

309th Meeting

Wednesday, 5 June 1985, at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 9.40 a.m.

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

Article 5. Scope of court intervention

1. Sir Michael MUSTILL (United Kingdom) said that judicial control of the arbitral process was a topic of prime

importance. The United Kingdom's position on the subject was set forth in its written comments, reproduced in A/CN.9/263/Add.2, and he did not propose to restate it. Everyone would agree that some measure of judicial intervention was inevitable in the field of arbitration and that the concept of a Model Law would be meaningless without courts to enforce its provisions. Differences of opinion on the

matter in the Commission were concerned more with the timing of judicial intervention than with whether it should exist at all. The only purpose of the Model Law was to help the businessman, who might need a court to help him remedy the occasional injustice that inevitably occurred in any dispute-resolving mechanism. It was essential that the businessman, the arbitrator and the lawyer should know exactly what article 5 meant, but as it had pointed out in its written comments, the United Kingdom did not.

2. The first problem arose from the opening words of article 5: "In matters governed by this Law", which were intended to convey the meaning that the Model Law did not regulate all the circumstances in which the courts and the arbitral process might come into contact. In practice, therefore, what matters did the Model Law govern? As he understood it, it was not the intention of the draftsmen that article 5 should be interpreted as stating that the remedies the Model Law provided were exclusive only for matters it dealt with expressly, or that where the Model Law did not deal expressly with a particular matter, the court should have a free hand or there should be no possibility of a remedy.

3. He drew the Commission's attention to the example given in para. 21 of A/CN.9/263/Add.2 of a factual situation not expressly covered by the Model Law. The first possibility referred to in that paragraph was that the draftsmen of the Model Law had decided that the situation should not be dealt with by the Model Law and could therefore be redressed through domestic law. The second possibility was that they had decided that there should be no power of judicial intervention in the situation concerned. The third was that the situation had not been considered at all. He did not see how a reader of article 5 who did not have access to the *travaux préparatoires* could ascertain what his position might be under the article. If the provision was not clear to persons other than those who had drafted it, it was a failure. The United Kingdom had not proposed an amendment to article 5 because it believed that the meaning of the provision had never been fully debated. He had raised the problem for discussion by anyone interested. He would like to hear from the secretariat, on whose initiative the article had been introduced, what the first phrase of article 5 meant. He had noted with interest the secretariat's comment (A/CN.9/264, p. 19, para. 4) that the words in question were intended to refer to matters "expressly or impliedly" regulated by the Model Law, but he was uncertain as to how that interpretation would operate in practice.

4. A second question was how to deal with abuse of the arbitral process. The Model Law appeared to contain no provision for intervention during the actual arbitration: article 34 dealt with intervention after the award and article 36 with defensive intervention at the stage of execution, but the Model Law was silent on the possibility of the court intervening before the award. The Commission should consider whether the omission of a reference to judicial intervention during arbitration meant that the subject was not covered by the Model Law, or that such intervention was implied, or that it was excluded; and whether it wished the Model Law to deal with the questions at all.

5. He also wished to raise the question of contracting out of article 5. The fundamental principle of the Model Law was to recognize the autonomy of the parties. The parties could choose the procedures they wanted, and he had learned from the previous day's debate that they could choose to apply the Model Law even in a field where there was no international commercial dispute. It was a misconception that the businessman wanted to rule out all judicial control. The United

Kingdom was not in favour of deleting article 5, but it was not for the Commission to tell the businessman what he wanted: the Commission was there to serve him.

