311th Meeting

Thursday, 6 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)

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

1. Mr. PARK (Observer for the Republic of Korea) referred to the remarks he had made at the previous meeting with regard to the court authorized to exercise the functions mentioned in article 6 (A/CN.9/SR.310, para. 29). He wished to emphasize his point that it should in the first place be the court agreed upon by the parties.

2. The CHAIRMAN observed that both the suggestions made by the previous speaker at the 310th meeting could, if they were not already covered adequately in national legislations, be taken into account by States when adopting the Model Law.

3. Mr. TORNARITIS (Cyprus) expressed support for the Soviet Union proposal.

4. The CHAIRMAN noted that considerable enthusiasm had been displayed for that proposal. He suggested that the Soviet Union representative might be invited to assist the secretariat in incorporating it into the draft text.

5. *It was so agreed.*

Article 7. Definition and form of arbitration agreement

6. Mr. SEKHON (India) proposed a drafting change, to the effect that article 7 (1) should read ". . . all or any existing or future disputes between them . . .".

7. Mr. GRIFFITH (Australia) said that paragraph (1) contained a definition which properly belonged in article 2.

8. The CHAIRMAN said that a suggestion to transfer the definition to article 2 had been made by Mexico in the discussion on that article (A/CN.9/SR.308, para. 10), but had not met with support.

9. Mr. STALEV (Observer for Bulgaria) asked whether a statement of claim and the reply to that claim submitted to an arbitral tribunal would constitute an exchange of letters under article 7 (2) and thus prove the parties' willingness to refer their dispute to arbitration. He proposed that the description of an agreement in writing given in article 7 (2) should be extended to cover an extract from the record of an arbitral tribunal. Such a provision might assist States in a liberal interpretation of the 1958 New York Convention in regard to the question of what constituted an agreement in writing.

10. The CHAIRMAN said that he did not think such an extract would constitute an agreement in writing unless it was signed by the parties.

11. Mr. HERRMANN (International Trade Law Branch) said that in his view a statement of claim and the reply to that claim would constitute an exchange of letters for the purposes of the article. He agreed that an extract from the record of an arbitral tribunal would be an agreement in writing if it was signed by the parties. If the parties had made no specific arbitration agreement, either of them would be entitled to challenge the jurisdiction of the arbitral tribunal under article 16 (2), and failure to do so would indicate acceptance of the arbitral tribunal's authority.

12. Mrs. VILUS (Yugoslavia) reiterated her Government's written suggestion (A/CN.9/263/Add.1, p. 7, para. 7) that the Model Law should allow a party to validate an arbitration agreement by certain acts which were not in writing. If that suggestion was adopted, it would be necessary to include in article 35 a provision that a party must prove that the other party had accepted the authority of the arbitral tribunal.

13. The Government of Argentina had expressed the written view (A/CN.9/263, p. 20, para. 6) that the incorporation of an arbitration clause into a contract by reference, provided for in paragraph (2), should be made subject to the requirement that the party against whom the arbitration clause was invoked should be aware that it had been incorporated into the contract. That was especially relevant to contracts for the sale of commodities. Her delegation considered that the contract itself should inform the parties of the incorporation of the clause.

14. Mr. ILLESCAS ORTIZ (Spain) said that the Commission had two separate problems before it: the form of the arbitration agreement and the proof of its existence before the arbitral tribunal, and it was important not to confuse the two.

15. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that a written document was not sufficient proof of an act under some legal systems; in Japan, for instance, the document must bear an official seal. In his view, the matter was best left to national legislation.

16. Mr. BONELL (Italy) said that the Model Law could only provide general guidelines about what constituted an agreement in writing. He supported the United Kingdom's written proposal (A/CN.9/263, p. 5, para. 16) that the paragraph should use the formulation employed in article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements, as amended.

17. Mr. HOLTZMANN (United States of America) supported the Bulgarian proposal. It gave expression to the legal concept that certain conduct, in the present case participation in the proceedings, constituted evidence of agreement. He agreed with the view expressed by the Italian representative.

18. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that Norway had made a written proposal for paragraph (2) (A/CN.9/263, p. 19, para. 5); it might deal adequately with bills of lading, but a more general clause was needed. The best possibility seemed to be offered by article 17 of the 1968 Brussels Convention, as amended. It was important to establish that contracts effected by the parties in a manner acceptable in trade usage should constitute sufficient agreement in writing for the purpose of the paragraph (2). He urged the Commission to give serious consideration to that point and reflect it in the paragraph.

19. Mr. RUZICKA (Czechoslovakia) said he supported the Bulgarian proposal, which had practical merits.

20. Mr. HUNTER (Observer for the International Bar Association) said he fully agreed with the idea of extending the scope of what could constitute an arbitration agreement. He would nevertheless caution the Commission against going too far in that direction, because a problem might arise if an arbitration took place in a country which had adopted the Model Law and a party sought to enforce it under the 1958 New York Convention in a country which had not adopted the Law.

