

## 307th Meeting

Tuesday, 4 June 1985 at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

*The meeting was called to order at 9.35 a.m.*

### International commercial arbitration (*continued*)

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

1. Mr. MAGNUSSON (Sweden) said that article 1 (2) of the draft Model Law (A/CN.9/246, annex) was sound in intention but might be improved in order to eliminate overlapping provisions. Subparagraph (b) (i), however, should remain unchanged. It covered situations commonly found in practice. It was best if the parties agreed the place of arbitration in advance, but often they did not; if the arbitrators subsequently chose a foreign place of arbitration, the Model Law should cover the situation. If the place of arbitration was not

determined by the parties, the question of applicable law would remain pending, and domestic law would apply in the meantime.

2. Mr. MOELLER (Observer for Finland) said that paragraph 2 should remain unchanged. Paragraph 2 (b) (i) would not lead to problems if the Model Law was made strictly territorial in application.

3. Mr. SCHUETZ (Austria) said that he also approved the existing text of paragraph 2. It was not unusual in private international law for purely domestic cases to become

international. The Model Law should apply as broadly as possible and include cases where the place of arbitration was in a foreign country and was determined by the arbitrators.

4. Mr. PELICHET (Observer of The Hague Conference on Private International Law) said that the words "or pursuant to" might raise practical problems. The aim was to have a broadly applicable law and to limit confusion. Other speakers had pointed to the dangers inherent in the present text, which suggested that the price of retaining paragraph 2 (b) (i) might prove high. In any case, the draft text made the place of arbitration almost a fiction, since the tribunal could meet wherever it wanted and for any purpose; it need never meet at the place of arbitration at all. That consideration removed much of the force from subparagraph (b) (i).

5. Mr. SAWADA (Japan) said that he had no difficulty in accepting the Working Group's text. If it was to be changed, however, he would prefer that paragraph 2 (b) (ii) be deleted since it was covered by paragraph 2 (c), and that paragraph 2 (b) (i) be amended to read "the place of arbitration chosen by the parties".

6. Sir Michael MUSTILL (United Kingdom) said that the words "or pursuant to" should be deleted because of the difficulties to which they might give rise.

7. Mr. HERRMANN (International Trade Law Branch) said that a distinction must be made between the territorial scope of application of the Model Law and the internationality of an arbitration. The Model Law did not seek to cover all cases where an arbitration was transferred from one country to another, but only cases so transferred which were international ones; and paragraph 2 (b) (i) answered the question whether the arbitrators in the country to which an international arbitration had been transferred would apply its domestic arbitration law or its Model Law for international arbitration. The words "or pursuant to" did admit of uncertainty in that respect because of the possibility of delay in determining the place of arbitration, but that uncertainty existed in practice and could not be removed by the Model Law. The Commission would meet the same kind of uncertainty in regard to the territorial scope of application of the Model Law.

8. Lord WILBERFORCE (Observer of the Chartered Institute of Arbitrators) said that paragraph 2 was bound to involve a measure of uncertainty. There was no problem with the many cases that would fall under subparagraph (a), but subparagraphs (b) and (c) could give rise to difficulties. The problems arising from subparagraph (b) (i) would be no greater than those inherent in other provisions. In principle, arbitrators would be able to work with it, but it would be best for the words "or pursuant to" to be deleted since they placed a heavy responsibility on the initial arbitrators.

9. Mr. GRIFFITH (Australia) agreed that the words "or pursuant to" created uncertainty and should be deleted.

10. Mr. SAMI (Iraq) said that, for the purpose of determining whether an arbitration was international, he could accept the criterion of the places of business of the parties and the criterion of the place where a substantial part of the obligations was to be performed. The place of arbitration, however, was not an essential feature of a contract and should not be an essential criterion for determining internationality. As to the deletion of the words "or pursuant to", it must be

remembered that it might be impossible to determine the place of arbitration in advance. Furthermore, to use the place of arbitration as the main criterion for determining internationality could produce a situation in which the parties, being of the same nationality, could choose internationality in order to evade the mandatory provisions of their domestic law. However important freedom of decision was in the arbitration process, that situation was unacceptable; if it arose, the country to which the parties belonged might not enable the foreign award to be enforced. The best course would be to delete paragraph 2 (b) altogether. If the Model Law was to be acceptable to all countries, it must not conflict with their legislation or sovereignty.

11. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that since the text was to be a Model Law and not a convention, it would be for each State adopting the Model Law to retain or delete the provisions of subparagraphs (b) or (c). The Model Law should include, however, a provision to the effect that it did not apply to international commercial disputes where another provision of the applicable national legislation precluded the submission of such disputes to arbitration or assigned their settlement exclusively to a specified judicial or other body. That point arose with regard to later provisions of the draft as well.

