Summary record of the 562nd meeting

Thursday, 11 May 1995, at 2 p.m.

[A/CN.9/SR.562]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 2.10 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT *(continued)* (A/CN.9/405, A/CN.9/408, A/CN.9/411)

Article 20 (continued) (A/CN.9/408, annex)

1. Mr. HERRMANN (Secretary of the Commission) said that following consultations, it was suggested, to take into account the point raised by the representative of the United States of America at the previous meeting, that the wording in the fourth, fifth and sixth lines of paragraph (1), beginning with the words "a provisional order" and ending with the words "are blocked", should be amended to read: "a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or a provisional order blocking the proceeds of the undertaking paid to the beneficiary".

2. Mr. VASSEUR (Observer for Monaco) asked for an explanation of the purpose of the change.

3. Mr. BYRNE (United States of America) said that the new language addressed the concern that the present paragraph (1) of article 20 permitted the court to make a provisional order whose scope might be sufficiently broad as to be interpreted as interfering with the obligation of an issuing bank to reimburse a confirming bank, or other bank nominated to pay, which had in good faith made payment prior to, without the knowledge of or in a country not subject to the jurisdiction of the court issuing the provisional order prohibiting payment. The suggested text read out by the Secretary was, he thought, the least disruptive way of making clear that the provisional order would only affect payment by the guarantor/issuer directly to the beneficiary. It sought to deal with a situation that had not been foreseen.

4. Mr. GAUTHIER (Chairman of the Committee of the Whole), after asking whether there were objections to the proposed wording, said he took it that the Commission agreed to it. He then invited the Commission to take up the question of counter-guarantees raised at the previous meeting.

5. Mr. HERRMANN (Secretary of the Commission) said that, to meet the concern expressed by the representative of France, it was suggested that a new subparagraph *(e)* should be added to paragraph (2) of article 19 worded as follows:

> "In the case of a counter-guarantee, the beneficiary of the counter-guarantee has made payment, as guarantor/issuer of the other undertaking to which the counter-guarantee relates, although it knew that the payment demand against it was made in bad faith."

The undertaking to which the counter-guarantee related was the guarantee referred to in French as *garantie de premier rang.*

6. Mr. VASSEUR (Observer for Monaco) suggested that the following text should be inserted in article 19:

> "The fact that the beneficiary has made a call on the first-ranking guarantee *(garantie de premier rang)* in one of the cases provided for in paragraph (1) of this article having resulted in the rejection of its demand cannot for that reason alone justify the rejection of the demand on the counter-guarantee invoked by the first-ranking guarantor *(garant de premier rang)* unless the latter has absolutely certain knowledge of the bad faith of the beneficiary making a call on the counter-guarantee."

The following text was suggested for insertion in article 20:

> "Provisional orders issued against a beneficiary having made a call on the first-ranking guarantee shall not automatically extend to the counter-guarantee from which the first-ranking guarantor benefits. Similarly, provisional orders issued against the first-ranking guarantor beneficiary of the counter-guarantee shall not automatically extend to the first-ranking guarantee existing in favour of the beneficiary."

7. Ms. FENG Aimin (China) expressed her concern that if the counter-guarantor addressed the local court to obtain provisional court measures that might raise problems of jurisdiction.

8. Mr. HERRMANN (Secretary of the Commission) said that the Working Group had at one point decided to delete the provisions on jurisdiction, a solution which might have clarified somewhat what and whom the court had jurisdiction over and solved some of the concerns of the representative of China. Article 20 should be regarded as a substantive procedural rule irrespective of whether the court had or had not jurisdiction, because the latter issue had not been addressed. When considering provisional court measures against the counter-guarantor, it was necessary to see whether, for the undertaking in question, the Convention actually applied, and the answer to that question lay in article 1.

9. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked for an indication of support for the amendments suggested by the observer for Monaco and for the suggested additional subparagraph for article 19(2).

10. Mr. SHIMIZU (Japan) said that, in considering the text suggested to deal with the United States point, the Chairman had not asked whether the suggestion was supported but whether there were objections to it.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that in the present case there existed two proposals on the same subject.

12. Ms. BAZAROVA (Russian Federation) said that until recently she had accepted the general approach adopted by the Secretariat and been under the impression that the draft Convention covered counter-guarantees. The statement by the observer for Monaco left her confused in that regard.

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, in his understanding, article 6 made it clear that counter-guarantees were indeed covered by the draft Convention. The point at issue was whether counter-guarantees needed to be mentioned in the articles under consideration, and whether the draft Convention needed a provision regarding counter-guarantees in the specific context of fraud and provisional court measures.

