

319th Meeting

Wednesday, 12 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;
A/CN.9/XVIII/CRP.1 and 3-6)

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

Article 34 (4) (continued)

1. Mr. SAWADA (Japan) said that the paragraph was an unknown quantity. That was not a reason for its deletion, but it would help his delegation to make up its mind about the provision if the secretariat could explain how it would work.
2. Mr. HERRMANN (International Trade Law Branch) said that the aim of paragraph (4) was to give the court the option of not setting aside the arbitral award when there was a possibility of curing the defect in the arbitral proceedings. The question would be considered by the court referred to in article 6. The court would not, however, be able to invite the arbitrators to cure the defect in the case of some of the reasons for setting aside listed in article 34 (2), for example incapacity of a party or invalidity of the arbitration agreement. In some legal systems, once the arbitrators had made their award their mandate could not be revived, but paragraph (4) would empower the court to do that.
3. Sir Michael MUSTILL (United Kingdom) said that his delegation was strongly in favour of the principle expressed in paragraph (4). In the United Kingdom, remission had proved a very valuable remedy by avoiding the choice between completely quashing the award and allowing no relief at all. It was very rare in practice in the United Kingdom for an award to be set aside; when a court had to intervene, the less drastic remedy of remission was usually granted. His delegation supported the written suggestion of the International Bar Association, reproduced in A/CN.9/263 (p. 48, para. 18), that the paragraph should be formulated along the lines of the version given in paragraph 126 of A/CN.9/246.
4. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that from the viewpoint of arbitrators paragraph (4) was very valuable, and he was perturbed at the prospect of its deletion. The objections raised to the paragraph were not serious and concerned only the obscurity of the language and the novelty of the provision. The remission system already operated well in many countries and offered a better means of dealing with procedural defects or mistakes by the arbitrators than the alternative, which was the complete setting aside of the award.
5. Mr. SEKHON (India) said that his delegation was in favour of paragraph (4). The fact that such a provision was not found in some legal systems was not a reason for excluding it if it was meritorious. The aim, after all, was harmonization of law. He suggested that the words "an opportunity to resume the arbitral proceedings" should be replaced by the words "an opportunity to reconsider the arbitral proceedings".
6. Mr. STALEV (Observer for Bulgaria) proposed, as a compromise, that the closing portion of the paragraph should read "an opportunity to eliminate such grounds for setting aside as are remediable without reopening of the arbitral proceedings". That would cover cases when, for example, the arbitrators had not given reasons for their award or had not all signed the award. The present text of the paragraph implied that the arbitrators would have the power to vacate the contested award, for otherwise a new award would not be possible; until the court set the contested award aside, if it did, the parties and the arbitrators would be bound by it. The arbitrators' power to vacate should therefore be stated explicitly, a point to some extent covered by the useful suggestion made by the German Democratic Republic (A/CN.9/SR.318, para. 77).
7. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the Council was strongly in favour of paragraph (4), which would benefit both arbitrators and businessmen. He thought that the Bulgarian proposal would make the provision more generally acceptable.
8. Mr. JOKO-SMART (Sierra Leone) said that if the purpose of the paragraph was to empower the court to remit an award to the arbitrators, it would be better to delete the words "and so requested by a party", which cast doubt on whether the court had that power. The hands of the court should not be tied by the wishes of the parties.
9. Mr. GRIFFITH (Australia) said that paragraph (4) was a sensible and useful provision in its existing form. He endorsed the view of the Observer for the International Council for Commercial Arbitration that it would benefit arbitrators and businessmen. His delegation opposed the Bulgarian proposal.
10. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that his delegation was in favour of the provision, which would save the parties time and money in cases in which the court found there was a defect in the arbitral proceedings. The arbitrators' review of their award should, however, be for the purpose of curing defects in the award itself and should not result in the validation of an award in the making of which mandatory procedural rules had not been observed.
11. Mr. GRAHAM (Observer for Canada) endorsed the comments made by the representative of Australia.
12. Mr. HOLTZMANN (United States of America) said that his delegation could accept the paragraph as submitted by the Working Group on International Contract Practices even though the version suggested by the International Bar Association seemed marginally better. It opposed the Bulgarian proposal but liked the idea put forward by the representative of Sierra Leone.
13. Mr. JARVIN (Observer for the International Chamber of Commerce) said that he was in favour of the principle contained in paragraph (4) but thought the provision should be amended to provide that the court had the power to suspend the setting-aside proceedings of its own motion and not only at the request of a party.
14. Mr. GOH (Singapore), Mr. LAVINA (Philippines) and Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) spoke in favour of the paragraph.