12. Mr. SEKHON (India) said that he had reservations about the lack of precision of sub-paragraph (c), which was designed to catch residual cases. Furthermore, it became inoperable when read in conjunction with the reference to a separate agreement in the second sentence of article 7 (1), since such an agreement could not be said to relate to more than one State.

13. Mr. HERRMANN (International Trade Law Branch) said that the parties' intention as to the subject-matter of the arbitration agreement should be clear from that agreement, whether the arbitration agreement was separate from the contract or in a clause in the contract itself. The Working Group had intended that the subject-matter of an arbitration agreement, whether in the former shape or the latter, should mean the area in which a dispute might arise that was then to be settled by arbitration.

14. Sir Michael MUSTILL (United Kingdom) said that it would appear from what the previous speaker had said that the term "subject-matter" in subparagraph (c) had more than one meaning. He asked whether the subject-matter of the arbitration agreement meant the obligation giving rise to a dispute or the goods or services which were the object of the contract. That consideration affected the question of the internationality of the arbitration. The words "otherwise related to more than one State" in subparagraph (c) had to be read with subparagraph (b) (ii), which referred to any place where a substantial part of the obligations was to be performed. Subparagraph (c) did not, therefore, relate to the place where the obligation was to be performed. What, then, did it mean?

15. Mr. HERRMANN (International Trade Law Branch) said that the analytical commentary (A/CN.9/264) did not include any examples for subparagraph (c) since it had been thought that most cases would come under the other subparagraphs. The wording of subparagraph (c) had been proposed by the Observer for the International Chamber of Commerce with a view to increasing the scope of article 1 (2).

16. Mr. SZASZ (Hungary) said that paragraph 2 (c) has almost unlimited scope but perhaps its wording was rather



vague. Almost all practical cases were covered by paragraph 2 (b) (ii), but if the Commission wanted paragraph 2 to be really broad in scope it would have to word subparagraph (c) more precisely. His own delegation proposed that the subparagraph should be deleted, since it referred by implication to matters with which the Commission was not competent to deal, such as the rights of multinational corporations in host countries.

17. Mr. ROEHRICH (France) pointed out that paragraph 2 (b) (ii) referred to "the obligations of the commercial relationship", whereas paragraph 2 (c) referred to "the subject matter of the arbitration agreement"; it would be more logical for the latter to speak of "the subject-matter of the dispute". The two subparagraphs did not duplicate one another. If subparagraph (c) was to be retained, it would have to be formulated more precisely.

18. Mr. HOLTZMANN (United States of America) said that a company which was performing a contract in a country other than its own would be performing one which was international in nature regardless of whether it did so through a branch office or an entity incorporated under the law of the host country. It was such cases that paragraph 2 (c) was intended to cover. It was therefore a necessary provision. To clarify this intent, a sentence might be added to subparagraph (c) to the effect that, if the parties had included in their contract a statement that the contract involved activities in more than one State, they could not deny the internationality of the contract at a later stage. Also, his Government had suggested an amendment to subparagraph (c) in its written comments (A/CN.9/263, p. 13, para. 25) to clarify that the phrase "related to more than one State" was not intended to be limited to the State itself, i.e. governmental activities, but rather to activities within a State. To accomplish this, he proposed that the provision should read "subject-matter . . . related to commercial activities in more than one State".

19. Mrs. VILUS (Yugoslavia) said that the provisions of paragraphs 2 (b) (ii) and 2 (c) were too broad and also vague. Although the amendments suggested by the United States representative might resolve that situation to some extent, her delegation would prefer the course of deleting paragraph 2 (c) altogether.

20. Mr. TANG Houzhi (China) agreed that paragraph 2 (c) should be deleted.

21. Mr. de HOYOS GUTIERREZ (Cuba) said that paragraph 2 (b) dealt with the matter adequately. Paragraph 2 (c) would only cause confusion and should be deleted.

22. Mr. BONELL (Italy) said that his delegation had proposed that the words "or pursuant to" in paragraph 2 (b) (i) should be deleted. If they were not, subparagraph (c) should be deleted. It was important for the Model Law to make it clear that an arbitration could not be considered international merely because one of the parties was wholly or partly owned by a foreign corporation.

23. Mr. KNOEPFLER (Observer for Switzerland) said that subparagraph (c) should be retained since it made it clear that the scope of paragraph 2 was intended to be as wide as possible.

24. Mr. MAGNUSSON (Sweden) agreed that subparagraph (c) should be retained. The notion of internationality

should bear the broadest possible interpretation, and in order to achieve that the subparagraph needed some refinement. His delegation could agree to it being worded along the lines suggested by the United States.

