310th Meeting

Wednesday, 5 June 1985, at 2.30 p.m.

Chairman: Mr. LOEWE (Austria)

The discussion covered in the summary record began at 2.40 p.m.

International commercial arbitration (*continued*)

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

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

1. The CHAIRMAN said that the question of territoriality had been raised by the secretariat in connection with article 6. If it was the Commission's feeling that there was an important problem in that connection, a decision could perhaps be reached and, if necessary, a text prepared.

2. Mr. HERRMANN (International Trade Law Branch) said that a number of difficulties arose when arbitration proceedings were held in one country under the procedural law of another: for example, in the taking of evidence or in applying for the annulment of an award. The general feeling in the Working Group had been that in terms of the competent court, the procedural law of the place of arbitration should prevail. The choice of any other criterion could lead to unmanageable situations. It was felt that it would be appropriate to state the principle explicitly in the Model Law, particularly since the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards envisaged the existence of both the territorial system and the party autonomy system.

3. Mr. HOLTZMANN (United States of America) said that the law of the United States assumed that the procedural aspects of an arbitration, whether concerning the arbitrators or judges in connection with the arbitration, would be the law of the seat of arbitration. He recognized that in some States there were laws which, in the interests of party autonomy, said that the parties could choose another procedural law, first in the procedures to be followed by the arbitrators and secondly, to some degree, in the procedure followed by the courts. Nevertheless, there was an inherent limitation, even where States permitted the parties to use the procedural law of their choice. They could not, for example, import into one State from another State something which violated the second State's public policy. As the secretariat had noted, the simplest approach would be to have those States which adopted the Model Law be in the same position as the vast majority of States, which was that, if an arbitration was conducted in their territory, in so far as a procedural law governing the subject of arbitration existed there, that law

should be followed by the arbitrators and by the courts. That would greatly simplify the task of drafting the Model Law. If both territoriality and party autonomy were to apply, all the various circumstances would have to be defined. That was why the Working Group had favoured a strict territorial principle, and why his delegation continued to do so. He felt that it would be wise to state the principle clearly in the Model Law at an early stage.

4. As far as article 6 was concerned, his delegation agreed with the remarks of the German Democratic Republic and with the written comments of the Soviet Union pointing out the problems that would arise in regard to the role of the courts in the appointment of arbitrators or in dealing with challenges in the event that the commercial contract had not specified the place of arbitration. It would be wise to provide specifically for one place and one court in a situation of that kind, in which a defendant refused to facilitate the arbitration by appointing an arbitrator. In such circumstances, where one of the parties would not appoint an arbitrator and no place had been agreed on, the plaintiff should be able to turn to his own court to appoint an arbitrator for the defaulting defendant. It could logically be argued that either place would be appropriate in a situation of that kind, but it would be simpler to pick the court of the plaintiff for dealing with such problems as appointment and challenge. A provision to that effect should therefore be added to article 6. It was not essential to decide on the territorial question for the moment, but he agreed with the secretariat that it would be wise to reach a decision rapidly.

5. Mr. ROEHRICH (France) agreed largely with the United States position but felt that it might not be appropriate to have a general provision affirming strict territoriality. Room should be left for party autonomy and for recognition that, in a given State that had adopted the Model Law, the parties could choose another law for the arbitration although, as far as the assistance and supervision of the State court was concerned, territoriality must apply. The Commission should examine the draft article by article to see if it was necessary in each case to provide for territoriality. As he felt, that need existed in article 6, and above all in article 34 (1), where a choice would have to be made between the two phrases left in square brackets, "in the territory of this State" and "under this Law". It was clear that, for the court functions mentioned in article 6, the territorial criterion should be specified, and he therefore supported the proposal of the German Democratic Republic.

