

308th Meeting

Tuesday, 4 June 1985 at 2.30 p.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 2.35 p.m.

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

Article 2. *Definitions and rules of interpretation (continued)*

1. Mr. GRIFFITH (Australia) said his delegation had felt that subsection (*e*) should perhaps deal with the question of a substitute service when it was known that the addressee was not at his last known business address or habitual residence. However, on reflection, he considered it more appropriate to raise that issue in connection with article 11 (4).

2. Mr. STROHBACH (German Democratic Republic) supported the Czechoslovak proposal that subparagraph (*e*) should state that written communication could be made by registered letter. It was also not clear to whom the addressee's place of business, habitual residence or mailing address was supposed to be known: was it to the other party or to the arbitrator? If it was the latter, was it incumbent on him to contact the police, the business registration office or some

other authority? In his view, the intention had been to refer to the last address known to the other party. If so, it should be clearly stated in subparagraph (*e*).

3. Mr. de HOYOS GUTIERREZ (Cuba) agreed that some clarification was required in the wording of subparagraph (*e*). In particular, the phrase "after making reasonable inquiry" seemed inappropriate. He would suggest a phrase along the following lines: "after having established that reasonable enquiries had been made", so that if there was an appeal by the addressee, evidence could be produced that a real effort had been made to contact him.

4. The CHAIRMAN said he did not feel it necessary in a Model Law on arbitration to enter into details about notification, which was a subject more appropriate for a code of civil procedure. If it was desired to expand subparagraph (*e*), perhaps it would be better to convert it into a separate article on notification.

5. Mr. STALEV (Observer for Bulgaria) thought that the matter was important since it was closely connected with the right of parties to be heard. He therefore strongly supported proposals which went to guarantee that the addressee actually received the communication. He endorsed the Chairman's suggestion of a separate article on notification.

6. Mr. ROEHRICH (France) noted that a Model Law should deal with basic principles. It should not go into too many details, which could give rise to difficulties with national legislations on procedure. The point of substance was that reasonable attempts should have been made to inform the addressee so that he had an opportunity to exercise his rights. Language to that effect appeared in a number of international conventions. It would be difficult to go any further and try to obtain agreement on precise rules.

7. Sir Michael MUSTILL (United Kingdom) supported the comments of the French representative.

8. Mr. SAMI (Iraq) agreed that the procedure under subparagraph (e) might have important legal implications in view of the fact that arbitration on international commercial disputes often involved considerable sums of money. It was therefore difficult to accept the present text: the mere dispatch of a communication was insufficient. The communication should be made by registered mail and a certain period of time should elapse before the addressee could be taken to have received it.

9. Mr. SCHUETZ (Austria) agreed with the views expressed by the French representative. The present text took into account the interests of both parties and was not prejudicial to the addressee.

10. Mr. BARRERA GRAF (Mexico) suggested that article 2 should contain the definition of arbitration agreement which at present appeared in article 7 (1). It was also necessary to include in article 2 some definition of the concept of "award", which was used in article 16 (3) and article 34 (1).

11. Mrs. OLIVEROS (Argentina) said there was no need to enter into details about notification in the Model Law. Most legal systems, whether common law or civil law, contained adequate provisions for that purpose. She supported, however, the Mexican representative's suggestion to incorporate in article 2 a definition of "award".

12. The CHAIRMAN said that subparagraph (e) should achieve a balance between the interests of the party sending the communication and the party receiving it and also a balance in the text, so that it was neither too detailed nor too brief. He therefore suggested that a small drafting group should be set up to reword subparagraph (e), composed of the representatives of Czechoslovakia, France, Iraq and Mexico.

13. There had also been a proposal to add two other definitions to article 2. Definitions of the terms in question did appear in the 1961 Geneva Convention but they now made rather strange reading.

14. Mr. HERRMANN (International Trade Law Branch) recalled that when the Working Group had discussed article 7 (1) it had had before it two draft versions, one in the form of a definition, which had become the present text, and the other closer to article II (1) of the 1958 New York

Convention. There were advantages in leaving article 7 (1) in its present form. The provisions in article 7, paragraphs 1 and 2, and in article 8 (1) would appear in the same order as in the New York Convention.

