317th Meeting

Tuesday, 11 June 1985, at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

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

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

Article 34. Application for setting aside as exclusive recourse against arbitral award

Article 34 (1)

1. Mr. de HOYOS GUTIERREZ (Cuba) proposed that the words "recourse to a court" should be amended to read "recourse to a competent court", so as to bring out the link between article 34 and article 6.

2. The CHAIRMAN suggested that the proposal should be submitted to a drafting committee.

3. *It was so agreed.*

Article 34 (2)

4. Sir Michael MUSTILL (United Kingdom) expressed concern that the exclusive list of grounds for setting aside an award would not cover all cases of procedural injustice. In its written comments, reproduced in A/CN.9/263/Add.2 (p. 9, para. 32), his Government had given some examples of that. The concept of public policy, mentioned in paragraph (2) (*b*) (ii), did not exist in his country and he could not say whether in other countries it would cover the examples he had mentioned. His delegation would welcome the addition to the article of a more general formula to ensure the possibility of recourse in all cases of serious procedural injustice.

5. Mr. MTANGO (United Republic of Tanzania) said that the list of grounds for setting aside an award should not be enumerated exhaustively; some flexibility should exist in that respect.

6. Mr. BROCHES (Observer for the International Council for Commercial Arbitration), referring to paragraph (2) (*a*) (i), said that the incapacity of only one of the parties should be sufficient reason for setting aside the award. The phrase "under the law applicable to them" was not clear; it would be preferable to state that the parties lacked the capacity to conclude an agreement. Although the present wording followed that of the 1958 New York Convention, the Commission might wish to depart from the Convention where its meaning was not clear.

7. Mr. SEKHON (India) agreed with the United Kingdom representative that the grounds given in article 34 (2) did not cover all possible cases. The Commission might, for instance, wish to include a provision covering misconduct of the arbitrator; if so, he could suggest suitable wording from his country's Arbitration Act. The question of public policy was a delicate one: it might, for example, be the public policy of a State with a considerable foreign debt to prohibit payments from being made to creditors in foreign countries, including payments owed under international commercial arbitration awards.

8. Mr. SAMI (Iraq) agreed with the Observer for ICCA that the phrase "under the law applicable to them" was vague. The rule governing party incapacity should make it absolutely clear that the incapacity should exist at the time when the arbitration agreement was concluded, not afterwards.

9. Mr. PELICHET (Observer for The Hague Conference on Private International Law) endorsed the remarks of the Observer for ICCA. He drew attention to his organization's comments on article 36 (1) (*a*) (i), reproduced in A/CN.9/263/Add.1 (p. 22, para. 3), which applied to the second part of article 34 (2) (*a*) (i) as well. It did not seem right that the question of the validity of the arbitration agreement should be submitted to the law of the country of arbitration, since many arbitration proceedings were held in a country which had no connection with the main contract or the parties to it. Under most systems of private international law, validity of an arbitration agreement was decided by the law governing the main contract. He therefore proposed that the second part of article 34 (2) (*a*) (i) should be amended to read "or the said agreement is not valid; or . . .".

10. Mr. MOELLER (Observer for Finland) agreed with previous speakers that the phrase "under the law applicable to them" should be amended. As to the proposal by the Observer for The Hague Conference, he thought the point was covered by the fact that the territorial scope of the Model Law allowed the parties complete freedom to choose the law applicable to their arbitration agreement.

11. Mr. LOEFMARK (Sweden) endorsed the comments of the Observer for Finland.

12. Mr. SZURSKI (Observer for Poland) agreed with other speakers that the words "under the law applicable to them" were unclear and should be amended in the manner suggested by the Observer for ICCA. Also, it was right that the incapacity of only one of the parties should be a sufficient ground for setting aside the award, and paragraph (2) (*a*) (i) should be amended to provide for that.

13. Mr. GRIFFITH (Australia) expressed approval of the changes recommended by previous speakers.

14. Mr. JOKO-SMART (Sierra Leone) said that he agreed with the United Kingdom and Tanzanian representatives that the grounds for setting aside an arbitral award should not be specified too rigidly. Also, the present text of article 34 (2) (*a*) (i) implied that the applicant should furnish proof that both parties were under some incapacity; surely it would be preferable for the applicant to furnish proof of its own incapacity only.

15. Mr. ROEHRICH (France) endorsed the comments of the Observers for ICCA and The Hague Conference.

16. Mr. de HOYOS GUTIERREZ (Cuba) said that the contents of paragraph (2) (*a*) (i) referred back to the words "the party making the application furnishes proof that . . .". The best way of meeting the view expressed by a number of speakers, namely that the incapacity of only one party should be sufficient reason for setting the award aside, would be to formulate the provision in the singular. Criticism had been directed against the exhaustive nature of the present list of

reasons for setting aside an arbitral award. There were two possibilities for remedying the situation: to add new grounds, which might entail the risk of making the list too long, or, which he would prefer, to add a general provision, such as "for any other cause", which would not preclude the grounds which the list already mentioned and would allow for new reasons as well.