25. Mr. GOH (Singapore) said that subparagraph (c) should be deleted.

26. Mrs. OLIVEROS (Observer for Argentina) agreed. The wording "otherwise related to more than one State" was too unclear to be of any use, and also the subparagraph would not allow national cases to be dealt with in an international context.

27. Mr. MOELLER (Observer for Finland) proposed that a sentence should be inserted in paragraph 2 (b) (ii) to the effect that, if the parties had agreed that the subject-matter of the dispute was of an international nature, they should not be able to deny the fact at a later stage. Subparagraph (c) might then be deleted.

28. Mr. TORNARITIS (Cyprus) said that the draft text had been drawn up by experts and should not be altered unless it contained obvious mistakes or ambiguities. The United States representative had made it clear why subparagraph (c) was necessary.

29. Mr. PAES de BARROS LEAES (Brazil) said that the test of internationality was adequately defined in subparagraphs (a) and (b). Subparagraph (c) should therefore be deleted.

30. Mr. SCHUMACHER (Federal Republic of Germany) said that his delegation withdrew its written comments on the matter and recommended that subparagraph (c) be deleted.

31. Mr. GRIFFITH (Australia) said that the present subparagraph (c) should be replaced by an opting-in clause to the effect that an arbitration agreement was international if the parties specified that it was international. Such a provision would give them desirable freedom of choice. His proposal differed from that of the Observer for Finland in making the result of characterizing the arbitration agreement quite clear.

32. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed with other speakers that subparagraph (c) was vague. It was important that the Model Law should be unambiguous and therefore desirable that it should include an explicit statement concerning the arbitrability of a dispute. He proposed that a new subparagraph should be inserted between the present paragraphs 2 and 3 to the effect that the Model Law should not affect the legislation of a State by virtue of which the dispute was assigned to the exclusive jurisdiction of judicial, administrative or any other authorities, or alternatively to the effect that it should not affect the legislation of a State by virtue of which the dispute was not capable of settlement by arbitration. A provision of that kind had appeared in many international instruments.

33. Mr. GRIFFITH (Australia) supported the Soviet Union proposal and said it would suitably balance the opting-in provision which his delegation had proposed as a replacement for subparagraph (c).

34. The CHAIRMAN asked the Commission whether it wished article 1 to contain a provision along the lines proposed by the Soviet Union representative.

35. *It was so agreed.*

36. Mr. ILLESCAS ORTIZ (Spain) said that subparagraph (c) contained a general provision under which all factors of internationality could be taken into account in determining the application of the Model Law to a dispute. It therefore made the rest of the paragraph superfluous. Once the factor of internationality had been established, there would seem to be no need to refer to the place of business or to the place of performance of obligations. He would like to see paragraph 2 drafted along the lines suggested by Australia and Finland. If the parties to a dispute determined a place of arbitration other than their place of residence, that would indicate their willingness to submit the dispute to international commercial arbitration under the Model Law.

37. The CHAIRMAN said that there was a difference between paragraph 2 (b) (i) and suggested the opting-in clause. Under the former, the parties would not have taken a decision on the applicable procedural law but would simply have stated that arbitration would be in a place abroad; under the latter, however, they could determine a place of arbitration within their State and still choose the law applicable to international arbitration.

38. Sir Michael MUSTILL (United Kingdom) said that he fully endorsed the views expressed by the Soviet Union representative. He favoured the replacement of paragraph 2 (c) by an opting-in provision formulated along the lines proposed by the Australian delegation. A provision of the kind suggested by the Soviet Union would be an essential safeguard if an opting-in provision was included.

39. Mr. MAGNUSSON (Sweden) said that his first preference was for a provision on the lines of subparagraph (c), but in view of the difficulty of redrafting the subparagraph to remove its weaknesses, he would not press for its retention. He, too, was in favour of giving the parties to a dispute the freedom to decide whether it was international or not. He could accept the proposal of the Observer for Finland but would prefer that of the Australian representative. He had nothing against the addition proposed by the Soviet Union.

40. Mr. BARRERA GRAF (Mexico) expressed support for the Finnish proposal. Paragraph 2 (c) as it stood was too broad in scope. He agreed with the representative of Spain that it made paragraph 2 (b) superfluous. The Model Law should include a provision leaving the decision about the internationality of a dispute to the parties concerned, either in paragraph 2 (a) or as a separate subparagraph between subparagraphs (a) and (b) of paragraph 2. He reserved his position as to the precise way in which the Soviet Union proposal should be given effect.

41. Mr. HOLTZMANN (United States of America) said that he could support either the Finnish or the Australian proposal. In regard to the Soviet Union proposal, he favoured the second alternative.

42. Mr. ROEHRICH (France) said that the addition proposed by the Soviet Union should be a general provision in respect of the Model Law. He supported the idea of an opting-in provision as suggested by Australia. However, he regretted the fact that it would allow two parties who both had businesses in a given country to agree to resort to international law even if their transactions were devoid of any international subject-matter.

