

306th Meeting

Monday, 3 June 1985, at 2.30 p.m.

Chairman: Mr. LOEWE (Austria)

The discussion covered in the summary record began at 2.35 p.m.

International commercial arbitration (continued)
(A/CN.9/246, annex; A/CN.9/263 and Add.1-2; A/CN.9/264)

Article 1. Scope of application

1. The CHAIRMAN invited the Commission to consider whether it wished the Model Law to be applied to international commercial arbitration and, if so, how were international arbitration and commercial arbitration to be defined.
2. Mr. BONELL (Italy), speaking on a point of procedure, proposed that the territorial scope of the Model Law should be clarified at that point, since it would have many implications on subsequent discussions of the text.
3. The CHAIRMAN suggested that the Commission should perhaps be allowed to discuss the draft text in order to ascertain the opinion of the representatives thereon and hence the role to be played by that text.
4. Mr. LEBEDEV (Union of Soviet Socialist Republics) reminded the Commission that a final decision had not yet been taken on whether the matter of international commercial arbitration was to be the subject of a Model Law or of a convention. Although his country had previously held a preference for a convention, its position was flexible and it was willing to accept a Model Law if that were the general view. However, a decision should be taken at the outset and duly reflected in the records.

5. The CHAIRMAN said that the decision should be left pending for the time being, but his impression was that the feeling within the Working Group was in favour of the formula of a Model Law.

6. Mr. TANG Houzhi (China) said that his country favoured a model law.

7. Mr. ABOUL-ENEIN (Observer of the Cairo Regional Centre for Commercial Arbitration) said that the Centre was eager to define the scope of application of the Model Law and to have some kind of definition of the word "commercial". He also proposed that the footnote to article 1 (1) should be incorporated into the text.

8. Mr. GRIFFITH (Australia) said that they should attempt to define arbitration within the text and not by footnote. He proposed that "commercial" should be defined as "arising out of trade and commerce".

9. The CHAIRMAN said that he understood there was general agreement on article 1 (1), except for the definition of "commercial". Noting that all the statements so far had been in favour of a definition within the text, he suggested that it should be briefer than the description of what was commercial contained in the footnote, but felt that a very brief description such as "trade and commerce" would serve little purpose.

10. Mr. TORNARITIS (Cyprus) said that it was not customary to put footnotes in a draft law. Moreover, it was dangerous to attempt to define too closely: *omnis definitio periculosa est*. By definition, "commercial" was intended to refer to transactions between people in the ordinary course of commerce. If it were not closely defined, future interpreters would have to apply the ordinary meaning to it. It would, however, be better if another means were found of describing "commercial", such as "dealings in commerce and trade".

11. Mr. SEKHON (India) said that a way out of the difficulty of arriving at a comprehensive definition of "commercial" would be to append an explanation to the draft Model Law, thus leaving room for further additional interpretations.

12. Mr. EYZAGUIRRE (Observer for Chile) said that he did not favour defining the term "commercial" because it was understood in widely differing ways in different legal systems throughout the world. He considered that the footnote would serve to ensure adequate understanding.

13. Mr. RUZICKA (Czechoslovakia) said that his delegation was satisfied with the concept of "commercial" as already included in the draft Model Law. He felt it was not sufficient to give a few examples of cases of commercial transactions; the list should be expanded, although it could never be exhaustive. However, his delegation did not insist on an expanded list and would accept it as it stood.

14. Mrs. RATIB (Egypt) said that the difference between commercial and non-commercial transactions was generally understood; still, she approved the contents of the footnote as an acceptable compromise to accommodate different legal systems. It would, however, be difficult to incorporate into Egyptian law because it was not customary to include footnotes in legislation. She suggested that a definition of "commercial", without examples, should be included in article 2. Examples might usefully be given in a commentary or in an explanatory note.

15. Mr. KNOEPFLER (Observer for Switzerland) said that in drafting a Model Law it was possible to accept a more flexible approach. If the form of a convention was adopted, a precise definition in the body of the text would have a restrictive effect. For the Model Law, he favoured the system which had been used.