17. The CHAIRMAN observed that most countries would find it difficult to accept an open list since their legislation provided for exhaustive lists.

18. Mr. MTANGO (United Republic of Tanzania) supported the suggestion that paragraph (2) (*a*) (i) should be formulated in the singular. The article was well drafted otherwise and was consistent with the New York Convention and the 1961 European Convention, as well as with article 36 of the draft text. He therefore had doubts about the wisdom of accepting the other suggestions for altering it. Could the secretariat explain why the provision had been drafted as it had?

19. Mr. HERRMANN (International Trade Law Branch) said that an earlier draft of the provision had been almost identical with what the Observer for ICCA had just recommended, but the Working Group had decided to use the wording of the 1958 New York Convention instead because that had enabled article 34 to be aligned with article 36. It was true, of course, that the effects were not the same under the two articles. Under the Model Law and the 1958 New York Convention, an award could not be enforced in any other country once it had been set aside.

20. The CHAIRMAN asked the Observer for ICCA whether his recommendation that paragraph (2) (*a*) (i) should refer to the incapacity of only one party meant that the applicant should be able to furnish proof of the incapacity of either party. Some speakers had in mind the idea that only the incapacity of the applicant should be provided for.

21. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that his recommendation was that the applicant should be able to furnish proof of the incapacity of either party.

22. Mr. BARRERA GRAF (Mexico) said that the list of reasons for setting aside an arbitral award should be an exhaustive one. He agreed with the representative of the United Kingdom that the present list was inadequate and should be expanded. He also agreed with the recommendation of the Observer for ICCA about the applicant being able to furnish proof of the incapacity of either party. A further point was that subparagraph (*a*) (i) dealt with two separate matters, incapacity of the parties and invalidity of the agreement, which involved different principles of private international law. He suggested that they should be placed in separate provisions. As far as the latter subject was concerned, the existing formulation seemed too general.

23. Mr. VOLKEN (Observer for Switzerland) said that if the incapacity of a party to the arbitration agreement was proved, the agreement itself would be invalid. That suggested that subparagraph (*a*) (i) need not deal with the question of party incapacity at all. He did not feel that the time was ripe for altering the reference to the applicable law. It was true that the content of paragraph 2 was the result of efforts to achieve a parallel between articles 34 and 36. He had serious doubts whether such a parallel was both desirable and feasible. The main reason for setting aside an arbitration award should rest in the idea of manifest injustice.

24. Mr. HOELLERING (United States of America) said that he supported the ICCA recommendation but not The Hague Conference proposal.

25. Mr. BONELL (Italy) said that he too supported the ICCA recommendation. He understood the reason for The Hague Conference proposal but preferred the text to remain as it was in that respect; in the first place, it should as far as possible be in line with the New York Convention and, more important, no decision had yet been reached on the question of the law which should govern the arbitration agreement. If the Commission decided to delete the reference to two systems of law, it should do so in article 36 as well.

26. Mr. JARVIN (Observer for the International Chamber of Commerce) also supported the ICCA recommendation. He could not accept The Hague Conference proposal without further discussion.

27. Mrs. RATIB (Egypt) said that a party should not be able to lodge an objection under article 34 that had already been presented under article 8 or article 16.

28. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that he supported the ICCA recommendation. He also favoured the idea that the reference to the law applicable should be changed. The proposal by The Hague Conference certainly needed careful study before there could be any thought of adopting it.

29. Mr. BOGGIANO (Observer for Argentina) supported the ICCA recommendation and the proposal of The Hague Conference but suggested that the latter should be discussed further in connection with article 36.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked for confirmation that acceptance of the ICCA recommendation concerning the words "the parties" was purely a drafting matter and would not imply that the Model Law and the New York Convention differed on that point substantively.

31. The CHAIRMAN said that the secretariat confirmed that.

32. Mr. SZASZ (Hungary) said that it was important to develop a system of international commercial arbitration but also important to ensure consistency between the various instruments governing the subject, particularly in order to help the user. If it was absolutely essential for the Commission to depart from the wording of documents such as the New York Convention, it should do so and explain its reasons in the report, but it should not make changes of that kind for purely cosmetic reasons.

33. Mr. STALEV (Observer for Bulgaria), supported by Mr. TANG Houzhi (China), endorsed the statement of the Hungarian representative.