21. Mr. AYLING (United Kingdom) said that article 17 of the 1968 Brussels Convention, as amended, solved a problem common in international trade and, as far as his delegation was aware, was the only example of its kind. There might, of course, be better ways of solving it.

22. Mr. HOLTZMANN (United States of America) endorsed the comments made by the observer for the Chartered Institute of Arbitrators. He appreciated the words of caution voiced by the Observer for the International Bar Association about the problem which might arise with enforcement under the New York Convention. That problem might be less serious than it seemed, however, since the definition of an agreement in writing in that Convention (article II (2)) stated that it should "include", not that it should "be", the kinds of agreement there specified.

23. Mr. SCHUETZ (Austria) said that he shared the cautious approach recommended by the observer for the International Bar Association. The need for caution was in no way diminished by what the United States representative had said, particularly since the German version of article II (2) of the New York Convention had a very mandatory form. The adoption of the Bulgarian proposal would remove the need for written agreement, a requirement which protected the parties, and he could not accept it unless there was a corresponding requirement that the parties to an arbitration should be informed in advance by the arbitral tribunal that either party could insist on a written agreement if he wished.

24. Mr. BONELL (Italy), speaking on the Bulgarian proposal, said that there was no need for the Model Law to include a specific requirement of express agreement before or during the arbitration procedure, particularly if, once the procedure had started, the parties behaved in a way that unequivocally led to the conclusion that they agreed to arbitration. He thought the Model Law should perhaps lay down that principle explicitly. He did not think that the adoption of the Bulgarian proposal would create any difficulties in regard to the operation of the New York Convention.

25. With regard to the idea of using the wording of the 1968 Brussels Convention, as amended, he thought that consideration should be given to the possibility of establishing some uniformity among the various provisions concerning written-form requirements for jurisdiction and arbitration clauses. Article 17 of the revised version of the Brussels Convention was the most advanced and developed way of addressing a very complex problem.

26. Mr. ROEHRICH (France) said that he agreed with the remarks of the Austrian representative about the requirement of written form. It was true that, as far as international trade agreements were concerned, the 1968 Brussels Convention, as amended, dispensed with it in favour of the form sanctioned by trade practice, but it did so in connection with choice of jurisdiction. The Commission, however, was dealing with the more important question of proof of the parties' agreement to withdraw their dispute from the jurisdiction of a particular State and to have it settled instead by a conventional procedure. The comment made by the United States representative with regard to the English text of article II (2) of the 1958 New York Convention did not apply to the French version, which had the same formulation as the German version. His delegation favoured a conservative approach, based on the need for written agreement, to the way in which the Model Law should deal with the question of proof of the existence of an arbitration agreement. In any case, it would prefer to see the Bulgarian proposal in writing. It could not support either the Norwegian or the Austrian written suggestions (A/CN.9/263, p. 19, para. 5 and p. 20, para. 8).

27. Mr. MOELLER (Observer for Finland) said that if the parties agreed to arbitration, the arbitrator would have no difficulty in obtaining their consent in writing. An extract of the record of the arbitral proceedings would not provide the same proof, and he would prefer the Model Law not to mention it.

28. Mr. STALEV (Observer for Bulgaria) said that since means of telecommunication were acceptable forms of proof, he saw no reason why records of the arbitral proceedings should not be acceptable as well.

29. Mr. HJERNER (Observer for the International Chamber of Commerce) supported the Bulgarian proposal but said that the Yugoslav proposal had merits as well. The basic philosophy of the two proposals was the same, namely that a party should not be able to object to the tribunal's jurisdiction if he had taken part in arbitral proceedings for a long time without objecting to them.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) also supported the Bulgarian proposal, which he found sound in ideas and substance.

31. The CHAIRMAN said that there appeared to be widespread support for the Bulgarian proposal. Unless he heard any objections, he would take it that the Commission approved it. He suggested that the Yugoslav proposal should be taken up under article 16.

32. *It was so agreed.*

33. Mr. MOELLER (Observer for Finland) said that if the notion of an agreement in writing was broadened, situations might arise in which an award could not be enforced under the New York Convention, but the notion should at least be widened to include a reference to bills of lading. It would not be a good idea to go as far as using the wording of article 17 of the 1968 Brussels Convention, as amended, since that would produce differing interpretations of the Model Law in different States.

34. Mr. MTANGO (United Republic of Tanzania) said that, while he appreciated the aim of expanding the notion of written agreement to include agreements in a form established by trade practice, the Commission ought to recognize that such practices were not necessarily established universally. It was doubtful in fact whether in many developing countries there would be sufficient awareness of such forms of trade practices which were established primarily in developed countries. The Model Law shold be easy to adopt in most countries if its provisions included only those notions which were familiar and uncontested. Article 7 should be as clear as possible. He therefore favoured the existing, narrower formulation of the notion.