6. Mr. HERRMANN (International Trade Law Branch) said that the United Kingdom representative, in referring to the difficulties which arose in deciding whether a particular situation fell within the scope of article 5, had brought out the clear distinction which existed between two related but separate problems: namely, what matters were and were not governed by the Model Law; and the extent of judicial control envisaged in it. On the second point, there had been a slight divergence of opinion in the Working Group on International Contract Practices. There seemed to have been a clear understanding that the purpose of article 5 was not to deal with the extent of judicial control but to oblige the draftsmen of the Model Law, or, at a later stage, the national legislator, to decide what would be the situations in which court control should be provided. Regarding the words "In matters governed by this Law", problems of interpretation and application were not unique to article 5; even without it, the question would arise as to which of the three possible interpretations mentioned by the United Kingdom was the correct guide to the application of the Model Law.

7. In regard to the question of express or implied provisions, it was impossible for the Model Law to deal expressly with every procedural instance that might arise in arbitral proceedings. Article 19 (2), for example, gave arbitrators a certain discretion in the conduct of arbitral proceedings and was meant to cover, without spelling them out, a wide range of procedural circumstances that might occur. Again, the Model Law contained a provision allowing the parties to agree on a procedure for appointing arbitrators, but under a certain domestic law there was a rule that even arbitrators appointed by the parties had to be confirmed by the local court; that question of confirmation was not dealt with expressly in the Model Law, but in his opinion the provision that the parties were free to agree on the arbitrators clearly implied that they could actually appoint them.

8. The United Kingdom had dwelt on the difficulties which might arise in deciding how to read article 5 in a situation concerning which nothing was found in the Model Law. There might of course be nothing in the Model Law about a specific situation, but in that case it would be necessary to look at the provisions of the Model Law dealing with the area out of which the situation had arisen. He agreed that decisions on individual cases would be very difficult to make, but he doubted whether the Model Law could go beyond using the words "In matters governed by this Law".

9. The United Kingdom's written comments included the question (A/CN.9/263/Add.2, para. 25) whether it was really the intention of the Model Law that article 5 should operate to exclude judicial control in situations not foreseen by the Working Group on International Contract Practices. That was obviously not its intention because the list of matters which the Working Group had decided not to deal with in the Model Law was clearly given by way of example only (A/CN.9/246, para. 188).

10. Mr. LAVINA (Philippines) said that his delegation supported the principle underlying article 5 because it would prefer that court intervention in arbitral proceedings should be avoided as far as possible. The article nevertheless raised problems. For example, if the Model Law was enacted in national legislation, it would be a *lex specialis* and therefore take precedence over other domestic law. An awkward situation would then arise if article 5 conflicted with

provisions of national constitutions or fundamental laws in regard to areas of jurisdiction.