15. Mr. SZURSKI (Observer for Poland) said that his delegation supported the idea of including the paragraph in the Model Law but thought it would rarely need to be used in practice. It would be improved by various drafting changes, including the replacement of the words "grounds for setting aside" by "possible grounds for setting aside" or "grounds for setting aside indicated by the court". The remission procedure might of course cause problems for the arbitrators if they were located in another country, and it would increase the costs of the arbitral proceedings.

16. Mr. MTANGO (United Republic of Tanzania) said that he was not opposed to the inclusion of the paragraph in the Model Law. He wished to point out, however, that if the court had the power to order a resumption of the arbitral proceedings, the potential costs to the parties would be much higher. The parties should therefore have a say in any decision on remission.

17. Mr. SAWADA (Japan) said that his delegation felt strongly that the court should have the power to remit only at the request of a party.

18. Mr. MOELLER (Observer for Finland) said that even if the words "and so requested by a party" were deleted, the provision would still be understood in his country to mean that remission could only be ordered if requested by a party. The Commission might make the intention of the paragraph clearer by using a formula such as "the court, at the request of a party or of its own motion".

19. The CHAIRMAN said that in his opinion the words "when asked to set aside an award" covered that point.

20. Mr. VOLKEN (Observer for Switzerland), Mr. SCHUMACHER (Federal Republic of Germany) and Mr. OLUKOLU (Nigeria) expressed their agreement with the Japanese contention that the court should have power to remit only at the request of a party.

21. The CHAIRMAN said that it seemed to be the general view that the paragraph should be included in the Model Law and that the court should have the power to suspend the setting-aside proceedings only when so requested by a party. There appeared to be little support for the Bulgarian proposal. He suggested, therefore, that the substance of paragraph (4) should not be changed and that the various drafting suggestions which had been made should be submitted to the drafting committee.

22. *It was so agreed.*

Article 1. Scope of application (continued)

Article 1 (1) (continued)

23. Mr. HOLTZMANN (United States of America) introduced the text proposed by the *ad hoc* working party (A/CN.9/XVIII/CRP.1).

24. Mr. ROEHRICH (France) said that his delegation was not happy with the new proposal. Its main defect was that it no longer used the term "international commercial arbitration", which despite different interpretations had become a well-known concept in international trade circles. The new wording created ambiguity, especially by using the words "other economic relations". His delegation favoured a broad interpretation of the concept of "commercial" but was unwilling to exchange satisfactory wording for unsatisfactory. Any reference to "services and other economic relations" should appear in the footnote and not in the text.

25. Mr. WAGNER (German Democratic Republic) said that his delegation could accept either the original text or the new version. If the Commission adopted the latter, he would like to have the words "whether contractual or not" inserted after the words "economic relations". If the original text was retained, the insertion should come after the words "commercial nature" in the footnote.

26. Mrs. RATIB (Egypt) said that her delegation preferred the original text.

27. Sir Michael MUSTILL (United Kingdom) said that his delegation tended to prefer the original text. The new version introduced into the text two ideas taken from among a number of ideas expressed in the original footnote. It would be better for all those notions to be in the footnote since they were all of similar importance. He agreed with the representative of France that the term "international commercial arbitration" had become generally accepted.

28. Mr. SAMI (Iraq) said that his delegation also had problems with the new proposal. The original text should be retained and any necessary details defining commercial activity should appear in the footnote.

29. Mr. HOLTZMANN (United States of America) said that the *ad hoc* working party had inserted the phrase "economic relations" in the text of the paragraph with the intention of summarizing the contents of the original footnote. The word "services" was intended to reflect the majority's desire that they be included. He noted that the intention was to make clear that a contract to buy trousers, a contract to build a factory and a contract to lend money would all be "commercial" under the Model Law, even though they might not be under some laws.

