

314th Meeting

Friday, 7 June 1985, at 2 p.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 2.05 p.m.

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

Article 13. Challenge procedure (continued)

1. The CHAIRMAN recalled that article 13 was based upon a compromise between two different approaches to the question of challenges. One was that all decisions of the arbitral tribunal on a challenge to one of its members could be the subject of immediate application to the court. Arbitration proceedings would then be suspended until the challenge was either sustained, when the composition of the tribunal would be changed before it could proceed, or the challenge was rejected, when the original tribunal would continue its work. The second system left the decision on a challenge to the arbitral tribunal itself, but a rejected challenge could constitute grounds for contesting the final award. Article 13 embodied a compromise procedure whereby the final decision on the challenge rested with the court but the arbitral tribunal could continue its proceedings pending that decision.

2. Mrs. RATIB (Egypt) proposed that the concluding phrase of article 13 (3) should be amended to read "... pending such a decision, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings, unless the

court orders their suspension". It would be preferable to give the court power to order the suspension of arbitral proceedings when it was made aware of reasons which might justify such a measure.

3. Mr. SEKHON (India) endorsed the Egyptian proposal. If arbitral proceedings continued pending a decision by the court and the latter later upheld the challenge, a good deal of unnecessary expense and delay would be incurred. The period of 15 days set in article 13 (2) and (3) was perhaps too short for cases of international commercial arbitration. He would suggest a period of 30 days unless the provisions of article 11 (1) of the UNCITRAL Arbitration Rules were scrupulously observed. Finally, in the fourth line of the English text of article 13 (2), the word "the" before "later" appeared to be redundant.

4. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation's proposal in respect of article 13 (3) was the most far-reaching of the various comments by Governments on article 13 (A/CN.9/263, p. 26, para. 10). The present text did not in fact constitute a compromise when compared to the legislation of countries such as his own which did not envisage the possibility of challenging an arbitrator before the court until the award had been made. The Soviet delegation's proposal was to delete paragraph 3

altogether from article 13, leaving paragraph 1 to apply if the parties agreed upon a challenge procedure and paragraph 2 to apply if they had not so agreed. It was clear, however, that paragraph 2 could apply only when there was a minimum of three arbitrators and the challenge affected only one of them. The representative of the German Democratic Republic had also rightly pointed out that it could not apply in the case of a sole arbitrator. His own alternative proposal would be to retain paragraph 3 but to restrict it to those cases where the challenge procedure had not been previously agreed by the parties and where the challenge affected a sole arbitrator or more than one arbitrator out of a panel of three.

5. Mr. STALEV (Observer for Bulgaria) said that a possible compromise would be to agree on full autonomy of the parties as far as the procedure for challenge was concerned by deleting from article 13 (1) the phrase "subject to the provisions of paragraph (3) of this article". In practice that would mean that in a case of institutional arbitration there could be no resort to the court if the institutional rules precluded it. As far as *ad hoc* arbitration was concerned, his delegation was ready to accept the procedure set out in article 13 (2) and (3). He suggested that the problem of the sole arbitrator should be considered later.
6. Mr. MTANGO (United Republic of Tanzania) said he preferred the Working Group's compromise, which took into account the fact that various legal systems adopted different attitudes towards court intervention. It was advisable to adopt an arrangement which would facilitate the adoption of the Model Law by all countries. Where intervention by the court was not the practice in national legislation, there was no reason to introduce it.
7. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) suggested a drafting amendment to insert in the second line of article 13 (2) the words "of notification" after the words "within fifteen days" and before the words "of the constitution". The United States proposal was acceptable and, as he understood it, article 13 (2) would apply to all cases except where there was a challenge to a sole arbitrator or to a majority of the arbitrators. He did not agree with the proposal of the representative of the German Democratic Republic that if a sole arbitrator refused to withdraw, he should be made to do so.
8. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) endorsed the amendment proposed by the Egyptian representative.
9. Mr. AYLING (United Kingdom) supported the Working Group's compromise, for the reasons which were set out in the secretariat commentary on article 13 (A/CN.9/264, pp. 32 and 33). If the question was reopened, he would be inclined to support the Egyptian amendment.
10. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that the present wording of article 13 (3) left it to the discretion of the arbitral tribunal whether or not to continue its proceedings. It was not far from the Egyptian proposal, which was a useful one and which she accordingly supported.
11. Mr. GRIFFITH (Australia) said his position was the same as that of the United Kingdom representative.
12. The CHAIRMAN said that the proposal to delete paragraph 3 altogether had received little or no support. As for the two other proposals, they might perhaps be combined into a single amendment to the effect that the parties could

exclude a resort to the court but that when a challenge was brought before the court, the latter could stop the arbitration proceedings. He wondered whether the Commission might consider that a more acceptable compromise than the present article 13.