15. Mr. TORNARITIS (Cyprus) enquired whether the intention was that States should adopt the Model Law as it stood or adapt it to their municipal legal systems. He observed that definitions in a legal text usually related to the specific meanings which should be attributed to particular words for purposes of that text and which they did not have in ordinary language. As for subparagraph (e) of article 2, it should constitute a separate article; it was not a definition.

16. The CHAIRMAN observed that the Model Law would be used according to the requirements of the country concerned. States which did not have rules on international arbitration might take the Model Law as it stood; others would modify it in conformity with their general rules of law. Article 2 contained definitions in subparagraphs (a) and (b) and rules of interpretation in the remaining subparagraphs. The proposal to incorporate the definition of arbitration agreement in article 2 did not appear to have attracted much support. As to the question of defining "award", he felt that such a definition would be useful but doubted whether it would be practical in view of the range of concepts which it covered.

17. Mr. HERRMANN (International Trade Law Branch) said that the Working Group had at various times attempted to define arbitral award but had not been satisfied with the results. In that connection, he read out the definition contained in the report of the Working Group on its 7th Session (A/CN.9/246, paras. 192 and 193). He himself would venture to caution against the inclusion of a definition as such, which would be intended to apply to all the instances in which the term was used in the Model Law. The only matter that should be regulated was that of what decisions could be set aside under article 34. Following the example of the 1958 New York Convention, which also did not define an arbitral award, no attempt should be made to define it for the purposes of articles 35 and 36. The definition of the type of decision that could be set aside under article 34 might be "any decision which contained a decision on substance". Any decision which was strictly on a procedural matter, including the competence of the arbitral tribunal, would not be covered by article 34. However, it would be seen that for those procedural matters where court assistance or supervision was deemed appropriate (as in articles 11, 13 and 14), the Model Law provided for special court intervention, the object of which was, unlike in article 34, the matter itself, namely appointment of arbitrator, justification of challenge or of termination of mandate due to failure to act. There remained the issue of article 16 (3). There would probably be a discussion on whether to retain that text in its present form, according to which a court review on the decision of the arbitral tribunal which affirmed its competence was envisaged only in an action for setting aside the arbitral award and the intention was that it should be available in conjunction with the procedure set out in article 34 (2).

18. Mr. de HOYOS GUTIERREZ (Cuba) pointed out that in Spanish the word "*tribunal*" referred to an ordinary court, whereas an arbitral tribunal was called a "*corte*". Similarly, there were several words for award, including "*auto*" to refer to a decision which did not settle a question of substance.

19. Sir Michael MUSTILL (United Kingdom) said that if definitions were to be omitted, the inconsistencies of termino-

logy in the existing draft must be eliminated. For example, article 16 (3) referred to "rule", whereas article 20 (1) and article 22 (1) had "determine" and article 24 (1) and article 25 mentioned "decision". It was necessary to go through the text to see where, if anywhere, differences in language were required in order to indicate differences in concept. Furthermore, the phrase "final award", used in article 32, was nowhere defined. Article 34 was the prime location for the term "award", but consideration would have to be given to the meaning of that word in article 31. Should a procedural decision take that form? Was it to be a reasoned decision and need it be in writing? Another point was whether article 33 was applicable to awards other than the final award, which constituted the subject matter of article 36. A further unresolved issue was the question of interim awards. Some confusion had arisen because there were two connotations of the term. The first was an award made before the final award dealing, for example, with procedure and not with merits. The second was an award dealing with the merits but only with part thereof. It was very common in international arbitration, particularly in cases in which a decision had first to be taken on liability before proceeding to an assessment of the damages. If the decision was negative, the interim award might well constitute the only award. In that case, did it fall within the scope of article 34? Perhaps that question, which must be solved, would be better dealt with when considering article 34.

20. Mr. BONELL (Italy) reminded the Commission of the difficulties faced by the Working Group in attempting to define "arbitral award". He agreed with the proposal that there should be no initial general definition. Where the need for a specific definition was identified in the text, a decision could be taken at that time.