6. Mr. BONELL (Italy) said that his delegation's basic assumption was that the Model Law was intended to apply only and exclusively to arbitral proceedings taking place within the territory of the enacting State, i.e. the so-called territorial approach. It believed, therefore, that article 6 should be understood as indicating that the court of the State in which the arbitration took place was competent in the matters specified in the article. In his delegation's written comments on the jurisdiction of the State court (A/CN.9/263, p. 17, para. 1), attention had been drawn to the still-open question of what would happen if cases of the kind envisaged in articles 11 (3), 11 (4) and 13 (3) arose before the place of arbitration had been determined. Accordingly, article 6 needed to be drafted so as to cover such hypothetical cases. A possible solution would be a provision similar to that in the Italian Code of Civil Procedure, which provided in such cases for the competence of the court of the place where the arbitration agreement or the contract containing the arbitration clause had been concluded. His delegation attached great importance to the inclusion of such a provision in article 6, since otherwise the whole mechanism would not function satisfactorily.

7. A number of other interesting aspects had been raised in connection with article 6. It was true that the 1958 New York Convention did not explicitly state the territorial criterion, or the principle of party autonomy, but there was no reason why it should have done so since its aim was simply to regulate the execution of foreign awards. Article 1 of the New York Convention was significant in that respect, since it recognized that there was no uniformity as to the criteria for defining the nationality of arbitral proceedings. It referred to the most common case, that of an arbitration taking place abroad, but stated that the Convention also applied to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought". The Model Law was more ambitious in seeking to cover not just the recognition and enforcement of foreign awards but all possible international arbitral proceedings. It was intended to go beyond procedural issues *strictu sensu*, where the parties should be enabled to enjoy the greatest possible autonomy, and to act as a kind of constitutional law for international commercial arbitration. It therefore had to clarify whether the principle of party autonomy could still be admitted in so large an ambit. His delegation's view was that it should not, and possibly could not. Accordingly, the territorial approach should be adopted on an exclusive basis. The Commission could, however, show a certain flexibility in adopting that approach. It could avoid laying down the principle in a general fashion, and settle the matter only where it must inescapably be dealt with, as in article 34. His delegation, therefore, was open-minded. It would not object if the territorial criterion was not spelt out from the beginning, but, as far as substance was concerned, that should be the only criterion in determining the application of the Model Law.

8. Mr. BROCHES (International Council for Commercial Arbitration) said that there seemed to be a general feeling that the Commission should look at each instance separately and that it was not yet time to formulate a general provision. While it was not necessary to do so in the case of article 6, the discussion had awakened an awareness of the problems that lay behind it. Opinions could be strong on some issues, for example in connection with article 34, regarding the power of a court to set aside an award not made under its law on the grounds that it was made within its territory. France, for example, held that an international award could be annulled if it was made in France. From the practical point of view, it was important for the parties to know where they could turn for judicial assistance or to lodge an appeal. A stage had been reached where the actual place of arbitration was becoming more and more of a fiction. For instance, in a case involving a French company and a Turkish company, the International Chamber of Commerce had decided that the place of arbitration should be Austria. Until an action for annulment was brought in Austria, the whole proceedings had actually taken place in France. The Commission would have to consider to what extent a distinction might have to be made between the place of arbitration for purposes of enforcement or annulment, and for other stages of the proceedings. All those complications would have to be kept in mind as the Commission went through the draft.

9. Mr. MOELLER (Observer for Finland) agreed that it was time for the Commission to try to decide whether it should have as its starting point a strictly territorial scope or the approach that the parties should be free to subject their arbitration to a law other than the law of the place of arbitration. Finland, for example, would like to change its current procedure and accept the territorial criterion because of the extreme complications that could arise under the other system. It would be helpful if the Commission could reach agreement on whether or not to adhere to the territorial concept so as to avoid difficulties at a later stage.