13. Mr. HOLTZMANN (United States of America) said the the Chairman's suggestion might be too complex.
14. Mrs. RATIB (Egypt) accepted the Chairman's suggestion.
15. Mr. ROEHRICH (France) asked whether it was not possible to keep the present text. His delegation wished to avoid a situation where national courts issued injunctions during arbitration proceedings. Their role should be the more general one of the setting aside of awards, the recognition or enforcement of foreign awards and the provision of assistance, when needed, with the composition of arbitration tribunals. Furthermore, he had doubts as to what sanctions could be envisaged if courts were given positive powers to order the suspension of arbitration proceedings. Article 13 (3), with the reservation in article 13 (1), wisely left the arbitral tribunal the option whether or not to continue its proceedings.
16. The CHAIRMAN said that the Egyptian amendment might put the courts in a difficult position. If a judge made an interim order to suspend the arbitration proceedings, would he not be inclined to uphold the challenge in his final decision? If he decided to reject it, he would have caused a good deal of time and money to be wasted.
17. Mr. SEKHON (India) said that there were clearly constraints in Austria which might make judges unwilling to grant a stay. Under the common law system, there were certain guidelines for the granting of a stay order. First, there must be a *prima facie* case for the request. Secondly, the balance of convenience must lie with the party seeking the stay. Thirdly, the party who requested it must stand to suffer irreparable injury if the stay was not granted. If he were acting as judge in such a case, he would order the tribunal to continue the proceedings but not to make an award.
18. Mr. SCHUETZ (Austria) said his delegation was in favour of the compromise drafted by the Working Group since it combined the benefit of court assistance in a challenge while minimizing the risk of delaying tactics by one or other of the parties. It also took account of all points of view and of the interests of all parties. He was not in favour of the proposal that the judge should be able to grant an interim stay, because of the implication of State liability if that decision was later reversed.
19. Mr. GRIFFITH (Australia) said his delegation concurred with the Chairman's suggestion to combine the proposals of the delegations of Bulgaria and Egypt. He saw no difficulty in common law with the granting of interim relief. There would be no question of judicial or State liability, since a court which contemplated granting an interim order for suspension would probably require the party requesting the suspension to undertake liability for any damages to the other party arising out of a subsequent reversal of the decision. Despite the fact that it would require redrafting of the opening portion of article 13 (3), his delegation preferred that the court should have power of suspension as proposed.
20. The CHAIRMAN invited the Commission to consider what would happen in a situation where the court ordered an interim suspension but the arbitral tribunal continued its proceedings in defiance of the court and made an award.

Subsequently, the final decision of the court was that the challenge, on the basis of which it had ordered the interim suspension, was unfounded. Was the award therefore invalid because it had been made in defiance of the court's interim decision, or was it validated by the court's subsequent final decision?

21. Mrs. RATIB (Egypt) said that the judgement of the court should prevail in all cases.

22. Mr. LAVINA (Philippines) said that in most judicial systems, courts had powers to enforce their decisions. With regard to the question of judicial liability, he felt that a judge would only be liable if he abused his powers.

23. Mr. KNOEPFLER (Observer for Switzerland) said that it was unlikely, in practice, that arbitrators, who were presumably worthy of trust and persons of a certain standing, would fail to respect the ruling of the court.

24. Mr. SAWADA (Japan) said that he was in favour of the text drafted by the Working Group as being the best solution.

25. Mr. TANG Houzhi (China) said that the article 13 as drafted by the Working Group constituted a reasonable compromise on the matter of court intervention, and his delegation was in favour of it.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) felt that the Commission should clarify what was meant by "final" decision. Did it mean that it was final for the parties or, alternatively, a decision not subject to appeal to a higher court? The Commission needed to be clear on whether or not a decision on a challenge would be liable to appeal to a higher Court.