30. Mr. SAWADA (Japan) said that his delegation preferred the original text. If the Commission decided to adopt the new version, the phrase "including services and other economic relations" should be replaced by the words "including those involving services", and the words "commercial matters" should be replaced by "commercial transactions".

31. Mr. ILLESCAS ORTIZ (Spain) agreed with the French representative with regard to the term "international commercial arbitration"; it was a *nomen juris* recognized in many countries and should appear in the Model Law. The reference to "services and other economic relations" should appear in the footnote.

32. Mr. LEBEDEV (Union of Soviet Socialist Republics), supported by Mr. SZASZ (Hungary) proposed that the original text should be maintained, with two minor amendments to the second footnote: the end of the first sentence should be amended to read "... relationships of a commercial nature, whether contractual or not", as suggested by the representative of the German Democratic Republic; and in the second sentence, the words "exchange of goods" should be amended to read "exchange of goods or services".

33. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that he too preferred the original text of paragraph (1).

34. Mr. ROEHRICH (France) supported the proposed Soviet Union amendment with the exception of the addition of the words "whether contractual or not"; they were unnecessary, because the commercial nature of the transaction was the deciding factor.

35. Mr. TANG Houzhi (China) said that he found the Soviet Union proposal acceptable in its entirety. A further point was that it should be made clear that the paragraph was not intended to affect State immunity.

36. The CHAIRMAN suggested that the report on the session should make it clear that the Commission intended the Model Law to cover also parties other than strictly commercial parties but that it did not affect State immunity.

37. Mr. MTANGO (United Republic of Tanzania) expressed support for the Soviet Union proposal.

38. Mr. JARVIN (Observer for the International Chamber of Commerce) said that the footnote to the paragraph should make it clear that State enterprises could be considered commercial parties for the purposes of the Model Law. No such clarification existed in the text at present.

39. The CHAIRMAN noted that there was widespread support for the Soviet Union proposal. Unless there was any objection, he would take it that the Commission wished to adopt it.

40. *It was so agreed.*

Article 1 (2) (c) (continued) and proposed new paragraphs (4) and (5)

41. Mr. GRIFFITH (Australia), introducing the proposal in A/CN.9/XVIII/CRP.5, said that it attempted to reconcile the various views expressed in the Working Group on International Contract Practices and in the Commission. The proposed new paragraph (4) had been introduced as a *lex specialis* provision.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics), explaining the proposed new paragraph (5), said that the Commission had agreed that a provision of national legislation forbidding arbitration on certain disputes should not be overruled by the Model Law. The text of the paragraph was an adaptation of article 1 (3) of the 1966 European Convention Providing a Uniform Law on Arbitration.

43. Mr. MTANGO (United Republic of Tanzania), referring to the proposed inclusion of the new paragraph (4), said that it should be left to States to decide whether the Model Law should overrule a national law.

44. Mr. BONELL (Italy) said that the proposal was acceptable. He understood the concern of the Tanzanian representative about the *lex specialis* provision and wished to point out that States could choose which provisions of the Model Law they would adopt.

45. Mr. SAWADA (Japan) said that the wording of the proposed paragraph (4) might be brought into line with that of the suggested paragraph (5) by amending the words "other provisions of law" to read "provisions of any other law". With regard to the proposal for paragraph (2) (c), his delegation wished to repeat the view it had expressed at the 307th meeting (A/CN.9/SR.307, para. 44) that it was not desirable that the decision about the internationality of an arbitration should lie with the parties.

46. Mrs. RATIB (Egypt) suggested that the proposed new paragraphs (4) and (5) should be amalgamated.

47. Mr. HOLTZMANN (United States of America), supported by Mr. LEBEDEV (Union of Soviet Socialist Republics), said that the *ad hoc* working party had decided that the matters dealt with in the two paragraphs involved different scopes of application and should therefore be treated in separate paragraphs.

48. Mr. KADI (Algeria) said that his delegation's only problem with the proposal concerned paragraph (4), about which he shared the Tanzanian representative's view. He suggested that the paragraph should be deleted.