10. Mr. SZASZ (Hungary) said the Commission should consider the practical situation of a judge in a country where the Model Law had been adopted as part of the national legislation and the parties had selected the procedure of another country for their arbitration proceedings. If that judge was approached by one of the parties, what should his attitude be towards the mandatory rules of the Model Law? The Commission must take up a position on the subject of territoriality and then see how it would apply in the various articles. There would have to be exceptions, but there must be a clear-cut approach. His delegation offered to adopt the concept of strict territoriality to start with.

11. Mrs. RATIB (Egypt) said that Egypt wished to make its position clear on two matters connected with the problem of territoriality. The first was the autonomy of the parties to choose the rules of procedure for their arbitration. Exception made of public policy, Egypt would oppose any restraint on that freedom which might oblige the parties to apply the procedure of the place of arbitration or restrict their right to adopt rules of procedure from other sources of their choice. In article 34, the question of territoriality was covered by two phrases in square brackets. In that case, Egypt opted for territoriality, i.e. the maintenance of the phrase "in the territory of this State" and the deletion of the other phrase "under this Law". The latter phrase could in fact give national courts competence to rule on the validity or otherwise of a decision made outside their territory. Such extraterritorial competence was not acceptable for a number of countries unless it was on a reciprocal basis.

12. Mr. LAVINA (Philippines) endorsed the recommendation of the Working Group. He believed that the principle of territoriality was both logical and practical. An eclectic criterion would lead to confusion and delay in arbitration proceedings. The autonomy of the parties was desirable, but in the case under consideration, it had to be related to some other basic issues such as public policy in the State of the place of arbitration. Opting for the procedure of another State might cast doubts on the soundness of local procedural law. There was also the question of sovereignty. Normally, legislation had an exclusively territorial application.

13. Mr. KNOEPFLER (Observer for Switzerland) said that in cases where the parties had not previously determined the place of arbitration, the United States proposal was interesting. He was less favourable to the idea of selecting the place where the contract or arbitration agreement had been concluded since it rarely had any link with the substance of the contract. He favoured the principle of territoriality but did not wish it to be opposed to the autonomy of the parties. They should not be prevented from choosing certain rules of procedure of a country other than that of the place of arbitration. His delegation favoured territoriality in order to avoid a positive conflict of jurisdiction.

14. Mr. SCHUMACHER (Federal Republic of Germany) said he shared the majority view that the decisive factor should be the place of arbitration, because articles 27 and 34 of the Model Law dealt with the role of the courts. They could only be the courts of the State in which the arbitration took place and they would always apply their own procedural law. That meant that the courts of a State in which the Model Law did not apply could not be obliged to fulfil the functions envisaged in articles 27 and 34. Agreement of the parties to apply the law of another State could relate only to the arbitral tribunal in so far as it kept within its functions as such. For that reason, and in the interests of certainty, he favoured the territorial criterion at least as far as the possible functions of national courts were concerned. A decision on territoriality should be made immediately in respect of article 6.

15. The CHAIRMAN said that the majority appeared to favour strict, but somewhat toned down, territoriality. Once the place of arbitration was determined, the courts of the State in question were competent. The Commission must decide later who should be competent to appoint arbitrators when the place of arbitration had not yet been determined. The participants also seemed agreed that such a decision did not prevent the parties from choosing the procedure of another State, at least as far as the arbitration proceedings themselves were concerned.

16. Mr. HOLTZMANN (United States of America) said he must enter a reservation with respect to the broad statement that the parties could agree to adopt the procedure of a State other than that of the place of arbitration. For his delegation, that must be subject to the proviso that the foreign procedure was not contrary to United States public policy and did not violate United States laws. Possibly other delegations might share that view.

17. Mr. HJERNER (Observer for the International Chamber of Commerce) said that territoriality was a simple principle, but simplicity was not the only virtue. In international arbitration, where State agencies were often involved, both the parties and the arbitration procedures were more sophisticated. The parties might choose the procedure of a State other than that of the place of arbitration, or opt for general principles or for some other combination. The wishes of parties in that regard should be fully respected, not only in respect of the arbitration proceedings themselves but also with regard to the possibility of challenging those proceedings on the grounds that the arbitrators had not complied with local law.