27. Mr. HERRMANN (International Trade Law Branch) said that the intention of the Working Group had been that, for the sake of minimizing delay, decisions on matters of a more administrative nature, such as a challenge, should be final and not subject to appeal to a higher court.

28. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the finality of the decision would be interpreted in individual countries on the basis of their national procedural rules, thus allowing for a possible appeal to a higher court. It was not expressly stated in article 13 that the decision was not subject to appeal. It was important for the Commission to take a decision on the matter to avoid future misunderstandings.

29. Mr. ROEHRICH (France) said that it was difficult, when drafting, to specify that a decision was not subject to appeal. His delegation found the use of the word "*définitif*" ("final") ambiguous. However, to attempt greater precision in drafting might be very time-consuming, and it would wiser to retain "*définitif*".

30. The CHAIRMAN said that the drafting committee, if one was appointed, would attempt to find a form of words to make it clear that there was no appeal. If that proved impracticable, "*définitif*" and "final" would be retained.

31. Mr. MTANGO (United Republic of Tanzania) said he appreciated the intention to allow no appeal but was doubtful if the Model Law could override national procedural laws allowing appeal to higher courts in such cases.

32. The CHAIRMAN said that it was hoped that most countries would accept the provisions of the Model Law but

in certain instances there would, of course, be departures. The wording relating to the finality of the decision on the challenge would be drafted as clearly as possible, but the compromise would be retained. A matter particularly to be borne in mind was the difficulty of the sole arbitrator who would have to decide upon his own impartiality.

33. Mr. STALEV (Observer for Bulgaria) stressed that, in his view, article 13 did not regulate the case of the sole arbitrator.

34. Mr. HOLTZMANN (United States of America) said that the question of which court was competent remained to be decided in cases in which the place of arbitration had not yet been determined.

35. The CHAIRMAN understood that it had already been decided that where the place of arbitration was known, it would be the court in the place of arbitration. Otherwise, it would be the court of the country of the party nominating the challenged arbitrator.

36. Mr. LEBEDEV (Union of Soviet Socialist Republics) had reservations concerning the use of that formula in national legislation since he did not believe it was possible for that legislation to lay down rules of jurisdiction for the court of another country. In his view, if the place of arbitration were not known, then the competent court would be that of the State adopting the Model Law.

37. Lord WILBERFORCE (Chartered Institute of Arbitrators) suggested that an alternative might be to use the mechanisms contained in the UNCITRAL Arbitration Rules and ask the Secretary-General of the Permanent Court of Arbitration to nominate a suitable independent person.

38. The CHAIRMAN doubted whether the Secretary-General of the Permanent Court of Arbitration would be willing to discharge that function.

39. Mr. HOLTZMANN (United States of America) said that he believed the Secretary-General would do so and understood that there were precedents indicating that this had been done.

40. Mr. ROEHRICH (France) said that under a Model Law, as opposed to a convention, it was up to the individual countries incorporating the Model Law to designate, under their own national legislation, which courts would be competent. It was not possible to deal with matters of international jurisdiction in that context. The same problem applied to article 11, although the Commission had not objected when considering it, and to article 14 as well. He felt that it was not the responsibility of the Commission to deal with the question of which court had jurisdiction when the place of arbitration was not known.

41. Mr. SZASZ (Hungary) said that the Model Law should not be addressed to external bodies but should be confined to the courts of the State adopting the Model Law. With regard to the court indicated in article 6, he felt that it would not be too difficult to specify in what circumstances that court was to act.

42. Mr. BONELL (Italy) said that he shared the doubts already expressed. The Model Law was to be incorporated in the legislation of each individual State, and no State could be expected to renounce its prerogatives in the matter of jurisdiction.

43. Mr. MOELLER (Observer for Finland) said that he agreed with the view that it would not be appropriate in the context of a Model Law to specify the competence of international bodies such as that suggested by the observer from the Chartered Institute of Arbitrators.