14. Mr. ABASCAL ZAMORA (Mexico) expressed agreement with the point raised by the representative of Japan. He was not sure whether the text adopted at the suggestion of the United States solved the problem completely. It did not entirely dispel the ambiguity that arose when a payment was made in good faith by the guarantor. The guarantor had an undeniable right to be reimbursed. But if the text meant that provisional court measures would be authorized only when the guarantor/issuer had not paid the beneficiary it might be better to say exactly that. In other words, the text could be made clearer than it was at present by amending it to state that "the judge may issue a provisional order to the effect that the guarantor/issuer shall not pay the beneficiary". The second part of the paragraph would then no longer be necessary and the text would be clearer. The provisional order would be issued only when the guarantor/issuer did not pay the beneficiary and would be without prejudice to other situations.

15. Mr. HERRMANN (Secretary of the Commission) said that, if he had understood it right, the Mexican proposal entailed a major change in substance. It would be possible to do away with blocking orders, in which case the problem addressed by the United States proposal would not arise, but the United States proposal was designed to clarify the fact that the order to block funds had always been intended only for the purpose of preventing the beneficiary from receiving payment. If the beneficiary had already been paid, the question did not arise.

16. Mr. LAMBERTZ (Observer for Sweden) said he had much sympathy with the position of the representative of the Russian Federation. However, he thought that it was too late for the Commission to reopen the question of counter-guarantees.

17. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there was no support for the text suggested by the observer for Monaco.

18. Mr. EDWARDS (Australia) suggested that the drafting group should include in the proposed new subparagraph *(e)* a formulation along the following lines: ". . . and without limiting the possible application to a counter-guarantee of the types of situation referred to in subparagraphs *(a)*, *(b)*, *(c)* and *(d)*".

19. Mr. BYRNE (United States of America) said it would be useful for the Commission's report to reflect the fact that the Commission had decided not to accept the text suggested by the observer for Monaco not because it wished to exclude the issue of counter-guarantees from the Convention but because it had already decided to follow a system taking account of the issue of counter-guarantees and because it had been thought inappropriate to introduce a new formulation at such a late stage.

20. Mr. OGARRIO (Mexico) said that, as he saw it, the intent of the text was to provide for a situation where payment effected by the guarantor was not in good faith. The text as it stood was not clear and he would prefer an alternative wording.

21. Mr. ADENSAMER (Austria) said he had the same problem with the text as the representative of Mexico and agreed with the suggestion that it be redrafted.

22. Mr. OGARRIO (Mexico), in reply to a question from Mr. GAUTHIER, explained that, in his view, instead of making the new text a new subparagraph *(b)*, it should be made a separate paragraph.

The meeting was suspended at 3.25 p.m. and resumed at 4.10 p.m.

23. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, following consultations with a number of delegations, the following text was suggested for a new subparagraph *(e)* to be added to paragraph (2) of article 19:

> "In the case of a demand against a counter-guarantor, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates."

24. He took it that it was the Commission's wish to adopt that proposal.

Article 21

25. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said his delegation regretted that the subject of conflict of laws was being treated in such a summary fashion in the text of the Convention. On a point of drafting, he pointed out that most codifications of international private law allowed for the possibility of choice of applicable law, but that choice was subject to much more stringent conditions than those set out in article 21. The text proposed did not specify those conditions, which in his view raised a problem in relation to other conventions, and would also leave the way open for reversion to the old idea that, when the parties had not expressly designated their will, their hypothetical will would be deemed to apply. He therefore suggested that the drafting group should review the text, in order to bring it more into line with that of other conventions.

26. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that it was his understanding that the current formulation was in part drawn from existing conventions; however, the question was not one of drafting but of substance.

27. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that under Iranian law the parties explicitly stipulated the applicable law in the undertaking. The words "or demonstrated by the terms and conditions of the undertaking" in article 21(1)*(a)* were confusing and he proposed their deletion.

28. His delegation believed that articles 21 and 22 should be combined, article 22 becoming paragraph (1)*(c)* in article 21.

29. Mr. STOUFFLET (France) did not share the pessimism of the observer for the Hague Conference with regard to article 21(1)*(a)*. It would be taking things too far to consider the reference to the terms of the undertaking as a resurgence of the old idea of the hypothetical will of the parties. However, the text could be aligned with that used in other conventions.