49. Mr. BOGGIANO (Observer for Argentina) shared the view expressed by the representative of Japan about paragraph (2) (c), which represented a fundamental departure from the original text and would allow a dispute to be internationalized even if in reality it was connected with only one State.

50. Mr. LAVINA (Philippines) said that his delegation also felt that concern about paragraph (2) (c) and preferred the original version of the provision. A further point concerning the *ad hoc* working party's version of subparagraph (c) was that it used the word "country" instead of the normal term "State". He could not see the reason for that.

51. Mr. SZURSKI (Observer for Poland) said that he fully supported the position taken by Japan.

52. Mr. SCHUMACHER (Federal Republic of Germany) said that the content of the proposed paragraph (4) was not appropriate for a Model Law. However, if it was adopted it would conflict with paragraph (5) and would then need to contain the words "notwithstanding paragraph (5)".

53. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that he too had considerable doubts about paragraph (4). He had found no evidence in the summary record of any discussion which might justify the insertion of such a provision into the Model Law. It was true that at the 307th meeting (A/CN.9/SR.307, para. 57) the Commission had agreed that the United States written suggestion in A/CN.9/263 (p. 8, para. 3), namely that the Model Law should express the principle of *lex specialis*—a valuable idea—should be considered by the *ad hoc* working party in connection with the Soviet Union proposal about dispute arbitrability. His view of the principle of *lex specialis* was that in matters not governed by the Model Law, States should be free to include any provisions they wanted in the national law. The proposed paragraph (4), however, seemed to reverse that principle completely by making the Model Law override the provisions of national law. Moreover, it employed the controversial expression "matters governed by this law".

54. Sir Michael MUSTILL (United Kingdom) endorsed the comments of the previous speaker.

55. Mrs. VILUS (Yugoslavia) said that her delegation had been unhappy with the original wording of paragraph (2) (c) and was even less happy with the new version because it gave the parties unlimited autonomy, something which was far from desirable.

56. Mr. HOLTZMANN (United States of America), referring to the observation made by the Chartered Institute of Arbitrators, said that the question of *lex specialis* was discussed in a secretariat note (A/CN.9/WG.II/WP.50) prepared for the guidance of the Working Group on International Contract Practices. The note stated (p. 2, para. 3): "It seems to be clear and accepted that the Model Law is

designed to establish a special legal régime for international commercial arbitration which, in the States adopting it, would prevail over any other municipal law on arbitration." That was the concept which the *ad hoc* working party had tried to make explicit. Perhaps the objection to paragraph (4) could be overcome by the addition of the words "except as otherwise provided herein" at the end of the provision.

57. Mr. VOLKEN (Switzerland) said that he was not satisfied with paragraph (2) (c). Although he was not against the idea of opting-in, he would give preference to a solution which introduced that idea in a direct and not only in an indirect manner. In short, he would prefer the addition of a phrase to paragraph (1) to the effect that the Model Law also applied to an international commercial arbitration if the parties expressly so agreed.

58. He pointed out that, with the exception of the second sentence in paragraph (1), the first three paragraphs of article 1 concerned the field of the substantial application of the Model Law, whereas the proposed paragraphs (4) and (5) concerned the relationship of the Model Law to national laws. It therefore seemed logical that the proviso, which dealt with the relationship between the Model Law and international agreements, should be removed from paragraph (1) and become a separate paragraph, (3) *bis*.

59. The CHAIRMAN said that a majority seemed to accept the proposal in A/CN.9/XVIII/CRP.5 for paragraphs (2) (c) and (5), subject to the possibility of drafting improvements. What had not been accepted was paragraph (4). Since it had given rise to so much comment, he suggested that a note should be included in the report to the effect that the purpose of the Model Law was to cover the field of application otherwise covered by national law, but that it had been left to the legislators in States accepting the Model Law to deal with the situation as they understood it. He would take it that the Commission approved that suggestion along with the proposal for paragraphs (2) (c) and (5).

60. *It was so agreed.*

Article 2. Definitions and rules of interpretation (continued)

Article 2 (e) (continued)

61. Mr. RUZICKA (Czechoslovakia) introduced document A/CN.9/XVIII/CRP.3. He explained that the provisions on receipt of communications had been drafted as a new article because they seemed out of place in article 2.

62. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission approved the proposal in A/CN.9/XVIII/CRP.3.

63. *It was so agreed.*

Article 11. Appointment of arbitrators (continued)

Article 11 (4) (c) (continued)

64. Mr. STROHBACH (German Democratic Republic), introducing document A/CN.9/XVIII/CRP.4, said that it contained a proposal intended to avoid the need for the Model Law to give a definition of an "appointing authority". The proposal should be corrected by the insertion of the words "functions in connection with" before the words "the appointment of arbitrators". This would cover the situation

in which the parties named someone to appoint an appointing authority.

65. Mr. ROEHRICH (France) proposed that the provision should open with the words "A third person or institution . . .".

66. The CHAIRMAN suggested that the proposal in A/CN.9/XVIII/CRP.4, as corrected, should be submitted to a drafting committee together with the French suggestion.

67. *It was so agreed.*

Article 14. Failure or impossibility to act (continued)

68. Mr. SEKHON (India) introduced a revised draft of article 14 (A/CN.9/XVIII/CRP.6). The words "with reasonable speed" had been placed in square brackets, which the Commission could remove if it decided that the words were necessary.

69. The CHAIRMAN suggested that the square brackets should be deleted straightaway since the earlier discussion of the article seemed to indicate that the Commission wished that notion to be included in the draft Law.

70. *It was so agreed.*

71. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked how the moment of termination of the arbitrator's mandate would be decided under the new provision; and whether the second sentence of the article meant that, in the event referred to in the first sentence, either party could apply to the court to have the arbitrator continue in office.

72. Mr. SEKHON (India) said that the date of withdrawal from office was a matter of substance and had not been referred to the *ad hoc* working party. It was certainly a point that the Commission should deal with. Regarding the second question, there was a link between articles 14 and 15. For the Commission's guidance, he read out the text which the *ad hoc* working party intended to propose for article 15.

73. Mr. HOLTZMANN (United States of America) said that, after hearing the new proposal for article 15, he thought that the whole problem might be solved by employing the original version of article 14 with the addition of a sentence to the effect that the mandate of an arbitrator would also terminate if for any other reason he withdrew from his office or the parties agreed on termination. Regarding the notion of reasonable speed, he would prefer the words "without undue delay" to be used.

74. The CHAIRMAN said that in his view the United States suggestion would not cover the question of the moment of termination of the arbitrator's mandate. Where an arbitrator did not withdraw and there was no agreement between the parties on a date of termination, and where nevertheless he was unable to perform his functions or failed to act, what would be the precise moment at which his mandate terminated? Until it was terminated he was still an arbitrator.

75. Mr. SZURSKI (Observer for Poland) said that he could not accept the United States representative's suggestion. Provision must be made for situations in which there was no moment of automatic resignation. There were two possibilities: to provide that the mandate of an arbitrator terminated if he became *de jure* or *de facto* unable to perform his functions, or for other reasons failed to act, and thereby

delayed proceedings for more than a specified period; or to provide that if an arbitrator failed to withdraw when asked by the parties, the parties would have recourse to the court, which would decide whether there were really grounds for withdrawal or not.

76. Mr. BONELL (Italy) said that the new draft seemed to change the entire scope of the article by making it deal exhaustively with the terms of the arbitrator's mandate, yet he understood that the Commission's intention was not to deal with the contractual relationship between parties and arbitrators. The affirmation of the arbitrator's right to withdraw for any reason and the right of the parties to terminate his mandate for any reason, without further qualification, was a departure in substance from the original version, which he

strongly preferred, subject only to the inclusion in it of the reference to reasonable speed.

77. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the proposal submitted by the *ad hoc* working party contained a rational element which might be used without, however, any change to the substance of the article. He himself was in favour of keeping the article as it stood, with the inclusion of a reference to reasonable speed and of a separate paragraph to deal with other reasons for the termination of an arbitrator's mandate, either by himself or by the parties. There would then be no need for that to be dealt with in article 15.

The meeting rose at 12.45 p.m.