11. Mr. SEKHON (India) said that his delegation endorsed the United Kingdom's objections to article 5 but would not like to see it deleted. It was important that the Model Law should find wide acceptance in different countries. In India, for example, judicial control of arbitration was sometimes exercised by the Supreme Court. In the states, the High Courts under article 227 exercised superintendence and control over various tribunals, including arbitral tribunals. Those controls should not be removed. His delegation could accept article 5 if it was modified to enable parties to opt out of it.
12. Mr. GOH (Singapore) said that his delegation was not happy with article 5. There should be some judicial control over the conduct of arbitration proceedings and over the parties to an arbitration, to prevent abuse of the arbitration process. In his opinion, article 5 should either be deleted or be amended to reflect that principle.
13. Mr. SCHUETZ (Austria) said that he found fewer problems with article 5 than the United Kingdom representative. Its purpose was not to imply that court intervention was undesirable or should be kept to a minimum but to make it clear that there should be no court intervention except in the cases provided under the Model Law. In order to allay the doubts that had been voiced about the meaning of the words "In matters governed by this Law", he suggested that they should be deleted; that would not harm the article. The correct place to strike a balance between the independence of the arbitral process and the need for judicial intervention in it was in the special provisions. The Commission might usefully consider whether to increase the possibilities for court intervention in special fields in the knowledge that the purpose of article 5 was to make it clear that no court should intervene in the arbitral process except as provided in the Model Law.
14. Mr. STALEV (Observer for Bulgaria) said that article 5 should remain as it stood because it reflected the need for speedy international arbitration. To date, over seven arbitration cases had been decided by the Bulgarian Chamber of Commerce and Industry's Arbitration Court and as yet no need had been felt for judicial control over the conduct of its proceedings. In his opinion, extensive judicial control might delay arbitral proceedings and go against the interests of international trade.
15. Mr. KIM (Observer for the Republic of Korea) drew attention to the wording proposed by his Government for article 5 in its written comments (A/CN.9/263, p. 16, para. 2). The present wording of the article was insufficiently broad to cover matters of international commercial arbitration not governed by the Model Law.
16. Mr. BONELL (Italy) said that he appreciated the points made by the United Kingdom representative. His delegation was nevertheless strongly in favour of retaining the present article 5, because court intervention in the arbitral process, particularly if it was international, should be kept to a minimum. More important, the cases where it was permitted should be stated clearly, so that the position was known to those concerned from the outset. The provision in article 5 would not be binding on States, and they would be able to interpret it when incorporating it into their national legislation.
17. He noted the written comment of the United Kingdom (A/CN.9/263/Add.2, para. 37) that the Model Law should set a minimum of judicial control, whereas he had always understood that the purpose of article 5 was to set a maximum. Perhaps the Commission should consider that question.
18. Mr. SZASZ (Hungary) said that the underlying issue was the unification not merely of procedural law but of all kinds of law. There was, therefore, no simple answer as to what matters were covered by article 5. The members of the Council for Mutual Economic Assistance, for example, followed the rule that when their unified law did not cover a particular point, the domestic law of the seller's country would apply. The Commission could do no more than recognize that article 5 raised the whole issue of the problems of unification. The article did not deal with the question of how broad court control should be, and it should not be attacked on that ground. If the Commission wanted some degree of unification, then article 5 was acceptable; if not, the article was open to criticism. His delegation favoured the retention of the article, for the Model Law must make it clear to the reader exactly where the limits of court control lay. He agreed with the observation made by the United Kingdom about the view which the secretariat had expressed in its commentary with regard to the scope of the article (A/CN.9/264, p. 19, para. 4); there again, the problem was one affecting all matters of unification.
19. Mr. HOLTZMANN (United States of America) said that the United Kingdom had raised the question of what matters were covered by the Model Law. He was not sure that the wording of article 5 could be improved in that respect. It was his country's general policy that court intervention during arbitration proceedings should take place only in rare cases since it could cause great delay. As to the United Kingdom suggestion that parties have the right to opt out of article 5, should they be able to opt out of it in regard to the entire arbitration process or only part of it? In any case, it would be difficult for the parties to state exactly what they were opting out of. The Commission would not be helping businessmen by adding a further complication to an already complicated process.
20. Mr. MOELLER (Observer for Finland) said that the principle underlying article 5 must be supported: the Model Law must try to prevent abusive court intervention, especially during arbitration proceedings, and be clear as to the cases in which court intervention was permitted. It might be better to replace the words "In matters governed by this Law" with the admittedly narrower provision "During the course of the arbitration proceedings".
21. Mr. HJERNER (Observer for the International Chamber of Commerce) agreed that the principle underlying article 5 was a very important element of the Model Law. The possibility and extent of court intervention had a great influence on the choice of the place of arbitration. Mr. Hermann had implied that the circumstances of court intervention should be spelled out in national law, but if that allowed broader intervention than the Model Law, the aim of the latter—to assure potential users that its procedures were adequate—would be frustrated. States should therefore try to avoid changing the Model Law in that respect.
22. It might be possible for the wording of article 5 to be improved. The meaning of intervention, for example, was not clear; a distinction must be made between intervention and assistance. If, during the proceedings, an arbitral tribunal requested court assistance, for instance with respect to the production of a witness, that did not amount to intervention. The question of intervention also concerned article 18, which should not be interpreted to mean that the ordinary courts could not order interim measures.