30. Mr. FAYERS (United Kingdom) said that a possibility would be to add to article 21(1)*(a)* the words "or the circumstances of the case". He would, however, prefer to leave the text as it stood.

31. Mr. GAUTHIER (Chairman of the Committee of the Whole), having asked whether there was support for the proposal of the representative of the Islamic Republic of Iran for the deletion of the words "or demonstrated by the terms and conditions of the undertaking", said it appeared that there was none.

32. He wondered whether there was support for the Iranian proposal to merge articles 21 and 22, although that was really a drafting matter.

33. Ms. CZERWENKA (Germany) said that article 21 dealt with the choice of applicable law, whereas article 22 dealt with the situation where there was no choice of law. Merging the two would not be appropriate.

34. Mr. LAMBERTZ (Observer for Sweden) said that the question whether the principal should be governed by a decision of the bank and the beneficiary might arise in connection with article 21 if the bank and the beneficiary stipulated in the undertaking that the undertaking should be governed by a given law. The bank's obligation to the principal to check that the documents were genuine and not pay if they were fraudulent would not arise from the undertaking itself. He wondered whether the bank and the beneficiary could decide something on behalf of the principal and what law would govern the relation between the principal and the bank.

35. Returning to article 1, he said that article 1(1) provided that the undertaking might exclude the application of the Convention in the undertaking. In his view it would be odd if the bank and the beneficiary could exclude the application of those parts of the Convention that were designed to protect the principal, since the bank had an obligation towards the principal that was outside the undertaking. For the Convention to be complete, therefore, there should be an addition to article 1(1) to the effect that for the Convention rules not to apply to the relation between the bank and the principal there had to be an exclusion of the Convention between the two of them. He therefore suggested adding at the end of article 1(1) the words "or, as concerns the relation between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention".

36. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the point made by the observer for Sweden did not relate to article 21. He took it that the Commission had concluded its discussion on article 21.

Article 22

37. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that under article 2 of the Convention the guarantor/issuer might not be a bank but a private person. Article 22 was therefore not complete: if the guarantor/issuer was a private person and had no place of business, a rule had to be found to apply to that situation. He therefore suggested the addition at the end of article 22 of a comma and the words "and in cases where there is no place of business, the place of habitual residence".

38. Mr. MARKUS (Observer for Switzerland) said that, for the sake of consistency, that wording should be added to article 1(1)*(a)* if it was added to article 22.

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission agreed to align articles 22 and 1(1)*(a)*. The drafting group should be asked to make the necessary amendments, and he suggested that a text be included in the definitions to the effect that, where there was no place of business, the rule of habitual residence would apply. In any case, the problem would rarely arise.

40. Mr. BURMAN (United States of America) concurred with that view.

41. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission had concluded its deliberations on article 22.

Article 1 (continued)

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) requested the Secretary to respond to the question raised by the observer for Sweden on article 1(1).

43. Mr. HERRMANN (Secretary of the Commission) said that, in considering the Swedish suggestion, the Commission should consider how the reference to the relation between principal and guarantor was to be understood. A fairly usable test was needed in a "scope of application" provision. However, although the focus of the Convention was on the guarantor-beneficiary relationship, there would be certain effects on the principal that could be obviated by the amendment suggested by Sweden. An agreement to exclude the application of the Convention did not mean that there would be a legal vacuum: another legal order would apply.

44. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked for reactions to the Swedish suggestion to amend article 1(1).

45. Mr. MARKUS (Observer for Switzerland) supported the Swedish suggestion. The principal/applicant should not be made subject to a legal regime that he had not desired.

46. Ms. CZERWENKA (Germany) considered that although the amendment was desirable in theory it was not needed and would rarely be used. If the principal and the guarantor/issuer opted out of the Convention, the national law and good faith would apply. She did not support the amendment.

47. Mr. SHISHIDO (Japan) said that since few articles and provisions would be affected and it was important for the sake of fairness to ensure that the principal/applicant had an opportunity to exclude application of the Convention, he supported the Swedish suggestion.

48. Mr. FAYERS (United Kingdom) agreed with the representative of Germany. Although desirable in theory, the Swedish suggestion would give rise to great practical difficulties.

49. Mr. OGARRIO (Mexico), supported by Mr. BYRNE (United States of America) and Mr. ADENSAMER (Austria), endorsed the view of the representatives of Germany and the United Kingdom. At that stage he did not think that a matter that had already been decided should be reopened.

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission did not accept the Swedish amendment.

The meeting rose at 5 p.m.