44. Mr. SAWADA (Japan) asked if there would be discussion on whether an arbitrator who was challenged could participate in a ruling on that challenge. If not, he wished to draw the Commission's attention to his country's written submissions on that matter (A/CN.9/263, p. 24, para. 2 under article 13, second sentence).

45. The CHAIRMAN said that there was a general feeling that the challenged arbitrator should remain and thus rule on the challenge. If there were no comments, he would take it that the Commission agreed on that point.

46. *It was so agreed.*

47. The CHAIRMAN noted that there were no further comments on article 13; that article could therefore be taken as approved, on the understanding that the various drafting proposals would be duly considered.

48. *It was so agreed.*

Article 14. Failure or impossibility to act

49. Mr. BONELL (Italy) said that although article 14 was brief, its implications were considerable. In its written comments, his delegation had proposed that the words "with appropriate speed and efficiency" should be inserted after "fails to act" (A/CN.9/263, p. 26, para. 3). A somewhat similar proposal had been made by Sweden on article 19 regarding the "prompt conduct of the arbitration" (A/CN.9/263, p. 32, para. 1). His delegation attached considerable importance to its proposal since without any such reference to the duty of the arbitrators, the text would lack an important provision. Nearly all national legislations or arbitration rules contained a provision of that kind, and article 14 was the proper place for it. His delegation, however, would welcome suggestions for another location but strongly urged approval of the substance of the proposal.

50. Mr. SCHUETZ (Austria) felt that the Model Law ought to trust the arbitrators to act with speed and efficiency. If such terms were included, it might convey the idea that the Commission assumed that they could perhaps act in some other way. He felt that the phrase "fails to act" was broad enough to cover unacceptable delay. His delegation therefore favoured retaining the article as it stood.

51. Mr. SEKHON (India) agreed fully with the Italian proposal. The expression "for other reasons" suffered from an inherent vagueness, which could be remedied by the addition of a phrase such as "with due diligence" or "with due despatch". He also questioned the use of the comma after the phrase "fails to act". He felt that it would be clearer if the sentence ran "fails to act with due despatch or if he withdraws from his office or if the parties agree on the termination, his mandate terminates".

52. Mr. SAMI (Iraq) said that his delegation also believed that arbitral proceedings should be carried out with speed and efficiency. That was precisely why the parties had resorted to arbitral procedure. Undue delay through prevarication on the part of one of the arbitrators could well be grounds for recourse by the other party and for an application for a

change of arbitrator. His delegation therefore supported the Italian proposal. The next sentence, however, did not seem to be very clear and could be interpreted in several ways. As he saw it, the sentence did not relate to the grounds for inaction but to the situation or state of the arbitrator which did not allow him to act speedily. Perhaps the sentence might run: ". . . if the arbitrator cannot act speedily or efficiently . . .".

53. Mr. MTANGO (United Republic of Tanzania) said that speed did not mean efficiency in every case. He proposed, therefore, that only the word "efficiently" should be inserted.

54. Mr. MOELLER (Observer for Finland) pointed out that the wording of the proposal was "appropriate speed". As for the suggestion that appropriate speed and efficiency were already implied, he felt that the additional language should be introduced into the sentence in order to make it entirely clear.

55. Mr. ROEHRICH (France) wholeheartedly supported the Italian proposal.

56. Mr. HOLTZMANN (United States of America) expressed concern about the implications of the term "efficiency", which seemed to invite review of the entire nature of the arbitration proceeding. The arbitrators, who had the power to decide how the proceedings should be conducted, might, for example, ask for more written evidence than had been provided. The possibility of a court review of the efficiency of the procedure opened up a whole area going beyond the question of speed. He knew of no national law relating to arbitration which invited a judicial review of efficiency.

57. The question of speed was different: many domestic laws provided for various time periods. The insertion of the phrase "due despatch" might be of some help to arbitral proceedings. He read the related article in the UNCITRAL Arbitration Rules as requiring due despatch. While he felt there was no need for any addition, provided it was understood that article 14 did not change the UNCITRAL Rule, his delegation would not object to a phrase such as "reasonable speed" or "due despatch".