16. Mr. MAGNUSSON (Sweden) had doubts as to whether the Model Law should be restricted only to international arbitration, and his first choice would be to omit the words "international" and "commercial" altogether. In Sweden, there were already in existence good arbitration systems and there would be reservations about introducing new complexities based on the Model Law. However, following the lengthy discussions in the Working Group, his delegation could accept the restriction on the scope of application and the concepts of "international" and "commercial", but it was important to interpret those terms as broadly as possible. With regard to "commercial", he found it strange that the interpretation should be in a footnote and saw a risk of divergent interpretations. An attempt should be made to define the term in the text, but he was not optimistic about the possibility of success.

17. Sir Michael MUSTILL (United Kingdom) said that it was impracticable to attempt to define "commercial" precisely and it was better to be content with a general expression

in the text. If the term were to be explained outside the text, his delegation preferred it to be in a commentary rather than in a footnote. It would be open to individual States to define the term, if required; that would not be a departure from the spirit of the Model Law.

18. The CHAIRMAN said that an agreed commentary could not be achieved for practical reasons. Commentaries were really intended for the private use of delegations and contained a variety of definitions. The footnote to article 1 was in the nature of an incipient agreed commentary.

19. Sir Michael MUSTILL (United Kingdom) said that the matter was of considerable importance. He hoped that, with the assistance of the secretariat, a record of the proceedings (constituting *travaux préparatoires*) would serve as guidance to legislators.

20. Mr. HOLTZMANN (United States of America) said that the definition of the term "commercial" was a key issue. There were parts of the world where "commercial" referred only to trade transactions by merchants and where there were wide exclusions. The Model Law was intended to cover trade and commerce in the broadest possible sense. He felt that brevity was not the principal goal and might, in the circumstances, be the enemy of clarity. The footnote might be lost when the text was considered by courts. As for the *travaux préparatoires*, they would not be available to the courts. In his view, the footnote should be brought into the text because the details in question were important at the drafting stage and would serve to avoid subsequent litigation. He found the footnote as written satisfactory, but suggested two alterations. The first was to add at the end of the first sentence the words "regardless of the nature or character of the parties". The second was to expand the first item in the list of examples to read "any trade transaction for the supply or exchange of goods or services".

21. Mr. SAWADA (Japan) found the wording of article 1 acceptable. His delegation realized that the word "commercial" was ambiguous, but to define it would be impracticable. He did not feel that the addition of "trade and commerce" would clarify the matter. He suggested that examples should be included in a commentary.

22. Mr. MOELLER (Observer for Finland) said that the Model Law should be limited to international and commercial arbitration. He favoured a broad definition of "commercial" and supported the United States amendments. He felt that the footnote as drafted should be included in the text, unless that were to have a restrictive effect on the scope of the Model Law. He was not in favour of its inclusion in a commentary, since the legal effect of a commentary was even less clear than that of a footnote.

23. Mr. BONELL (Italy) supported the restriction of the scope of the application of the Model Law to international and commercial arbitration. Since there was no consensus regarding the precise meaning of "commercial", the footnote—or the report on the session—would serve as a guideline to interpret the term in the widest possible sense. He recalled that the main purpose of the work on the present topic was to achieve the highest possible uniformity in commercial arbitration throughout the world. If the term "commercial" were too closely defined, the existing national legislation would prevent certain countries from incorporating the Model Law. However he found the United States suggestion useful in that it made it clear that the commercial

character of the arbitration did not depend upon the commercial status of the parties to it.

24. Mr. EYZAGUIRRE (Observer for Chile) agreed that in legislative drafting any definition was dangerous. It might, however, be possible to work out some general criterion for inclusion in the text without resorting either to a definition or to examples. An appended note or commentary would have no force of law in his country's legal system.

25. Mr. SCHUETZ (Austria) agreed with previous speakers regarding the advantages of the form that had been adopted. The Working Group had discussed the matter at length and the text as it stood, with the footnote, seemed to offer the best possible solution. The footnote made it clear that the term "commercial" should be interpreted broadly and flexibly, which was the most important point. His delegation could accept the United States proposal to insert the words "or services" and "regardless of the nature or character of the parties", although the Working Group had decided to delete the latter concept.

26. Mr. STALEV (Observer for Bulgaria) said that the clarity and certainty required for the application of the Model Law to actual international commercial disputes could only be achieved by means of a precise definition of the term "commercial". That definition should be in the text of the Model Law itself, and the proper place for it was article 2, which dealt with definitions. Regarding the contents of the definition, he could support the additions suggested by the United States delegation. The list of contracts given in the footnote should also include contemporary contracts for international economic co-operation of all kinds.