21. Mr. HOLTZMANN (United States of America), referring to article 32 (1), said that it would be necessary to consider the matter of various kinds of awards in addition to final awards. A distinction might have to be made between interlocutory awards, whereby the tribunal ruled on such preliminary matters as jurisdiction or the finding of liability, and partial awards, whereby damages were awarded on one part of a claim but other issues remained to be decided. The term "interim award" referred to an award on such matters as interim measures of relief. All of these terms were found in article 32 of the UNCITRAL Arbitration Rules.

22. Mrs. RATIB (Egypt) said that the Commission really needed to specify in article 34 which types of award could be set aside.

23. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the reason for defining "award" would be to facilitate the identification of measures which were subject to review or enforcement. The approach suggested by the secretariat, however, was more promising. If "award" were not defined, then there would be no need to define interlocutory, partial and other awards.

24. Mr. SEKHON (India) said that there was no need to define "award".

25. The CHAIRMAN said that subparagraph (e) of article 2 would be redrafted by the small drafting group he had suggested earlier. That concluded the discussion of article 2 for the time being, but if there were a need to define terminology arising in the course of consideration of the text

of the draft Model Law, it would be possible to make additions to article 2. If there were no objections, he would take it that the Commission agreed to adopt those suggestions on article 2.

26. *It was so agreed.*

Article 4. Waiver of right to object

27. Mr. SEKHON (India) wished to make two points. First, article 4 took away a valuable right. Secondly, the words "ought to have known" and "without delay" were too vague and likely to give rise to controversy. He suggested that the former phrase should be elaborated by adding "by use of ordinary diligence" and that a time-limit should be specified to replace the latter.

28. Mr. SAMI (Iraq) said that article 4 was ambiguous and contained a number of difficulties. In Iraq, for example, substantive matters in arbitration agreements could always be the subject of objection without any time-limit. In arbitration, which was the amicable settlement of a dispute, it was necessary to guarantee the freedom of the parties and not introduce differences stemming from ignorance of the law, the arbitration agreement or other matters on the part of one or other of the parties. While the parties undertook to use arbitration in accordance with the arbitration agreement, future imponderables would be outside their contemplation and they could therefore not set fixed deadlines. As to the expression "without delay", it was unduly vague. The addition of the references to diligence and timely objection would still leave full latitude to the parties. For those reasons among others, his delegation proposed that article 4 should be deleted.

29. Mr. HJERNER (Observer for International Chamber of Commerce) said that an article of that type was useful. Parties wishing to object should do so in proper time. However, he thought that the scope was too wide; the concept of constructional knowledge reflected in the words "ought to have known" went too far. To apply that rule to non-mandatory provisions was too strict. With regard to mandatory provisions, it was not well-founded, since if a party wished to object, he should do so at the beginning of the proceedings.

30. Mr. ROEHRICH (France) said that article 4, as drafted, could not be transferred into certain national legislations. Since many national judicial systems contained rules relevant to the matter, it might be sufficient to indicate that existing civil procedures should be used. Perhaps it might be possible to identify those articles in respect of which the right to object could be exercised and define the procedure there.

31. Mr. MATHANJUKI (Kenya) said his delegation had reservations relating to article 4 arising in particular from the dispatch and receipt of communications referred to in article 2 which might affect the knowledge of a party. He did not see any provisions relating to instances when an appellate court could reopen all or certain questions settled by a tribunal, provisions which might be affected by those in article 4. His delegation wished to see article 4 qualified to take account of those matters and could not accept it as it stood.

32. Mr. MOELLER (Observer for Finland) said it was useful to provide for a general waiver. A party could not wait until a later stage, such as after the award, in order to object.

33. Mr. HOELLERING (United States of America) said his delegation supported the policy of including a general provision, since it was difficult to define every instance within the Model Law. Although the words "without delay" were vague, it was difficult to set a time-limit in advance; that matter could be decided by the arbitral tribunal or court in each case. He felt the rule should relate only to non-mandatory provisions, otherwise it might be too severe. The words "knows or ought to have known" should be included, and he supported the addition of wording such as "using ordinary diligence". In his view, the waiver extended to subsequent judicial proceedings.

