



SUMMARY RECORD OF THE 3rd MEETING

Chairman: Mr. GASTLI (Tunisia)

CONTENTS

ORGANIZATION OF WORK

REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS SIXTEENTH SESSION

UN LIBRARY

OCT 11 1983

UN/SA COLLECTION

*This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned within one week of the date of publication to the Chief of the Official Records Editing Section, room DC2, *40, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate fascicle for each Committee.

Distr. GENERAL
A/C.6/38/SR.3
4 October 1983
ENGLISH
ORIGINAL: SPANISH

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

ORGANIZATION OF WORK (A/C.6/38/L1; A/C.6/38/L.1)

1. The CHAIRMAN recalled that the consultations on the selection of the second vice-chairman and the rapporteur had not yet been concluded and requested the regional groups to continue their consultations with a view to completing the Bureau of the Committee as soon as possible.
2. Furthermore, he wished to suggest that, on the basis of the consultations that had been held with representatives of the various regional groups, the Committee's timetable should be amended (A/C.6/38/L.1) and that agenda item 126 should be considered immediately after agenda item 128, provided that the Chairman of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations was in a position to introduce the relevant report. Moreover, agenda item 64, which came at the end of the list, would be considered immediately after agenda items 124 and 134. Lastly, he wished to draw attention to paragraph 11 of the note by the Secretariat (A/C.6/38/L.1) in connection with the Working Group on the Review of the Multilateral Treaty-Making Process and the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and to the fact that at its previous session the General Assembly had decided to convene those groups at the current session.
3. If he heard no objection, he would take it that the Committee wished to amend the timetable in the manner he had just described and that it endorsed the re-establishment of the working groups at the current session.
4. It was so decided.
5. The CHAIRMAN drew attention to the fact that the Committee could hold no more than seven meetings per week and that, barring exceptional circumstances, the working groups would meet only if the Committee did not avail itself of all the time officially set aside for it. He therefore wished to suggest that the meeting scheduled for the morning of 30 September should be cancelled so that the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment could immediately start its work.
6. If he heard no objection, he would take it that the Committee wished to adopt that suggestion.
7. It was so decided.
8. Mr. FERRARI BRAVO (Italy) wished to know whether it would be desirable for the Working Group on the Review of the Multilateral Treaty-Making Process also to start its work the following day, since the morning meeting had been cancelled.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that the Working Group should start its work the following day.

10. It was so decided.

REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS SIXTEENTH SESSION (A/38/17)

11. Mr. ROSENSTOCK (United States of America) said that the current report reflected the continuation of the painstaking work carried out by UNCITRAL in the legal field, as well as the high quality of the contribution made by its secretariat.

12. Before turning to consideration of the substance of the report, he wished to inform the Committee that on 21 September the Government of the United States had submitted to the United States Senate the 1980 United Nations Convention on Contracts for the International Sale of Goods so that the Senate could expedite the formalities relating to the ratification of the Convention, and also that Columbia University was sponsoring a conference on the Convention, which would take place on 21 and 22 October.

13. With regard to harmonization and co-operation in the field of international trade law and the special role of UNCITRAL, a British scholar had commented, in that connection, that in the field of international trade law the most urgent problem was the waste of effort and the confusion caused by the number of agencies engaged in the work of unification and that the remedy would be to establish an international clearing house for information to facilitate activities relating to the co-ordination, supervision and collection of data. The current report reflected the extent to which UNCITRAL was fulfilling those needs. For example, paragraph 116 gave details on the fruitful co-operation between the International Chamber of Commerce and UNCITRAL, paragraph 117 told of the close co-operation with ECE and UNCTAD and paragraphs 109 to 117 described the co-operation between UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT).

14. With regard to the question of liquidated damages and penalty clauses, the Commission and the secretariat had made a great effort to bridge the gaps between legal systems, but, as indicated in the report, it had not been possible to eliminate all those gaps, although UNCITRAL was to be commended for the effort it had made in connection with that particularly complex question, which was unlikely to lend itself to unification or harmonization. His delegation could not see that there was any reason for attempting to draft a convention in such a narrow and specialized field, in respect of which the necessary degree of agreement did not exist. The idea of concluding a so-called mini convention seemed equally unnecessary and unwise.

15. With regard to the question of international payments, his delegation had submitted its comments on the two draft conventions and looked forward to receiving those of other Governments and international organizations, as well as the Secretariat's analysis of the key features of those comments and the major issues

(Mr. Rosenstock, United States)

to which they gave rise. Moreover, his delegation welcomed the opportunity to consider some draft chapters of the legal guide on electronic funds transfers in a general way at the seventeenth session of UNCITRAL.