23. Mrs. RATIB (Egypt) said that her delegation favoured the retention of article 5 despite the difficulties inherent in the question of court control. By limiting such control to the cases covered by the Model Law, the Commission would bring some order to the disparity of national legislations and make arbitration proceedings less complicated. The exclusion of matters not covered by the Model Law established a balance whereby the difficulties mentioned by some States might be overcome.

24. Mr. ROEHRICH (France) said that the merit of the United Kingdom submission was that it made the Commission think about the extent of the unification achievable through a Model Law. The Model Law must have a clear policy with respect to court intervention, which must be limited to the essential matters which it covered. The Commission's ambitions with regard to unification must be modest, for article 5 would not prevent courts from intervening in matters not covered by the Model Law.

25. The Observer for the International Chamber of Commerce had drawn attention to the need to distinguish between intervention and assistance. It was clear to his delegation that article 5 covered all acts in national courts, whether mere requests for assistance or applications for decisions directly affecting the arbitration proceedings. With regard to the idea of allowing the parties to opt out of article 5, his country did not think that national legislation should allow the parties to waive recourse to national jurisdiction or even agree to it. If the national law provided such recourse, it should remain available regardless of the wishes of the parties.

26. The existing wording might be the best that could be formulated for article 5. His objection to the Austrian suggestion to delete the words "In matters governed by this Law" was that their retention would leave the position clearer. The version of the article proposed by the Observer for the Republic of Korea was interesting but might create more problems than it solved. It might be useful for the draft to include a provision to the effect that the Model Law did not prejudice the right of States to provide remedies in their national legislation which were not in the Model Law.

27. Mr. TORNARITIS (Cyprus) said that some countries, including his own, might have constitutional difficulties with respect to article 5. In Cyprus, the judicial power was exercised by the courts under the jurisdiction of the Supreme Court. The establishment under the Model Law of an arbitral tribunal involving curtailment of the rights of local courts might be found unconstitutional.

28. Mr. SAMI (Iraq) said that his delegation supported article 5 because the courts should be available as a last resort to safeguard the rights of the parties. Article 5 guaranteed the parties equality by giving them the right to go to court in the specific cases provided in the Model Law. That provision would be very important if an arbitral tribunal could not resolve a dispute or if one of the parties could not accept its decision. Recourse to a local court would then be quite normal. He agreed with the representative of France that the article covered requests for a court's assistance. If the Commission decided to delete article 5, it would leave the door wide open to court intervention under national legislation. The merit of the article was to define the sphere of such intervention clearly and in a way which made it unnecessary to reword it.

29. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the attitudes of delegations to article 5 were determined by their view of what the users of the Model Law wanted. Some users were more

afraid of abuses by other parties than of court intervention, while others feared abuses by arbitrators. Article 5 could not solve that problem. The Commission had to decide how broadly such matters ought to be dealt with in the Model Law. A solution might lie in the use of wording such as "unless otherwise agreed" or "if the parties so agree".

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the problems which had arisen during the discussion of article 5 revealed the different concepts of arbitration which existed in different countries. All delegations were convinced of the importance of party autonomy, but some considered that the authority of the court should be preserved in order to avoid injustice, whereas others felt that the parties to an arbitration must accept the unavoidable risks which it involved that adjudication by a court did not. His delegation did not share the opinion that the article set a minimum judicial control over arbitration and would prefer to see an even lesser degree of judicial control provided for; however, the status of the text as a Model Law would leave each State free to decide that matter for itself. It was important to consider what relationship the Model Law would have with existing national legislation on judicial intervention after its adoption.

31. The present wording of article 5 was acceptable and followed that of many other international instruments. The Asian-African Legal Consultative Committee had suggested in its written comments (A/CN.9/263/Add. 1, p. 6) that the title of the article should be changed to "Limitation of court intervention". His delegation would prefer it to read "Limits of court intervention". The question could be discussed further in connection with other articles, especially article 34.