18. Mr. ROEHRICH (France) noted the Chairman's statement that the court designated by the State of the place of arbitration was competent but that that did not prevent parties from choosing a different procedure. He thought that statement should be supplemented by the observation that it in no way prevented the courts of the State whose law had been chosen by the parties for the arbitration proceedings from declaring that they were competent. That might not be stated as a rule, but the formulation adopted should not exclude that possibility.

19. The CHAIRMAN said he would be most reluctant to insert into the Model Law rules on the subject of disputed jurisdiction. If that course was followed, the Commission would end up attributing to each jurisdiction the competence it already possessed. He hoped that the Commission would be able to agree upon a Model Law, it being understood that the arbitrators would apply the rules the parties wished unless the rules conflicted with the public policy of the State to which the parties would have to turn for the annulment or enforcement of the award. Experience with the Geneva Convention showed how undesirable it was to enter into very great detail.

20. Mr. HOLTZMANN (United States of America) said it seemed to be the view of some speakers that the national law to be followed by the arbitrators could be selected by the parties but that the law to be followed by the courts could not. In fact, an example would show that there could be no such dichotomy. He would suppose that the parties wished to designate Austria as the place of arbitration but selected United States procedural law. The United States Arbitration Act provided that an arbitrator might administer an oath to a witness and that he might also issue a subpoena. Consequently, the appropriate penalties for perjury and contempt of court were also applicable. In many civil law countries, such powers on the part of the arbitrator would violate national law.

21. Mr. BONELL (Italy) endorsed the Chairman's view that the Model Law should not include rules about disputed jurisdiction. Obviously, the Model Law must contain criteria to determine its territorial scope, which the majority had supported. However, within that framework, much of the Model Law was not intended to be mandatory. The parties were free to determine the procedure for the arbitration proceedings proper, as expressly stated in article 19, and indeed in respect of other aspects of the arbitration.

22. Mr. SAMI (Iraq) said that freedom of the parties was an admirable concept but there could be no freedom without some limitation. As the discussion had made clear, the parties were free to choose their own procedure for the arbitration proceedings but they could not impose a law on the national courts of their chosen place of arbitration.

23. The CHAIRMAN said that the discussion now centred on the extent to which parties had the right to choose their own procedure. With regard to the point raised by the United States delegation, he thought that Austria—or some other countries—would not admit certain acts by arbitrators when they exceeded the powers attributed to arbitrators by national legislation. On the other hand, although Austrian law did not recognize written testimony, if arbitration proceedings were being conducted according to a foreign procedure which did admit it, written testimony would probably be regarded as admissible since it was neither coercive nor contrary to public policy. Generally, it would probably be possible to apply about 90 per cent of the foreign procedure chosen by the parties concerned. The question of disputed jurisdiction, raised by the French representative, was a current problem which the formulation of a rule was unlikely to solve. As an illustration, he would take the case of an award in an arbitration held in the Federal Republic of Germany but under Austrian procedural law. In Germany (where the law chosen by the parties was the test) the award was deemed a foreign award and in Austria (where the place of arbitration was the material element) it was also a foreign award and could not be set aside. However, it would be enforced everywhere as a foreign award.

24. He suggested that the secretariat should be requested to draw up a memorandum on the principles on which agreement had been reached, namely strict territoriality but with the possibility of agreement to apply the legislation of some other State provided it did not impinge on the functioning of the national courts and was not contrary to public policy in the State of the place of arbitration. Such a memorandum would be useful when the Commission considered other articles of the Model Law. Article 6 was perhaps not the appropriate place to consider it since it had been designed for other purposes. He therefore hoped that the Commission could agree to article 6 fixing the territorial competence of each State which accepted the Model Law, taking account of the decision on territoriality and extra-territoriality which had just been reached.