58. Mr. de HOYOS GUTIERREZ (Cuba) felt that a phrase such as "due diligence" would improve the article.

59. Sir Michael MUSTILL (United Kingdom) said that his delegation viewed with great alarm the proposal to introduce the concept of "efficiency". It seemed to invite any party dissatisfied with the way the proceedings were going to apply to a court on the grounds that there had been inefficiency. He therefore opposed the inclusion of the term. On the question of "speed" he agreed with the United Republic of Tanzania. He felt that the United Kingdom's arbitration law, which had been in effect for some fifty years, covered the point satisfactorily.

60. Mr. STROHBACH (German Democratic Republic) thought the article should be left as it stood. The reference to the performance of the arbitrators' functions implied that all the necessary steps would be taken in due time.

61. Mrs. VILUS (Yugoslavia) urged caution over the Italian proposal. It might prove difficult to interpret the terms "efficiency" and "speed".

62. Mr. SAWADA (Japan) shared the concern behind the Italian proposal. The exact wording necessary to achieve its purpose could perhaps be left to a small *ad hoc* drafting party. He suggested that "due despatch" might be appropriate.

63. Mr. ABOUL-ENEIN (Observer of the Cairo Regional Centre for Commercial Arbitration) felt that a judgement on the work of the arbitrators before it was completed, which was implied in the word "efficiency", could create problems. He would not object to the use of "speed" but would prefer to leave the article as it stood.

64. Mr. BONELL (Italy) said that his delegation was ready to withdraw the term "efficiency" in view of the criticism it had attracted. He stressed that his delegation's proposal called for "appropriate" speed; that qualification was important. If the Commission preferred the wording suggested by India, however, his delegation would be glad to accept it.

65. Mr. ROEHRICH (France) objected that it was impossible to translate "due despatch" into French.

66. Mr. MTANGO (United Republic of Tanzania) said that "due despatch" had been used for fifty years in one system of arbitration rules. It had been held in many quarters that the term "appropriate" had no legal meaning.

67. Mr. LAVINA (Philippines) said that the term "failure to act" had a meaning in law, and any adjective attached to it would be debatable.

68. Sir Michael MUSTILL (United Kingdom) said that his delegation would support the inclusion of the terms "reasonable", "appropriate" or "due".

69. Mr. HOLTZMANN (United States of America) said that his delegation could agree to "reasonable", on the understanding that its inclusion in the Model Law did not mean that it was not required in the interpretation of article 13 (2) of the UNCITRAL Arbitration Rules.

70. The CHAIRMAN stated that the proposed amendment to insert "reasonable speed" in the text was adopted, and that it was viewed as an elaboration, not a change, of the UNCITRAL Rule.

71. Mr. HERRMANN (International Trade Law Branch) said that the representative of Iraq had referred to a possible

ambiguity in the second sentence of the article with regard to the term "grounds". The reference was to the three basic instances of failure to act mentioned in the first sentence.

72. Mrs. RATIB (Egypt) suggested that the article should be divided into two paragraphs.

73. The CHAIRMAN said that, since a number of points of language had been raised, it would be wise to appoint a small *ad hoc* drafting party, consisting of the representatives of Iraq, India and the United Republic of Tanzania, to discuss the language with the secretariat and prepare an agreed text.

74. *It was so agreed.*

75. Mr. SCHUMACHER (Federal Republic of Germany) wished to reaffirm his delegation's written proposal, and that of Austria, to insert the words "unless otherwise agreed by the parties" in article 14 (A/CN.9/263, p. 26, paras. 1 and 2).

76. Mr. SCHUETZ (Austria) said that, in the interests of party autonomy, the parties should be free to agree on a procedure in cases coming under article 14.

77. Mr. HOLTZMANN (United States of America) found the written suggestion of the Federal Republic of Germany attractive. Article 13 (1) started with the words "The parties are free to agree on a procedure . . .", and the matter dealt with in article 14 was akin to challenge. The proposal of the Federal Republic of Germany was not intended to mean that there should be no possibility of a court review. The parties, who should be entitled to decide on their appointing authority, could also decide whether due speed was being exercised, and that should be made clear first, with provision for the possibility of a court review at a later stage.

78. The CHAIRMAN said that that was an entirely new proposal the acceptance of which would imply major drafting changes.

The meeting rose at 5.05 p.m.