32. Mr. PAES de BARROS LEAES (Brazil) said that court intervention in an arbitration should be kept to a minimum. Article 5 adequately expressed that valuable principle in its present form.

33. Mr. TANG Houzhi (China) said that court intervention could be understood to mean assistance, which should be provided as fully as possible, or control, which should be kept to a reasonable minimum. Article 5 should be retained, although the wording might be improved in the light of the written comments of the United Kingdom.

34. Mr. de HOYOS GUTIERREZ (Cuba) said that parties to an arbitration had expressly chosen to come before expert arbitrators rather than before the courts and that consequently courts should not have the right to intervene in arbitration cases. Article 5 should be retained.

35. Mr. JEWETT (Observer for Canada) said that in that part of Canada in which civil law operated, article 5 would not be necessary, and in the part governed by common law, it would be difficult to enforce. Measures to prevent court intervention had often failed because of the power wielded by the court. However, his delegation could support article 5 if it was amended to make it clear when judicial intervention was permissible.

36. Mr. ABOUL-ENEIN (Observer, Cairo Regional Centre for Commercial Arbitration) expressed support for article 5 in its existing form. A change in the wording would be acceptable if it did not alter the meaning of the text.

37. Mr. BONELL (Italy) said that it had been proposed that the opening words of the article "In matters governed by this Law" should be deleted; there was also the suggestion that they should be replaced by the words "During the course of the arbitration proceedings". Neither formulation was accept-

able to his delegation. A further suggestion had been that the words "unless otherwise agreed", referring to agreement between the parties, should be added at the end of the article. That too would cause his delegation difficulties.

38. Sir Michael MUSTILL (United Kingdom) said that the problems which arose in connection with article 5 could not be solved merely by drafting changes. His delegation considered that the present version of the article, while not perfect, was the best which could be hoped for.

39. Mr. HOLTZMANN (United States of America) said he felt that a drafting group consisting of experts, including perhaps the United Kingdom representative himself, might be able to improve the article.

40. The CHAIRMAN said that although the article might seem inflexible, States when enacting the Model Law were not obliged to follow it to the letter. The fact that the area which it governed was not defined precisely gave arbitrators and judges a certain amount of discretion. Most delegations had agreed with the French representative that it should be understood to cover assistance from the courts as well as judicial intervention proper. The article had found general approval and he therefore felt that the Commission would wish it to be maintained in its existing form.

41. *It was so agreed.*

Article 6. Court for certain functions of arbitration assistance and supervision

42. Mrs. RATIB (Egypt) proposed that article 6 should be amended to read "The Court with jurisdiction to perform the functions referred to in this Law . . .".

43. The CHAIRMAN observed that the text of the article should properly begin "The Court or Courts . . .".

44. Mr. STROHBACH (German Democratic Republic) said that article 6 should not be interpreted as an indication of the competence of the court, particularly in cases of multiple competence. The article was referred to in later articles and should be expanded to include the criteria for assigning jurisdiction, such as the place of arbitration, the place of business of the defendant or the habitual residence of the arbitrator.

45. Mr. SZASZ (Hungary) said that the issue really at stake was the territorial scope of the Model Law, which should be decided by the Commission for the text as a whole rather than for article 6 alone.

46. Mr. HERRMANN (International Trade Law Branch) said he felt that the Commission should settle the various questions concerning the territorial scope of the Model Law straight away. The secretariat had summed the matter up in paras. 4-6 of its comments on article 1 (A/CN.9/264, p. 7). Most members of the Working Group on International Contract Practices had been in favour of the strict territorial criterion, but a minority had considered that the parties should be allowed some freedom to select the law governing their arbitration. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards acknowledged the existence of both criteria in national law, but in practice parties rarely took advantage of their autonomy of choice of law where it existed.

The meeting rose at 12.35 p.m.