35. Mr. MAGNUSSON (Sweden) said that the notion of an agreement in writing should be broadened, but he too had doubts about that being done by the use of the wording from the Brussels Convention, which went too far. The Norwegian proposal might provide the best solution, and he suggested that a drafting group should consider it.

36. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the interpretation of the provision in the last sentence of paragraph (2) was not touched on in the secretariat's commentary (A/CN.9/264). Was he correct in thinking that only a written form of contract, not signed by both parties, was sufficient for the application of that sentence? If that was the case, the sentence might justify the view that an arbitration clause in a bill of lading signed only by the carrier was binding on the receiver of the goods as well.

37. Mr. HERRMANN (International Trade Law Branch) said that, as far as he knew, the point had not been considered by the Working Group.

38. Mr. ROEHRICH (France) said that he thought the Working Group on International Contract Practices had intended the last sentence of pararagraph (2) to refer only to model contracts and general conditions. The Norwegian proposal went too far: a reference in a bill of lading to an arbitration agreement should not constitute a valid arbitration agreement unless signed by both parties. If certainty as to the existence of an arbitration agreement was desired, there was no obstacle to concluding one. The present text was reasonable and should remain as it was.

39. Mr. TORNARITIS (Cyprus) said that there was unanimity on one point: there could be no arbitration without the agreement of the parties. But how was that agreement to appear? If in writing, would that mean that without the writing there was no agreement or that the purpose of the writing was simply to prove the agreement? Without departing from the idea of a writing, the Commission might provide that in certain cases a writing might be presumed to have existed, along the lines of the theory of the "lost grant" in English law. If at an arbitral tribunal the parties raised no objection to arbitration, it could be argued that they agreed to it by recourse. If the Working Group's intention had been that certain presumptions of the existence of the writing might be provided, his suggestion would meet the situation.

40. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that she shared the misgivings voiced about using the wording of the Brussels Convention. It used the words "or ought to have been aware", which were particularly dangerous for an instrument that was intended to have as wide an application as possible. The text should remain unchanged.

41. Mr. ILLESCAS ORTIZ (Spain) said that arbitral proceedings should be conducted on the basis of an agreement between the parties with regard to the settlement of their disputes. A unilateral statement stemming from a pre-existing contract should not be accepted as a basis for arbitration because of the awkward consequences that would arise if one of the parties rejected the statement. His delegation favoured the text as already expanded.

42. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that the problem was not that of deciding what constituted an agreement or even an agreement in writing, but of determining whether the agreement was signed by both parties within the meaning of article 7. In present-day trade there were many contracts, even in writing, that were not signed by both parties. To draft the Model Law so narrowly as to exclude them from arbitration under the Model Law would be far too backward-looking. The representative of the Soviet Union had suggested that they might come under the third sentence of paragraph (2), but the fact remained that the second sentence called for signature by both parties. One way of meeting that requirement might be to expand the last sentence of paragraph (2) along the lines of the Norwegian suggestion.

43. The CHAIRMAN said that the Norwegian proposal implied that acceptance of a bill of lading amounted to an agreement on arbitration. That was not merely a question of drafting.

44. Mr. SAMI (Iraq) said that his delegation hesitated to see paragraph (2) amended unless answers could be found to several questions. A document signed by one party and indicating his willingness to resort to arbitration amounted to an offer that lay open for acceptance. Was the second party to indicate acceptance in writing, or could acceptance be tacit? And what legal interpretation would be put on his silence? An arbitration agreement implied the consent of the parties to settle disputes amicably. Such an agreement must be explicit and in writing.

45. Mr. RUZICKA (Czechoslovakia) said that article 7 should state the principle that an arbitral tribunal might settle disputes only on the basis of, and within the framework of, an arbitration agreement. That principle was implicit in article 34, which dealt with the consequences of applying the principle.

46. The CHAIRMAN suggested that the Commission should consider that principle in connection with arbitral procedure. It could subsequently decide to insert the principle in article 7 if it wished. He noted that the Commission had been unable to reach agreement on changing the draft text of the article, apart from accepting the Bulgarian proposal. He suggested that the representatives of Bulgaria and the secretariat should meet to redraft the second sentence of paragraph (2) and also incorporate the drafting suggestion made by India with regard to paragraph (1).

47. *It was so agreed.*

48. Mr. HJERNER (Observer of the International Chamber of Commerce) noted that, although no agreement had been reached on the Norwegian proposal, a substantial number of speakers had commented favourably on it.

The meeting rose at 12.25 p.m.