

313th Meeting

Friday, 7 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 11. Appointment of arbitrators (continued)

Article 11 (4) (continued)

1. Mr. ROGERS (Australia) said that during the discussion of article 2 (e), his delegation had referred to the possibility of substituted service in cases in which it was known that the addressee was not at his last known business address or habitual residence. The problem was that the provision on receipt of communications in article 2 (e) was so carefully worded that a court might think the provision barred it from ordering substituted service. He proposed that the Commission should insert a provision in article 11 to make it clear that such an effect was not intended.

2. The CHAIRMAN said that in his view service under article 2 (e) was confined to service effected in the course of arbitral proceedings, including notification of choice of arbitrators and service of the award, and excluded service ordered by a court. It might be better to make that point clear in article 2 (e).

3. Mr. HOLTZMANN (United States of America) supported the Chairman's suggestion.

4. Mr. ROGERS (Australia) accepted the suggestion.

Article 12. Grounds for challenge

Article 12 (1)

5. Mr. KADI (Algeria) said that although the Working Group on International Contract Practices had already dealt with the

point, his delegation still felt that paragraph (1) should make a reference to the qualifications of a possible arbitrator. He proposed that the beginning of the paragraph should read "When a person is approached in connection with his qualifications for possible appointment . . .".

6. Mr. SAWADA (Japan) proposed that the beginning of paragraph (1) should read "A person approached in connection with his possible appointment as an arbitrator shall disclose . . .".

7. Mr. HOLTZMANN (United States of America) said that he preferred the present wording because it indicated the need for promptness.

8. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that articles 12-15 were of particular interest to arbitrators. He thought the Working Group had done an excellent job on what were essentially mechanical provisions.

Article 12 (2)

9. Mrs. VILUS (Yugoslavia) said that the intention of the word "only" in the first sentence of paragraph (2) seemed to be to confine challenges to the issues of impartiality and independence. That might prove too restrictive in some instances. It might be useful to expand the paragraph to allow challenges on other grounds.

10. Mr. SZASZ (Hungary) said that challenges should be restricted, and the word "only" helped to make that clear. His delegation nevertheless supported the written suggestion from the United States (A/CN.9/263, p. 24 (article 12), para. 3) for the addition to the sentence of the words "or on such additional grounds as the parties may agree".

11. Mr. SEKHON (India) said that he was not happy with the words "an arbitrator may be challenged" at the beginning of paragraph (2). The challenge would be to the arbitrator's appointment, not his person. He suggested that the sentence be redrafted to take account of that. While he felt that the word "only" might be deleted, the inclusion in the sentence of a third factor, as suggested by the United States, was a different matter.

12. Mr. de HOYOS GUTIERREZ (Cuba) endorsed the comments made by the representative of Hungary.

13. Mr. MTANGO (United Republic of Tanzania) said that he would like the word "only" to be deleted. It was true that in most cases challenges would address the question of impartiality or independence, but other factors might arise; in certain circumstances, for example, without the arbitrator's integrity being called into question, his nationality might be thought a sound ground for challenge in view of certain policies followed by his Government.

14. Mr. HOLTZMANN (United States of America) said that the paragraph, like the corresponding paragraph in the UNCITRAL Arbitration Rules, covered the point made by the Tanzanian representative by using the words "justifiable doubts". It was therefore unnecessary to delete the word "only". He agreed that such doubts might in exceptional cases arise because of a person's nationality. He thought that the implication of the last sentence of paragraph 4 of the secretariat's commentary on the article (A/CN.9/264, p. 31) was too broad to represent the view of the Commission, since the general reference, which was to impartiality or

independence, did not cover all the grounds for challenge mentioned in national legislation.

15. Mrs. VILUS (Yugoslavia) pointed out that the arbitration rules of the International Chamber of Commerce contained a provision for challenging an arbitrator if he delayed the proceedings or did not perform his duties in accordance with those rules. The word "only" made the draft text more restrictive than the ICC rules.

16. The CHAIRMAN said that the point made by the previous speaker seemed to be covered in article 14.

17. Mr. TANG Houzhi (China) said that he appreciated the point made by the Tanzanian representative but had no strong feelings about the detection or retention of the word "only". He did not feel that the addition proposed by the United States was necessary.

18. Mr. MTANGO (United Republic of Tanzania) said that the parties might disagree as to whether certain doubts were justifiable. If so, who would decide the point? He supported the addition to the text suggested by the United States.