34. Mr. MTANGO (United Republic of Tanzania) said that where the Model Law agreed word for word with the text of an existing international convention which was working well in practice, the Commission should only change it if it was unanimous about the need to do so.

35. The CHAIRMAN said it should be borne in mind that the 1958 New York Convention did not deal with the setting aside of awards.

36. Sir Michael MUSTILL (United Kingdom), while agreeing with the representative of Hungary, said that it would be wrong to incorporate wording from the 1958 New York Convention into the Model Law blindly.

37. Turning to paragraph (2) (*a*) (ii), he said that the textual distinction which existed between that provision and article 19 (3) was unnecessary. The two texts should be assimilated to each other.

38. Mr. HOLTZMANN (United States of America) said that he was inclined to agree. Making the change in the text of paragraph (2) (*a*) (ii) would of course bring the Model Law into line with the UNCITRAL Arbitration Rules but would at the same time distance it from the New York Convention.

39. Mr. SAMI (Iraq) said that the meaning of the words "or was otherwise unable to present his case" was unclear. There might be many reasons why a party was unable to present his case, but if they were personal ones or if the party could have avoided the situation, he should not be given an opportunity to have the award set aside.

40. The CHAIRMAN suggested that the Commission's report should make that point clear.

41. In response to drafting points raised by Mrs. RATIB (Egypt), Mr. SEKHON (India) and Mr. JARVIN (Observer for the International Chamber of Commerce), he suggested that the report should include a general statement to the effect that the Commission had had no wish to depart from the substance of the 1958 New York Convention but had felt compelled on occasion to adopt a slightly different wording for the Model Law. States could then decide whether to follow one or the other.

42. Mr. GRAHAM (Observer for Canada) suggested that paragraph (2) (*a*) (ii) was the place to take into account the comments of the United Kingdom about the need for paragraph (2) to cover all cases of serious procedural injustice. Three of the instances of that mentioned by the United Kingdom in its written observations (A/CN.9/263/Add.2, para. 32) related to lack of opportunity to present a case. He agreed with the United Kingdom representative that subparagraph (*a*) (ii) needed to be assimilated to article 19 (3), since procedural misconduct by the arbitrators interfered with the right of the parties to present their case. The problem might be overcome by redrafting it.

43. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that the text of paragraph (2) (*a*) (iii), which followed that of the 1958 New York Convention, was unclear and perhaps redundant.

44. Mr. STALEV (Observer for Bulgaria) said that it was necessary to consider the implications of article 16 (2) with respect to the procedures for setting aside and for the recognition and enforcement of arbitral awards. He suggested that article 16 (2) should be amended to make it clear that the precluding of the parties from raising a plea of lack of jurisdiction twice applied not only to the arbitration proceedings but also to the procedures for setting aside and for the recognition and enforcement of awards.

45. Mr. BONELL (Italy) said that the matter should be dealt with outside the Model Law by national legislators.

46. Mr. HOLTZMANN (United States of America) said that his delegation had always assumed that if a waiver with respect to jurisdiction or the scope of application of an award had not been raised during the arbitration proceedings, those issues could not be raised for the first time by the losing party in proceedings under article 34.

47. Mr. ROEHRICH (France) said that his delegation had the contrary understanding. It would be wiser to leave the present text as it was.

48. Mr. SAMI (Iraq) and Mr. SEKHON (India) endorsed the comments made by the representative of France.

49. Mr. GRAHAM (Observer for Canada) requested the secretariat to clarify the meaning of the last part of paragraph (2) (*a*) (iv), beginning with the words "failing such agreement".

50. The CHAIRMAN said that his own view was that if the parties had agreed on a matter not in conflict with the mandatory provisions of the Model Law and the arbitration procedure had run counter to that agreement, there would be grounds for setting the award aside. If, however, there had been no such agreement, the procedure must follow even the non-mandatory rules of the country in which it was sought to set the award aside, and there might be grounds for setting it aside if those rules had not been observed.

51. Mr. HERRMANN (International Trade Law Branch) said that the meaning of the wording in question, which appeared in the 1958 New York Convention and in article 36 as well, was disputed. The Working Group had taken the view that, for the purposes of article 34, it should be interpreted as meaning that an agreement between the parties which was in conflict with the mandatory provisions of the Model Law should not be used as the standard against which the conduct of the arbitration proceedings should be measured.

52. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) noted that subparagraph (*a*) (iv) provided that if an agreement conflicted with the mandatory provisions of the Model Law, non-observance of the agreement was not a ground for setting the award aside. It did not say that observance of such an agreement *was* a ground for setting it aside. The subparagraph would better reflect the Working Group's intention if the words "unless such agreement was in conflict with a provision of this Law" were replaced by the words "or the provisions of this Law".

The meeting rose at 12.40 p.m.