16. Arbitration continued to be a field in which UNCITRAL was making major contributions. In its two sessions held since the last General Assembly the Working Group on International Contract Practices had made commendable progress towards the completion of a draft model law on international commercial arbitration. The United States Government fully supported that project. With the increasing use of arbitration as a means of settling international commercial disputes, greater uniformity in domestic laws on the subject would add an element of certainty to international transactions and thus facilitate international trade and investment. That model law should be applicable to the broadest possible range of international transactions.

17. Work was progressing well with regard to the legal guide on construction of industrial works in the new international economic order. Based on the draft chapters of the legal guide on construction of industrial works, his delegation believed that the legal guide would prove to be the most complete and useful guide available for negotiations of that type of contract. Accordingly, it had supported the project with the participation of experts in the Working Group. A large amount of personnel resources were being devoted to that important project and the experts' experience in such negotiations was crucial to ensure that the legal guide fully reflected the realities that played a major role in such complex negotiations both for the contractor and for the developing countries. That project represented an opportunity for the Commission to produce a first-rate guide.

18. Turning to collaboration between UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT), his delegation was pleased that the Commission had decided to ask the Secretariat, in consultation with the secretariat of UNIDROIT, to produce for the Commission's seventeenth session a report on the manner in which court decisions and arbitration tribunal awards interpreting the United Nations Convention on Contracts for the International Sale of Goods might be made known and accessible, once it entered into force.

19. His delegation supported the decision of the Commission to review the work done to date by UNIDROIT on a preliminary draft convention on the liability of international terminal operators but questioned for the time being any expansion of the topic to include storage/warehousing not involved in international transport as it might unnecessarily complicate the task and exceed UNCITRAL's special competence.

20. The Commission was moving into completely new areas in its work on the unification of law. Its current work on the model arbitration law, the definitive legal guide for the construction of industrial works and the legal guide on electronic funds transfers was forging into new areas of international unification of private law. His delegation was aware of the difficulties and pressures under which the Commission worked and appreciated the efforts it had made to prevent those circumstances from affecting the outstanding quality of its work.

21. Mr. BERMAN (United Kingdom of Great Britain and Northern Ireland) said that a reading of the report of the United Nations Commission on International Trade Law on the work of its sixteenth session suggested that that session had marked further progress in the work of harmonizing and unifying international trade law. He noted that UNCITRAL had had difficulty in deciding on the final form to be given to the draft uniform rules on liquidated damages and penalty clauses and had remitted its decision to the Sixth Committee (para. 78 of the Commission's report).

22. That difficulty raised the question whether the topic of liquidated damages and penalty clauses was an appropriate subject for unification. Those doubts had been consistently expressed by his delegation at the fifteenth and sixteenth sessions and were recorded in the footnote to paragraph 76 of the report. The legal and commercial community within the United Kingdom had greeted the proposal for unification of law in that field with reserve. It had not been shown to the United Kingdom's satisfaction that the present disparity between the different legal systems caused any major problem in international contracts. Furthermore, the draft rules contained certain elements - such as the raising and lowering of the pre-determined levels of damages - which were so incompatible with the existing provisions and principles of English law that it would be very difficult, if not impossible, for them to be adopted in the United Kingdom.

23. In the view of his delegation that fundamental doubt ruled out the possibility of proceeding to the elaboration of a convention. In the circumstances, such a convention might attract only limited support and might never enter into force. The suggestion in paragraph 19 of the report - regarding a convention to which the rules could be annexed - would not solve the problem either. It was always open to States which did not adhere to a convention to use the substantive provisions of the Convention as a model for their own law. By the same token article I of the draft convention had the effect of making the Annex a substantive part of the Convention so the proposal was not satisfactory to his delegation.

24. The possibilities of having the instrument take the form of general conditions or a model law as set out in paragraphs 15 and 17 of the report had also been considered. As stated in paragraph 17 the majority view supported the form of a model law. But attention should first be focused on the "central question" mentioned in paragraph 18, namely, was that a field in which unification was necessary or even possible? To ask that question was in no way to denigrate the substantive quality of UNCITRAL's work; there might be a whole range of ways in which States could take advantage of what had been done.

25. With regard to the draft convention on international bills of exchange and international promissory notes and the draft convention on international cheques, his delegation hoped to submit written observations by the 30 September deadline. Work on electronic funds transfers had begun well and deserved particular attention. International commercial arbitration was an important topic and the United Kingdom was pleased at the progress made by the Working Group. UNCITRAL's work in the arbitration field had attracted lively interest amongst practitioners in London, for London was, of course, a world center of international commercial arbitration. In July, the Institute of Arbitrators had organized a very successful symposium which had been attended by a senior member of the UNCITRAL secretariat.