27. Mr. ILLESCAS ORTIZ (Spain) felt that since any list of trade transactions of the kind given in the footnote would be constantly outdated and could never be complete, a conceptual approach was preferable. Article 36 of the Model Law, which related to grounds for refusing recognition or enforcement of an arbitral award, offered an opportunity to provide for exclusions.

28. Mr. TANG Houzhi (China) said that the Working Group had spent some two years discussing the term "commercial". Since it had already decided to delete the words "irrespective of whether the parties are 'commercial persons'", the present suggestion that the idea should be restored could well lead to a further two years' discussion. The Commission was unlikely to succeed where earlier efforts to arrive at an agreement had failed. The area was a sensitive one for many States and it would be better to leave the text as it stood, with the footnote, so that the draft could be finalized as soon as possible. As far as the scope of application was concerned, his delegation would prefer territorial criteria.

29. Mr. SAMI (Iraq) urged that the scope of application of the Model Law should be confined to international transactions. Since the Commission was attempting to draw up a Model Law for adoption by all States regardless of differing legal systems, it would be appropriate not to determine the meaning of the term "commercial" but rather to leave the issue to national legislations. States applied many different criteria to define commercial transactions. A list of the kind in the footnote could never be exhaustive and a number of delegations had already given examples of new commercial transactions that should be included. He would not object to maintaining the footnote since it could help to guide legislators. He would, however, oppose the proposal to include it in the text of article 1 (1).

30. Mr. PAES de BARROS LEAES (Brazil) said that it must be made clear that the Model Law was confined to international commercial arbitration. He agreed that it would be dangerous to attempt to define "commercial" in the text itself and therefore supported the listing of examples in a footnote.

31. Mr. SCHUMACHER (Federal Republic of Germany) felt that, given its importance, the term "commercial" should be defined in article 1 rather than in a footnote. At the same time, he appreciated the difficulty of finding a suitably short definition and he would not therefore oppose the footnote form. It was, however, essential to make it clear that the Law would apply irrespective of whether the parties were commercial persons or not. The phrase to that effect in the previous draft had been deleted on the grounds that it touched on the question of State immunity. However, if a State had already agreed to arbitration in a contract, the question of immunity did not arise.

The meeting was suspended at 4 p.m. and resumed at 4.25 p.m.

32. Mr. GOH (Singapore) urged that the Model Law should state clearly that it applied to international commercial arbitration. In addition, a definition of the term "commercial" somewhere in the Model Law would help to reduce disputes at a later date, when the law was in force. He believed it was not impossible to work out a satisfactory definition which should not be unduly restrictive.

33. Mr. SZASZ (Hungary) said that his delegation also would have liked a clear-cut definition of "commercial" in the text, but since it was unable to offer one it believed that it must be satisfied with the text as it stood. The footnote, or some other guidance, would be better than nothing. In Hungary, it would not have any legal standing, although he did not consider that that was its intent anyway. It would, however, have a helpful unifying effect and it was possible that other national legislations might be able to agree on a definition for inclusion in the text. Those States whose legislative techniques allowed them to put the footnote as it stood into the body of the text were, of course, free to do so. The solution put forward by the Working Group was, therefore, satisfactory. He did not favour introducing more examples since it might then appear that the list was intended to be a full definition.

34. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation too understood fully the obstacles in the way of defining the term "commercial". Given the difficulty of finding any solution satisfactory to all States, it had supported the Working Group's decision. He noted, however, that the relationships mentioned in the footnote referred only to transactions, and asked whether that meant that the Model Law would not apply to relationships not of a contractual nature. Article 7 (1) referred to a "defined legal relationship, whether contractual or not". It would be expedient to make that point in the footnote as well.

35. The analytical commentary of the secretariat, and of some of the previous speakers as well, had expressed the idea that the Model Law did not touch on the question of arbitrability, but his delegation felt that it did. Its reading of the Model Law was that it suggested that international commercial disputes could be subject to arbitration. That belief had given rise to his delegation's comment, reproduced in paragraph 9 of A/CN.9/263, which coincided with the

points made by Mexico and UNCTAD in paragraph 12. If the Model Law was in fact intended to deal with that problem, it would be necessary to add a reservation to the effect that the Law would not cover those disputes which in the State adopting the Law were not capable of settlement by arbitration. The point was made in paragraph 1 (b) of article 36, but only in connection with the grounds for refusing recognition and enforcement of an arbitral award. It should be stated in one of the opening articles.