34. Mr. BONELL (Italy) said that the basic principle in article 4 was unimpeachable since it was a well-known general principle of law. However, he was uncertain as to the ultimate usefulness of the provision, since there were already several exceptions to it in the draft Model Law, such as article 16 (2). Other exceptions might already be contained in national procedural laws. He suggested that the Commission should adopt a functional approach and consider independently each specific occasion where failure to object might preclude a party from raising objections at a later stage.

35. Mr. STALEV (Observer for Bulgaria) said he was in favour of article 4 in principle, subject to possible minor corrections, since the main principle was already contained in the UNCITRAL Arbitration Rules. There was a need in international commercial relations for good faith, timeliness and stability.

36. Mrs. RATIB (Egypt) said that she approved the article in both substance and form. The text corrected the severity of the presumption it established, leaving the judge the ability to appreciate the elements composing it.

37. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the same principle was contained in the UNCITRAL Arbitration Rules, article 30; it was also widespread in national legislations, but there would be advantage in achieving uniformity by retaining article 4, which he strongly supported.

38. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that the theoretical principle underlying article 4 was an aspect of consent. It provided that the parties might consent to waive their right to object. Arbitration was a consent procedure, and it was therefore right that such an article should be included. It was also important to tell a lay arbitrator, who was not a lawyer, that parties who had not objected in due time had waived their right to do so. Greater uniformity would be achieved by retaining article 4, since national legislations were likely to introduce more technicality and diversity. He also suggested, for the sake of uniformity, that the words "ought to have known" should be omitted in order to bring the article into line with the relevant UNCITRAL Arbitration Rule.

39. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that article 4 reflected sound existing principles; he therefore supported its retention but felt that further clarification was required in order to avoid ambiguity.

40. Mr. SZASZ (Hungary) reminded the Commission that the terms of reference of the Working Group were to refer to the UNCITRAL Arbitration Rules and the 1958 Convention and there was therefore no reason for a radical departure

from them. He also suggested that the wording of the Model Law should be reviewed with a view to achieving closer uniformity with the UNCITRAL Rules.

41. Mr. SEKHON (India), in answer to those opposed to the retention of article 4, suggested that some of the severity of the article could be mitigated by giving power to the court or arbitral tribunal to exercise discretion, where there had been unreasonable delay, in deciding whether there were sufficient reasons for that delay.

42. Mr. LAVINA (Philippines) said he supported the retention of article 4, which was based on an established and valid concept in law, subject to the refinement of certain sentences.

43. Mr. GRIFFITH (Australia) said his delegation supported the retention of article 4.

44. The CHAIRMAN said that the majority view was clearly in favour of retaining article 4 in some form. He invited the Commission to consider possible amendments to the drafting. He recalled that objections had been made to the phrase "ought to have known".

45. Mr. HJERNER (Observer for the International Chamber of Commerce) said that the rule in article 4 should apply to objections to any provision of the Model Law.

46. The CHAIRMAN said that the general feeling in the Commission was in favour of specifying those provisions of the Law from which the parties might derogate. It had been suggested that the phrase "ought to have known" should be deleted.

47. Mr. HUNTER (Observer for the International Bar Association) said that the wording used in the UNCITRAL Arbitration Rules was preferable; the words "or ought to have known" should be deleted.

48. The CHAIRMAN took it that there was general agreement that the phrase should be deleted. He invited the Commission to consider next the phrase, "without delay", in the French text "*promptement*". The Indian delegation had suggested that the arbitrators should be given discretion to condone a delay for sufficient reasons. He pointed out, however, that if the rule in article 4 were to hold good for later judicial proceedings, the State courts would be bound by the discretion of the arbitrators.

49. Mr. HERRMANN (International Trade Law Branch) said that the idea in the Working Group had been that the waiver should go beyond the arbitral proceedings proper, although that was not expressly stated in the article. The question of raising an objection later than "without delay", as in the Indian suggestion, would still come within the arbitral proceedings.

50. The CHAIRMAN pointed out that if the arbitrators used their discretion to refuse to extend the time period, the State court concerned in the setting-aside proceedings would lose the power of control and supervision referred to in article 6.

51. Sir Michael MUSTILL (United Kingdom) said he could find no provision in the Model Law requiring objections to be made within a specific time. Article 33, which set a time-limit, was not concerned with procedural objections. If there was no time-limit, the phrase had no purpose.