25. Mr. SAWADA (Japan) said that his delegation could accept the Chairman's summary as just restated, namely that the choice by the parties of an arbitral procedure should not derogate from the judicial powers of the State where the arbitration took place.

The discussion covered in the summary record was suspended at 4.55 p.m. and resumed at 5 p.m.

26. The CHAIRMAN made a drafting suggestion following what had been foreseen as a memorandum by the secretariat. It had been suggested that the system of territoriality would operate with difficulty in certain situations where no place of arbitration had been determined. Therefore, it was perhaps inappropriate to mention articles 11 (3), 11 (4), 13 (3), 14 and 34 (2). He suggested that the text should be amended to read "to perform the functions referred to in this law" and then in the articles in question an exception would be introduced with the proviso that it was a real exception which did not contradict the general rule stated in article 6.

27. Mr. HERRMANN (International Trade Law Branch) said that the idea of listing those articles in article 6 together with the court functions envisaged was to make it clear that the proposal to designate one or more special courts for that purpose only applied to those functions and not to other court functions in the Model Law, such as those envisaged in articles 8, 9, 27, 35 and 36. The purpose of article 6 was to centralize matters at a specialized court; it would, for example permit certain urgent matters, such as appointment and challenge, to be heard by only one person such as the President of the court. Those considerations did not apply to other functions.

28. Mr. LEBEDEV (Union of Soviet Socialist Republics) raised the question of which bodies should perform the functions of assistance and supervision under article 6. He felt that those functions should not be restricted to a court. More flexibility would be achieved by envisaging that some functions, such as appointment, removal or challenge of arbitrators, might be attributed to bodies other than a court, such as a chamber of commerce or trade association, as appropriate under the national legislation of each State. In that context, the UNCITRAL Arbitration Rules permitted the designation of any competent body or authority. His delegation proposed that article 6 should contain an indication that a court or other competent body could be given jurisdiction in respect of those functions, as it had already suggested in its written submissions.

29. Mr. PARK (Observer for the Republic of Korea) said that his delegation accepted the provisions of article 6 in principle but foresaw two problems. First, there were doubts as to whether article 6 was mandatory, since where there was an agreement between the parties as to the competent authority, that agreement should be respected. Where there was no such agreement, the court should be designated by the enacting country. The draft Model Law did not make that point clear, and it should therefore be clarified. Secondly, where there were several competent courts agreed between the parties or designated by the State, it was not clear which court would exercise the functions under article 6. He proposed the addition of a second paragraph to establish that where more than one court had jurisdiction under the first paragraph, jurisdiction should be exercised by the first court with which the parties or the arbitrator had dealt.

30. The CHAIRMAN invited the Commission to consider first the USSR delegation's proposal to give the States adopting the Model Law a broader choice in assigning the functions mentioned in article 6 by amending the opening words "The Court" to read "The Court or another competent organ" (A/CN.9/263, p. 18, para. 9).

31. Mr. MTANGO (United Republic of Tanzania) said that he did not agree with the majority view on the territorial scope of application. He supported the proposal that the functions mentioned in article 6 should be assigned to the court or another competent organ.

32. Mr. SAMI (Iraq) said that he supported the proposal to assign the functions mentioned in article 6 to the court or

another competent organ, since that would allow more flexibility to States in designating the competent institutions.

33. Mr. de HOYOS GUTIERREZ (Cuba) said he supported the USSR proposal to give the States adopting the Model Law a broad choice in assigning the functions mentioned in article 6, because that would accord with the situation in Cuba, where the law on arbitration assigned those functions to the international arbitral tribunal attached to the Chamber of Commerce. He suggested that the text of the proposal should be more precisely elaborated.