36. Mrs. VILUS (Yugoslavia) said that her country had not been a member of the Working Group and she was not therefore familiar with all the problems encountered in trying to define the term "commercial". She was ready to support the Egyptian proposal and the additions proposed by the United States. She found the arguments in favour of a list convincing, although a definition without examples might be preferable. Since it was difficult to decide without seeing a text, she suggested that a drafting group should be set up.

37. Mr. STROHBACH (German Democratic Republic) said that his delegation did not altogether approve of the technique of leaving the explanation of the term "commercial" in the footnote but realized how difficult it would be to find an adequate solution in the near future. It was more important, therefore, to improve the footnote slightly in order to make it more precise. His delegation would support the additions proposed by the United States, together with a statement to the effect that the commercial relationships could be contractual or non-contractual. That would not be a major change and would be in line with the general approach in the Working Group.

38. Mr. ROEHRICH (France) said that the definition of "commercial" must be realistic and supported the Working Group's approach, with the additions to the footnote suggested by the United States. He did not think that the issue of arbitrability should be raised in the scope of application: it was sufficient to provide grounds for refusing recognition or enforcement under article 36. He agreed with the Hungarian representative that the footnote was indicative of the wide scope of article 1 (1) while recognizing that some States might wish to exclude certain activities, such as financing or investment, from the scope of international arbitration. With regard to the point raised by the USSR representative on non-contractual relationships, it was perhaps adequately covered by article 7 (1) and therefore need not appear also in article 1.

39. The CHAIRMAN, summing up the discussion on paragraph 1, said that the majority of speakers had favoured that paragraph being confined to the commercial field but some had wanted a slight expansion in the text of the definition of "commercial". An equal number had not favoured that proposal because they feared that it would lead to problems with domestic legislation, in which the term "commercial" was used in many other contexts; they had therefore supported the retention of the footnote. He therefore suggested, as a preliminary for further work, that the possibility should be considered of making paragraph 1 more explicit but retaining a footnote with the examples of the activities which the Commission had had in mind. The footnote might be enriched by including the proposal of the United States representative: it should also be drafted clearly to show that it was not intended to infringe State immunity. If his suggestion was accepted, the meeting might set up a small drafting group to formulate a text for the opening of paragraph 1 and for the footnote.

40. Mr. BONELL (Italy) asked what instructions would be given the drafting group with regard to a change in paragraph 1.

41. The CHAIRMAN said that he did not wish to propose any specific wording; perhaps the proposal made by the Australian representative might be considered.

42. Mr. BONELL (Italy) observed that, as an alternative to that proposal, the drafting group might consider the relevant passage in the Geneva Convention.

43. The CHAIRMAN suggested that the membership of the drafting group should consist of Mr. Szasz, Mr. Holtzmann and Mr. Tang Houzhi. If there was no objection, he would take it that the Commission agreed to set up a drafting group with that composition.

44. *It was so agreed.*

Article 1 (2)

45. The CHAIRMAN invited the meeting to consider the definition of internationality.

46. Mr. BONELL (Italy) said that his delegation had always found it difficult to regard sub-paragraph (b) (i) as a desirable criterion, although it was true, according to the secretariat commentary, that the intention was to exclude cases where the place of arbitration would be determined by the arbitrators only. However, he wondered what the result would be when the place of arbitration determined pursuant to the arbitration agreement turned out to be different from the place of business of the parties. While it remained undetermined, many issues, such as challenges, might arise and there would be uncertainty as to which law should be applied. If sub-paragraph (b) (i) was eliminated, there remained subparagraph (b) (ii), which was not very different from subparagraph (c). Paragraph 2 might therefore be revised to contain subparagraph (a), followed by subparagraph (c).

47. The CHAIRMAN said that there was not much controversy about subparagraph (a), which covered the majority of cases. Subparagraph (b) (i) covered two situations: one in which the place of arbitration had been previously determined and one in which the matter was not so certain and was perhaps subject to the decision of the three arbitrators.