52. Mr. HERRMANN (International Trade Law Branch) said that when article 4 was drafted it had been assumed that it would refer to non-compliance with the arbitration agreement or the arbitration rules, which often contained such time-limits.
53. Sir Michael MUSTILL (United Kingdom) said that, in English law at least, such indefinite expressions as "without delay" and "promptly" introduced an element of flexibility. It could be, therefore, that discretion was not really needed.
54. The CHAIRMAN suggested that it would be sufficient to say "without unreasonable delay", on the understanding that the phrase would be interpreted first by the arbitrators and then by the State court which might be asked to set aside any award.
55. Mr. SZASZ (Hungary) said that imprecise words such as "unreasonable" caused problems and that the words "without delay" sufficed.
56. Mr. BONELL (Italy) suggested that the word "undue", as used in the 1980 Vienna Convention, would give the desired flexibility.
57. Mr. GRIFFITH (Australia) said that two relevant time periods were involved. There was no provision in article 4 for extending the time-limit provided for in the arbitration agreement. Perhaps the article should pick up the provision in article 23 of the UNCITRAL Arbitration Rules and provide for the extension of the time-limits if justified.
58. Mr. HERRMANN (International Trade Law Branch) said that there were few exact time-limits set in the draft as the Working Group had thought it appropriate to give the arbitral tribunal wide discretion, as expressed in article 19 (2). He believed that article 4 was not as rigid as it seemed.
59. Mr. ROEHRICH (France) said that, as he read it, article 4 left it to national legislation to set a time-limit for stating an objection. Clearly, some time-limit must be fixed. That was a minor point, however. The most important point in respect of article 4 related to its application before the State courts which were the subject of article 6. He found it hard to accept that a court seized under article 34 with an application for setting aside an award should be bound by a time-limit for making objections to a procedural defect in the arbitration proceedings.
60. It ought, perhaps, to be made clear, for those who believed that the provisions of article 4 should apply to post-award proceedings in the State courts, that the fact that an objection had not been made within a certain time limit would have no consequence. It should, in fact, be clearly stated that article 4 applied only to the arbitral proceedings. In other words, it was unnecessary to envisage sanctions at the State level, given that the main purpose of State court intervention was to control the application of the mandatory provisions of the Model Law.
61. The CHAIRMAN said he could not agree that all the provisions of article 34 (2) applied to the violation of mandatory provisions of the Law. For example, the State court had a margin of judgement in considering whether the arbitral tribunal had fully respected the right of the party making the application to present his case. He agreed, however, that if mandatory provisions only were involved, article 4 would have no effect in the setting-aside proceedings. Without having the Commission go into the question of determining which provisions of the Model Law were mandatory and which non-mandatory—a task that would be infinitely time-consuming—he noted that, if the time-limit was made flexible by using a term such as "undue delay", the State court would be able to determine for itself the time-limit that should have been respected. Then, even if the arbitrators ruled that the normal time had been exceeded and the court then found that, in the circumstances, a normal time had not been exceeded, it would be able to control the regularity of the arbitral procedure, as provided for in article 34.
62. Mr. SAWADA (Japan) wished to repeat his Government's comment that the effect of a waiver of the right to object (under article 4) should extend to subsequent judicial proceedings.
63. Mr. BONELL (Italy) said that the representative of France had drawn attention to an important shortcoming of article 4, in that it failed to state which provisions were non-mandatory and which mandatory. Regarding the relationship between article 4 and articles 34 and 36, he agreed with the comment by Japan that if article 4 was accepted, the effect of the waiver should rule in any later proceedings. It would be appropriate, therefore, when the Commission arrived at the consideration of articles 34 and 36, to establish a link with the provisions of article 4.
64. The CHAIRMAN took it that the Australian representative did not wish to press his proposal, as that would mean a complete reworking of the text. If so, the Commission had completed its deliberations on article 4. It would be unnecessary to appoint a drafting group for the other changes which had been suggested and had been noted by the secretariat. If there were no objections, he would take it that the Commission agreed to approve article 4 with those changes.
65. *It was so agreed.*
- The meeting rose at 5.30 p.m.*