43. Mr. SZASZ (Hungary) said he strongly supported the idea of an arbitrability provision as suggested by the Soviet Union representative. He shared the concern of the representative of France about the effect of the proposed opting-in clause. States either differentiated between foreign and domestic arbitration or they did not. However, if the majority supported the proposal, he would not press his objection.

44. Mr. SAWADA (Japan) said that, while his delegation was in favour of improving paragraph 2 (c), it had reservations about the desirability of allowing the parties to decide what was international.

45. The CHAIRMAN observed that the paragraph proposed by the Soviet Union representative could restrict the effect of the proposed opting-in clause.

46. Mr. HJERNER (Observer for the International Chamber of Commerce) asked whether the Soviet Union would submit its proposal in writing, because it had important implications.

47. Mr. LAVINA (Philippines) supported the request.

48. The CHAIRMAN said that the Soviet Union representative had explained his proposal sufficiently clearly for it to be dealt with first by a drafting committee.

49. Mr. de HOYOS GUTIERREZ (Cuba) said that his delegation firmly supported the Soviet Union proposal.

50. Paragraph 2 (c) was rendered ambiguous by the word "otherwise". It should be deleted unless it could be reworded to make it clear that the subject matter of the arbitration agreement must relate directly or indirectly to more than one State.

51. The CHAIRMAN said that the Commission appeared to agree that subparagraph (c) of paragraph 2 should be replaced by a paragraph embodying an opting-in clause. It had already agreed that a paragraph on dispute arbitrability based on the Soviet Union proposal should be added to article 1. He suggested that the task of drafting those paragraphs should be entrusted to a committee composed of the Union of Soviet Socialist Republics, Finland, Australia, India and the United States of America.

52. *It was so decided.*

#### *Article 1 (3)*

53. Mr. SCHUMACHER (Federal Republic of Germany) said that the Model Law should contain a general provision on residence, something which would be important in cases where a party was not a business.

54. Mr. SEKHON (India) said that the word "relevant" in the second line of the paragraph was redundant in view of the expression "For the purposes of paragraph (2) of this article" and the article "the" preceding this word. It therefore needed to be deleted.



55. The CHAIRMAN suggested that article 1 (3) should be redrafted accordingly by the drafting committee which had just been set up.

56. *It was so agreed.*

57. Mr. HOLTZMANN (United States of America) drew attention to his Government's written suggestion, mentioned in A/CN.9/263 (p. 8, para. 3) that the Model Law should express the principle of *lex specialis*. He asked if the drafting committee might consider the matter in connection with the Soviet Union proposal.

58. *It was so agreed.*

#### Article 2. Definitions and rules of interpretation

59. The CHAIRMAN invited the Commission to consider the definitions and rules of interpretation.

60. Mr. STROHBACH (German Democratic Republic) proposed that the words "whether *ad hoc* or in arbitration administration by an institution" should be added to subparagraph (a).

61. Mr. HERRMANN (International Trade Law Branch) pointed out that article 7 (1) used the words "whether or not administered by a permanent arbitral institution" in order to make the clarification which the representative of the German Democratic Republic sought to add to subparagraph (a). He suggested that, in order to meet the suggestion of the German Democratic Republic, the Commission might wish either to use the wording in article 7 (1) or simply make a reference to that article.

62. Mr. STROHBACH (German Democratic Republic) said that he felt the clarification should be spelt out expressly in the definitions.

63. *It was so agreed.*

64. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said that his organization had made a written comment on subparagraph (c) to the effect that the subparagraph could not be reconciled with article 28, on rules applicable to the substance of a dispute. He reserved the right to raise the matter under that article and pointed out that it might involve redrafting subparagraph (c).

65. Mrs. RATIB (Egypt) said that article 2 should include a general reference to arbitral awards.

66. Mr. RUZICKA (Czechoslovakia) referred to his Government's written proposal on subparagraph (e), mentioned in A/CN.9/263 (p. 15, para. 4), and suggested that wording should be added at the end of the subparagraph to the effect that mailing by registered letter was sufficient to ensure that arbitration could begin.

67. Mr. GRIFFITH (Australia) expressed concern about subparagraph (e) in the light of Norway's written comments on it, mentioned in A/CN.9/263 (p. 15, para. 6). He suggested that the subparagraph should include provision for advertising if no address was found after reasonable enquiry and should stipulate that communications were to be deemed to be received on the day on which they were delivered. He also suggested that consideration should be given to Norway's written proposal for the Model Law to provide a right of recourse or appeal for a party to an arbitration who, through no fault of his own, had not received notice.

*The meeting rose at 12.35 p.m.*