34. Mr. HJERNER (Observer, International Chamber of Commerce) said that the proposal to allow the designation of courts or any other competent organs to exercise the functions set out in article 6 would make the Model Law somewhat more realistic. A State adhering to the Model Law was unlikely to accept the idea that only one court could be designated, particularly where there were several legal systems, as occurred in federal States. It was realistic to attribute those functions, which were mainly directed to the appointment and challenge of arbitrators, to bodies such as a chamber of commerce. It was less likely, however, for a chamber of commerce to be empowered to set aside an award. With regard to article 13, the International Chamber of Commerce was concerned that where the parties agreed upon a challenging procedure before an arbitral institution such as, for example, that of the International Chamber of Commerce, then the decision of that institution should be final and there should be no further recourse, e.g. to a local court.

35. Mr. MAGNUSSON (Sweden) said that it was convenient to attribute the functions set out in article 6 to institutions other than courts and he therefore had no objection to the proposal under consideration. However, it did not necessarily follow from article 6 that only one court could be designated. According to the commentary, countries were free to designate several courts. It was also open to individual countries to decide whether appeal to a higher court would be allowed from decisions of the court or tribunal of first instance.

36. The CHAIRMAN invited the Commission to consider whether in situations where the parties agreed that the challenge should be decided upon by another body such as a chamber of commerce, the decision of that body was binding or whether appeal to a court should be allowed.

37. Mr. MAGNUSSON (Sweden) said that if the parties designated a particular body then there could be no appeal, since the choice would have been made by the parties' own will. However, if the challenge were made within the normal judicial system of the country, such as in a district court, then the decision should be subject to appeal to a higher court.

38. Mr. ROEHRICH (France) said that the proposal to give States a broader choice in assigning the functions mentioned in article 6 was acceptable, since it gave flexibility in the face of differences in national legislative bodies. However, he preferred the phrase "competent authority" to "organ" in order to reflect the relationship with the legislation of the State. The effect of the proposal on article 13 could be discussed when that article was considered. However, although courts or other bodies might be appointed by States to exercise the functions in article 6, that did not perhaps mean that other bodies had the same status as courts and that their decisions should therefore be subject to appeal to a higher court. He also felt that to increase flexibility in article 6 might result in further complications in interpreting later articles.

39. He explained that if the principle of allowing the designation of a body other than a court was extended to the remainder of the Model Law, there would be no reason to make a distinction between courts and other authorities provided that they were permitted to act under the relevant national legislation. He suggested that it should be expressly stated in article 6 that designations made under that article should be in accordance with national law.

40. Mr. MOELLER (Observer for Finland) said that he supported the proposal that article 6 should refer to the court or another competent organ; if that organ, however, was not part of the judicial system, then that fact should be mentioned in the article. The question raised in connection with article 13 as to whether the parties could agree to exclude the court by designating a body outside the judicial system was something that should be discussed when that article was reached.

41. Mr. STALEV (Observer for Bulgaria) asked if the proposal to authorize institutions other than courts to perform the functions set out in article 6 would also apply to the setting aside of an award, since he felt that such was not the intention of the proposal under consideration.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics) reminded the Commission that full details of his delegation's proposal were set out in their written submission (A/CN.9/263, p. 18, para. 9). The proposal related specifically to the functions set out in articles 11, 13 and 14 concerning the appointment, challenge and substitution of arbitrators. Clearly, it was within the competence of each State to appoint an appropriate authority to fulfil those functions. However, it would be useful to state that fact in the Law, thus stressing the element of flexibility and thereby making the draft Model Law more attractive to States.

43. Mr. SEKHON (India) supported the proposal to give States a broader choice in assigning the functions mentioned in article 6. He also supported the view that where a court was not designated, the body appointed should be a competent authority.

44. The CHAIRMAN said that if there were no further comments, he would take it that the Commission agreed to adopt the proposal that States should be given a broader choice in assigning the functions mentioned in article 6; care should be taken to word the relevant passage on the basis of the USSR written proposal (AC/CN.9/263, p. 18, para. 9).

45. *It was so agreed.*

The meeting rose at 5.40 p.m.