48. Mr. SCHUMACHER (Federal Republic of Germany) endorsed the views of the Italian representative. His delegation supported the deletion of the words "or pursuant to".

49. Mr. HOLTZMANN (United States of America) said that the text should be left as it was. The words "pursuant to" had been included to accommodate the common situation which arose when parties chose not to specify the place of arbitration in their contract. There were several reasons for that. In some transactions, parties found it difficult to predict the nature of the disputes which might arise and felt that the most appropriate place to arbitrate could only be chosen when the issues in dispute were known. In other cases, the place of arbitration might be a source of contention in contract negotiations, and parties might find it expedient to postpone the question until a dispute actually arose. For these and other reasons it was common for some parties not to designate a place of arbitration in their contract, but to provide for such a determination to be made later pursuant to procedures established in their contract.

50. The CHAIRMAN asked whether the interpretation of "pursuant to" in the text would cover a case where, some speakers had maintained, no one would know which law would be applicable until the arbitrator had agreed to conduct the arbitration outside the countries where the parties had their places of business.

51. Mr. HOLTZMANN (United States of America) said that would be exactly the case. If he was acting as counsel for one of the parties, he would advise the place of arbitration to be determined at the outset, but if the two parties preferred to postpone that determination they should be free to do so.

52. Mr. STALEV (Observer for Bulgaria) said that the definition of "international" was too broad because it tried to combine two criteria, namely the substantive link between the subject-matter of arbitration and international trade, and the procedural test of the place of arbitration. If the latter criterion was adopted, it was clear from reading article 1 in conjunction with article 28 that a dispute involving a domestic contract for domestic goods denominated in domestic currency could, if the parties to the dispute so chose, be regulated by foreign law. It should not be possible for parties to evade the laws of their own country by submitting to arbitration abroad. The autonomy of the parties with regard to the place of arbitration was accepted in private international law when the contract had an international aspect. He therefore supported the deletion of the place of arbitration as a criterion of internationality.

53. Mr. SZASZ (Hungary) said that generally he was in agreement with the text as it stood but he thought that subparagraph (b) (i) might make the scope of application too broad. The point to be clarified was whether it was desired to make the scope of application purely territorial or whether a broader approach was desired. If the scope of application was to be territorial, it was possible to accept the present text, perhaps slightly amended. If a broader concept was adopted, then the text as it stood was dangerous.

54. Mr. ROEHRICH (France) said that his delegation supported the broadest approach. There were two important principles in international commercial arbitration, namely to give the greatest possible autonomy to the parties and to make provision for the "de-territorialization" of the relation between those parties when it came to a dispute, while

keeping matters within a reasonable framework. In his view, that would imply that the place of arbitration must play a role. On the policy to be followed as to the scope of application of internationality, the key issue had been raised by the Bulgarian representative, namely whether to have a provision like the one in the present text or not to have a provision at all. The question of whether or not to delete "pursuant to" was of relatively minor importance compared to the real problem, which was whether to give effect to the place of arbitration for determining whether the arbitration was "international" or not. In his view, from the moment that two parties domiciled in one country indicated, even if not expressly, that they wanted arbitration in another country, that fact indicated that the arbitration was international. Turning to the question of why such parties should designate a third country, he agreed it might sometimes be to avoid the application of mandatory rules existing in the country where they had their places of business. However, after the arbitration award had been made, it might still not be enforceable if it was contrary to the law of the country of residence of the parties concerned. When countries agreed that an arbitration was international, and the parties designated another country as the place of arbitration or left the decision to the arbitrator, it was appropriate to allow for those options in the Model Law. There had naturally to be some limit to the autonomy of the parties, and he therefore supported the existing text. The deletion of "pursuant to" unnecessarily circumscribed the freedom of the parties in view of the complexity in practice of such cases.

55. Mr. BONELL (Italy) said that it was necessary to distinguish clearly between two aspects: the first was whether or not to adopt the broader criterion of the scope of application or to agree that internationality might depend only on the place of arbitration being situated outside the country in which both parties had their place of business. The second and independent issue was whether to agree that the relevant place of arbitration could be determined at a later stage. He failed to understand how such a provision could work in practice owing to the uncertainty as to which court would be competent to decide many important issues, including the situation envisaged in article 8. He must insist at least on the deletion of the words "or pursuant to".

The meeting rose at 5.40 p.m.