(Mr. Berman, United Kingdom)

26. On the subject of the new international economic order, the Working Group had been making steady progress in pursuit of the realistic approach adopted at the outset. With regard to the liability of international terminal operators, his delegation supported in principle the proposal that UNCITRAL should consider the preliminary draft Convention prepared by the International Institute for the Unification of Private Law, but on condition that, as indicated in paragraph 114 of the report, the work could be carried out within the existing budget and would not create a need for additional staff.

27. With respect to the legal aspects of automatic data processing (paras. 117 and 118 of the report), his delegation believed that there was indeed a need for a body such as UNCITRAL to co-ordinate the activities being carried out by various international organizations in that field. The United Kingdom welcomed the proposal that the Secretariat should submit a report, at the seventeenth session, on the role which UNCITRAL might play.

28. Mr. FRANCHINI-NETTO (Brazil) said that the examination of the UNCITRAL report led to a recognition of the efforts the Commission had expended in carrying out the task entrusted to it by General Assembly resolution 2205 (XXI). The Commission had covered a great deal of ground in its attempt to give the international community a body of principles and norms to govern economic development.

29. The first role of law involved the normative regulation of social relations. The international community had to unite in a common effort to provide discipline for trade, so that commercial operations would contribute to the progressive development of all peoples, to the overcoming of economic inequalities and to the satisfaction of basic human needs. There was a need to bring about the progressive harmonization of the different legal systems trade. Proclaimed ethics had to be transformed into juridical imperatives to regulate commercial relationships by means of universal norms that would safeguard the interests of the community as a whole. Trade policy should be based on equitable terms in order to provide the indispensable climate of confidence for trade among peoples.

30. The UNCITRAL mission of harmonization involved several different processes that had already started, such as the intensification of mutually beneficial trade, the promotion of an equitable economic order, the conduct of trade to reflect the principles of mutual assistance, the reconciliation of different national economic practices and the fair interpretation of contracts. UNCITRAL had also addressed itself to issues relating to rights and obligations in the field of international trade, the regulation of maritime transport of goods and the offer of means for the peaceful settlement of disputes.

31. His delegation had participated actively in the work of the sixteenth session and had made a number of observations reflecting its general position. With regard to liquidated damages and penalty clauses, universal rules seemed to his delegation to protect the contracting parties from the imbalances created by the dominant position of those that were economically more powerful. The obstacles to a consensus on the formulation of universal rules were due mainly to the possibility

(Mr. Franchini-Netto, Brazil)

that such clauses might be invalidated because of differences in conflicting legal systems. There was no great discrepancy between the rules as formulated and some of the principles adopted by Brazilian law. Under title V of the Brazilian Commercial Code, the validity of a contract was based on agreement between the parties as to its object, and such validity did not depend on a special form, except when the law specifically required it. In the light of articles 917 et seq. of the Brazilian Civil Code, the rules on liquidated damages and penalty clauses as formulated did not present difficulties to Brazil. As to the form the draft was to take, his delegation had reaffirmed in Vienna its preference for general conditions rather than a convention or a model law.

32. With respect to the revision of the Uniform Customs and Practice for Documentary Credits, his delegation went along with the majority opinion that more time was needed for the analysis of the new version. As to the draft Convention on International Bills of Exchange and International Promissory Notes, and the draft Convention on International Cheques, his delegation believed that such subjects could be covered more appropriately by UNCITRAL rules than by conventions. However, if the idea of adopting conventions prevailed, they should be adopted by the General Assembly. There was no need to convene special diplomatic conferences.

33. With regard to international commercial arbitration, Brazil was a member of the Working Group entrusted with the task of preparing a draft model law for the legal settlement of contractual disputes. Special attention should be paid to the fact that the efficacy of any rule would always depend on the extent to which each legal order accepted foreign arbitral awards for execution. It was therefore necessary to be realistic and flexible during the structuring of the relevant instrument. His delegation attached particular importance to that question and recognized the praiseworthy efforts of UNCITRAL to establish an adjudicatory system outside the conventional State framework.

34. The "right to development" had been suggested as a new name for international law. UNCITRAL was creating a legal system that went beyond theory and was based on universal reality. It was essential to overcome gradually the difficulties stemming not only from the existence of differing legal systems, but also from the relationship between international law and changing State policies, which were characterized by varied purposes and means, while law was founded on general, stable principles. The difficulties were also due to the absence of central legislative and executive bodies which could strive for the common weal.

35. Nevertheless, the world was moving towards the internationalization of non-public life. Trade was crossing national borders and drawing people closer together, despite social and political differences. The jus mercatorum would reach its greatest moment when it produced a law able to discipline the vertigo of the current era. UNCITRAL was seeking to attain a universal order, without special privileges, that would give effect to the principles of solidarity embodied in the United Nations Charter.

The meeting rose at 4.45 p.m.