19. The CHAIRMAN said that article 11 (1) would permit a challenge on the ground of nationality if that was in accordance with the wishes of the parties. He too felt that an arbitrator's nationality might imply justifiable doubts about his impartiality or independence. The reason why the draft text contained the provision in article 11 (1) was of course that under the laws of some countries foreigners could not be appointed as arbitrators.

20. Sir Michael MUSTILL (United Kingdom) said that if an arbitrator's nationality raised justifiable doubts about his impartiality or independence, he could be challenged under article 12 (2). That situation would not alter if the word "only" was deleted.

21. Mr. HOLTZMANN (United States of America) agreed. He did not think the deletion of the word "only" would make any difference. However, the corresponding paragraph of the UNCITRAL Arbitration Rules did not use the word "only", and it might be considered that the Commission follow that example.

22. Mr. LAVINA (Philippines) said that he too favoured the idea of deleting the word "only". He supported the drafting suggestion made by the representative of India.

23. Mr. EYZAGUIRRE (Observer for the Inter-American Bar Association) said that the word "only" should be retained, since it seemed that its deletion would give rise to differing interpretations by different delegations. He supported the written proposal of the United States Government.

24. Mr. KADI (Algeria) said that if the Commission with its expert knowledge could not agree on the interpretation of the article, Governments would find it difficult to understand it clearly.

25. Mr. MOELLER (Observer for Finland) endorsed the remarks made by the Hungarian representative and by the observer for the Inter-American Bar Association. He supported the United States written proposal.

26. Mr. MTANGO (United Republic of Tanzania) pointed out that the Commission had decided at its twelfth session that the Model Law should take due account of the

UNCITRAL Arbitration Rules, but the corresponding paragraph of those Rules did not contain the word "only".

27. Mr. HERRMANN (International Trade Law Branch) said that the Working Group had included the word "only" with the intention of clarifying the meaning of the article. It was important to bear in mind the difference between a model law intended for adoption as national legislation and a set of optional rules which might become part of a contract. He thought the real issue was not the retention or deletion of the word "only" but whether to extend the scope of the article.
28. Mr. de HOYOS GUTIERREZ (Cuba) said that the deletion of the word "only" would make no difference to the meaning. The addition proposed by the United States Government would make the article less restrictive.
29. Mr. SEKHON (India) said that the concept of justifiable doubts as to an arbitrator's impartiality or independence did not seem a restrictive one at all.
30. Mrs. RATIB (Egypt) said that article 11 (5) stated that a court appointing an arbitrator should consider any qualifications agreed upon by the parties as well as the likelihood of the impartiality and independence of the arbitrator. Perhaps a similar formulation should be employed in article 12 (2).
31. Mr. ROEHRICH (France) said that impartiality and independence were already wide-ranging concepts. If the United States written proposal was adopted, the word "only" might be retained.
32. Mr. SZASZ (Hungary) said that in his country, the sentence would be interpreted restrictively even without the word "only".
33. Mr. ILLESCAS ORTIZ (Spain) said that the word "only" should be retained, since it made the restrictive meaning of the article clear. In most cases, a party would specify the reason for his doubts about the arbitrator's impartiality or independence when challenging him. National legislators would be free to specify other grounds than those mentioned in article 12 (2) when they adopted the Model Law. However, his delegation would not object to the addition proposed by the United States.
34. Sir Michael MUSTILL (United Kingdom) said that the Commission's difficulty with article 12 (2) stemmed from the unresolved uncertainty about the meaning of the words "matters governed by this Law" in article 5. If it was true that a challenge on a ground agreed between the parties did not constitute a challenge on a ground contained in the Model Law, article 5 meant nothing and served only to emphasize the lack of clarity about the Model Law, which permeated its entire text.
35. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) suggested that a provision should be added to article 12 (2) to the effect that the parties might agree on other grounds for a challenge.
36. Mr. LAVINA (Philippines) said that it would be helpful to have some clear indication whether the Commission wished to delete the word "only". Accordingly, he made a formal proposal for the Commission to have an "indicative vote" on the issue. That method was not new and had been used by the Commission in the past.
37. Mr. MTANGO (United Republic of Tanzania) observed that support had been expressed for the idea of deleting the word.
38. The CHAIRMAN said he felt it was the view of the majority of the Commission that the word "only" should be retained. The report might explain that the intention of article 12 (2) was the same as that of article 10 (1) of the UNCITRAL Arbitration Rules. The United States written proposal appeared to command considerable support. It should perhaps be made clear, on incorporating it into the draft text, that in exceptional cases the concept of "justifiable doubts" might extend to the nationality of an arbitrator. He suggested that the representatives of the United States, India and Algeria, and any others interested, should meet with the secretariat in order to decide the best way of incorporating the United States proposal into the article.
39. *It was so agreed.*
- Article 13. Challenge procedure*
- Article 13 (1)*
40. Mr. STALEV (Observer for Bulgaria) said that, as the secretariat had indicated in its commentary (A/CN.9/264, p. 32, para. 4, second sentence), article 13 did not adequately cover the problem of a sole arbitrator who was challenged and refused to resign. He suggested that words on the following lines might be inserted in paragraph (3) after the words "rejecting the challenge": "or of a sole arbitrator's refusal to withdraw".
41. Mr. HOLTZMANN (United States of America) drew attention to his country's written proposal for paragraph (1), reproduced in document A/CN.9/263 (p. 25, para. 8), to the effect that a decision reached under a challenge procedure agreed by the parties should be final.
42. The CHAIRMAN asked whether that would mean that the decision could not be reversed by a court.
43. Mr. HOLTZMANN (United States of America) said that while there might occasionally be grounds for appealing such a decision, by and large the presumption should be that it was final and binding on the parties.
44. Mr. ROEHRICH (France) said that the United States proposal seemed to mean that there would be a uniform rule stating the consequences of a choice of challenge procedure by the parties. If so, he would have some hesitation in accepting it, because it was impossible to predict what challenge procedure they might choose. If the parties were to be allowed such freedom of choice under paragraph (1), a view which he accepted, why should not the question of possible appeals against a challenge decision be left open? He would prefer to keep paragraph (1) as it stood.
45. Mr. MOELLER (Observer for Finland) shared the doubts of the representative of France. His view was that the Model Law should exclude recourse to a court during arbitral proceedings and give the parties the right to challenge the award afterwards, but the Working Group had rejected that idea. He could nevertheless accept the text as it stood. It did not create a problem. For example, if the parties had agreed that challenges should be decided by an institution and the agreed institution rejected a challenge, the unsuccessful party would be disinclined to go to court because he would know that by then his chances of success were slight. Thus the existing text should not have the effect of delaying arbitrations.

46. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation's written proposal, reproduced in A/CN.9/263 (p. 26, para. 10), to delete or at least considerably limit paragraph (3) was directly related to paragraph (1). Regardless of what happened to paragraph (3), however, he considered that the United States proposal was justified. If parties had agreed on an institutional procedure for challenging an arbitrator, the procedure should be applied without recourse to the court. Article 34 appeared to allow an appeal against an arbitral award on the ground that an arbitrator was not impartial or independent. If so, why have a judicial procedure for that circumstance in article 13 as well? His view was borne out by the comments of the International Chamber of Commerce, reproduced in A/CN.9/263/Add.1 (p. 10, para. 1).

47. Mr. HOLTZMANN (United States of America) agreed with the Soviet Union representative that court intervention during arbitral proceedings should be avoided.

48. Sir Michael MUSTILL (United Kingdom) said that his Government did not share that view, for reasons which would be clear from its interventions on other articles.

49. The CHAIRMAN suggested that the question should be discussed under paragraph (3).

50. *It was so agreed.*

Article 13 (2)

51. Mr. STROHBACH (German Democratic Republic) referred to the statement made by the Observer for Bulgaria. While the second sentence of paragraph (2) contained a ruling

on how to proceed if one of a panel of arbitrators was challenged, the question remained how to deal with a challenge where there was only one arbitrator. In his opinion the simplest way would be to amend paragraph (2) to provide that a sole arbitrator who was challenged had the possibility of withdrawing, and that if he did not, his mandate would be terminated.

52. The CHAIRMAN pointed out that such a provision could give rise to a never-ending series of challenges.

53. Mr. HERRMANN (International Trade Law Branch) said the secretariat's view was that a sole arbitrator who was challenged and did not resign implicitly made the decision contemplated in paragraph (2). The paragraph therefore seemed comprehensive and simple in operation.

54. Mr. MAGNUSSON (Sweden) said that it might be inadvisable to allow an arbitrator who had been challenged during the proceedings to withdraw voluntarily, since if he did so late in the proceedings the result might be considerable expense and lengthy delay. It might be better to provide that the arbitral tribunal should decide whether a challenged arbitrator should respond to the challenge immediately or at the end of the proceedings.

55. Mr. SCHUMACHER (Federal Republic of Germany) said that where one of a panel of arbitrators had been challenged, it was best that he should not take part in the decision on the challenge. His country would have problems in implementing the rule in paragraph (2) because its national law embodied that principle.

The meeting rose at 12.30 p.m.