regard to the comments made by the representative of Canada, he said that the idea of a "brochure" was very interesting; it should be a brief document of three to four pages which would simply include the agenda items constituting the check-list.

34. Lastly, he hoped that UNCITRAL would be able to conclude its work on the item during the 1995 session.

35. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that the document prepared by the secretariat was an excellent starting point to which the arbitration community would undoubtedly attach considerable importance; it also gave the Commission an opportunity to have a real impact on the harmonization of arbitral procedure. At a recent conference in Budapest organized by the London Court of International Arbitration, it had been pointed out that there was a significant ground swell of opinion that considered the draft to be much broader in scope than its relatively modest title would suggest, since it referred not only to pre-hearing conferences but also to arbitral procedures in a much broader context. The conclusion had emerged that it would be preferable for the title of the draft to reflect that broader scope and, for the document to focus not only on the preparatory conferences, but also on a broader issue, such as the planning of arbitral procedures. For those same reasons, he agreed with those who believed that the word "Guide" would be more appropriate than "Guidelines". It would also be best not to complete the draft until after the Congress of the International Council

for Commercial Arbitration had met in Vienna. The Commission would benefit from observations originating outside UNCITRAL, and the arbitration community would also feel that it had had a valuable opportunity to contribute to the Commission's work.

36. The Representative of Canada had suggested that the draft should be more specific and, while he endorsed that idea in principle, he advised caution in that regard, since in the sphere of arbitration there was no single right way of doing anything but, rather, many different roads which led to the same result; if the language was too specific, there was a danger that the document would sound too mandatory.

37. With regard to the comment that preparatory conferences might provide an opportunity to examine questions of substance regarding the matters in dispute, he believed that it was necessary to proceed very cautiously, for when questions of substance, as opposed to procedural questions, were discussed, all the requirements of due process and the other elements required in a hearing were brought into play.

38. Mr. DUCHEK (Austria) commended the secretariat for its excellent work in preparing the draft and said that when the final version was prepared it should be borne in mind that most of the proposals it contained would be ideal solutions if the topic in question was the only one in the world and bore no relation to national procedural rules; obviously, that was not the case. That point did not seem to have been taken adequately into account in the draft. It often happened that in the arbitration clause or arbitration agreement, or at the first meeting of the tribunal, the parties agreed on specific national procedural law which should be the procedural law for the arbitration. One reason for that might be that, in some national jurisdictions, the law applicable to the procedure was decisive with respect to the competence of the tribunal that was competent to overrule the final arbitral award. Once the parties had agreed on the applicable procedural law, the question arose as to what the relationship was between that agreement and some of the provisions mentioned in the Guidelines, such as those concerning the submission of evidence, a matter generally governed by the procedural law of each country. A discrepancy might then exist between the agreement by the parties to apply the procedural law of a particular country and the procedures established by the arbitral provisions, with attendant undesirable consequences. Reference should therefore be made to such relationships with national procedural regimes, since the common goal was to simplify the system and make it more flexible.

39. Mr. GOH (Singapore) said that preparatory conferences were useful since they shortened the arbitral procedure and reduced its costs. Nevertheless, the Guidelines should clearly state that such conferences were not mandatory. He endorsed the suggestion by the representative of Canada that a check-list should be drawn up to assist the tribunal in determining the topics to be dealt with at such conferences. He also agreed that the Commission should adopt the Guidelines at its current or next session, without submitting them to a working group.

40. Mr. GRIFFITH (Observer for Australia) agreed that the Guidelines should be as simple and brief as possible and easy to implement, and that a user's guide

was needed. Furthermore, it might be desirable for the Guidelines and the Guide to leave room for the parties to request the arbitrator to consider, before beginning the arbitration process, whether an effort should be made to resolve the dispute through mediation or conciliation, which were common methods of settling disputes. In his country, for example, it had been demonstrated that 90 per cent of all cases could be resolved by having a judge intervene informally. There was every reason to believe that, in most arbitration situations - except those in which the arbitrator had to personally inspect certain goods in order to determine whether their characteristics matched those listed in the contract - preparatory conferences would be held, and therefore the draft under consideration was useful.

41. It should be possible to complete the draft Guidelines at the Commission's next session without transmitting them to a working group. Accordingly, he agreed with the observer for the International Council for Commercial Arbitration that the secretariat should take into account the discussion at the Congress of the International Council for Commercial Arbitration, at which the secretariat probably would be represented by an observer.

42. The CHAIRMAN invited the Commission to begin its consideration of the draft Guidelines and said that, if there was no objection, he would take it that the Commission wished to adopt the suggestion that the introduction to the Guidelines should contain a short history of the work on the Guidelines and a resolution which the Commission could adopt in finalizing the Guidelines.

43. It was so decided.

44. Mr. HOLTZMANN (United States of America) noted that paragraph 2 of the draft referred to two limits on the principle of flexibility and discretion. It might also be desirable, in that paragraph and in other relevant paragraphs, to mention a third source of limits in that regard, namely, the practice by parties of reaching other agreements on the subject. Such agreements usually appeared both in arbitration clauses dealing with the applicable rules of law and in arbitration agreements which made no reference to them. He also proposed the deletion of the phrase "to conduct the case in the procedural style preferred by the parties and the arbitrators" in paragraph 3 and in other passages of the draft, since it implied that the parties and the arbitrator must agree in that regard, which was not the case in many arbitration rules, including the UNCITRAL Rules (article 15). Such rules allowed the arbitrator ample discretion in determining the procedural rules, the only limitations being those proceeding from rules agreed upon by the parties or agreements reached by them. In any event, the draft should clearly indicate that the agreement of both parties was not needed to determine the procedural rules.

The meeting rose at 6.05 p.m.