

320th Meeting

Wednesday, 12 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;
A/CN.9/XVIII/CRP.6-8)

Article 14. Failure or impossibility to act (continued)

1. Sir Michael MUSTILL (United Kingdom) recalled that the Working Group had exhaustively discussed at its fifth session the formulation of article 14 (A/CN.9/233, paras. 113-115). The present text was perhaps not ideal, but it was sufficiently satisfactory and did not warrant further alteration.
2. Mr. de HOYOS GUTIERREZ (Cuba) suggested that reference should be made to the efficiency as well as the speed of arbitration, since that was an equally important factor.
3. The CHAIRMAN said that it was impossible to reopen the discussion. If he heard no objection, he would take it that the Commission agreed to retain the original text of article 14 with the addition of the reference to reasonable speed (A/CN.9/XVIII/CRP.6), the exact formulation of which would be left to the drafting committee.

4. *It was so agreed.*

Article 7. Definition and form of arbitration agreement (continued)

Article 7 (2)

5. Mr. PENKOV (Observer for Bulgaria), introducing the proposed amendment (A/CN.9/XVIII/CRP.7) to the second sentence of article 7 (2), said that in all logic, an exchange of statements in which neither party denied the existence of an agreement had to be regarded as constituting an agreement in writing. Moreover, in some countries that was one of the rules of arbitration, so that difficulties would arise if the Model Law did not refer to the point. He had the impression that the majority favoured that approach.
6. Mr. GRIFFITH (Australia) suggested that the concluding phrase should be recorded to read "or in an exchange of statements of claim and defence one party alleges and the other party does not deny the existence of an agreement".

7. Mr. SZURSKI (Observer for Poland) said that the intention of the proponents of the amendment would be made clearer if the concluding phrase read "or if in an exchange of statements of claim and defence neither party has denied the existence of an agreement".

8. Mr. SEKHON (India) supported the Australian suggestion.

9. Mr. HOLTZMANN (United States of America) said that he could accept either the Polish or the Australian formulation.

10. The CHAIRMAN suggested that the proposal in A/CN.9/XVIII/CRP.7 should be sent to the drafting committee for amendment along the lines suggested by the Australian representative.

11. *It was so agreed.*

Article 16. Competence to rule on its own jurisdiction (continued)

Article 16 (3)

12. The CHAIRMAN, introducing the proposed amendment to article 16 (3) (A/CN.9/XVIII/CRP.8), said it constituted a reasonable compromise between two divergent approaches. He drew attention to the two alternative time-limits indicated in square brackets.

13. Mr. SZURSKI (Observer for Poland) said that he had doubts about certain expressions in the proposed amendment. First, the reference in the second sentence to "a preliminary ruling" was inappropriate; the reference should be rather to a ruling on a preliminary question, which ruling should be final. Secondly, mention was made of a "notice of that ruling" but it was not clear what kind of notice was intended: was it to be an order of the court? Thirdly, it would be preferable to replace the phrase "to decide the matter" by "to decide on the jurisdiction". However, in his view, any decision or intervention by the court in the proceedings of the arbitral tribunal should be provided for only at the stage of setting aside the award. He would suggest a text on the following lines: "At the request of a party, the ruling, as a preliminary question,

should be made in the form of a preliminary award, from which each party may resort to the court specified in article 6 within 30 days after its receipt. While the question of jurisdiction is pending with the court, the arbitral tribunal may, and at the request of a party shall, continue the arbitral proceedings."

14. The CHAIRMAN said it was impossible to reopen the original debate on the article. He asked the Commission to concentrate on the question of the desirable time-limit to be imposed.

15. Mr. REINSKOU (Observer for Norway) said his delegation would prefer 30 days. He had difficulty in accepting that the court specified in article 6 should be empowered to give a final decision on such an important matter as the jurisdiction of the arbitral tribunal. There should either be provision for appeal to a higher court under article 16 or it should be possible to reopen the matter under the setting aside procedure.

16. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) enquired what would happen if a party did not take advantage of its right of recourse to the court under article 16 (3). Could that fact be regarded as a waiver if that party subsequently wished to act under article 34 to set aside the entire award, including jurisdiction?

17. The CHAIRMAN said that it would be a question of national procedural law on the authority of judicial decisions (*res judicata*).

18. Mr. GRIFFITH (Australia) said 15 days was too short a period for his country in the context of international arbitration. It was his delegation's understanding that article 21 (4) of the UNCITRAL Arbitration Rules was subsumed in article 16 (3). If such was the case, he did not wish to suggest any change in the text and would leave the matter to the discretion of the arbitrators in each particular case.

19. Mr. MOELLER (Observer for Finland) said that a period of 15 days was somewhat short, although the period need not necessarily be as long as 30 days. With regard to the concluding phrase, it was his understanding that the continuation of the arbitral proceedings could include the making of the award. He did not wish any change in the text; a record in the report would suffice.

20. Mr. de HOYOS GUTIERREZ (Cuba) pointed out that, owing to an error in the Spanish text, the decision had been described as subject to appeal.

21. The CHAIRMAN said that the point had been noted by the secretariat.

22. Sir Michael MUSTILL (United Kingdom) said that in the United Kingdom, for many years the challenge time had been six weeks. In the interests of speeding up arbitration proceedings, it had been shortened to three weeks, but that had generally been regarded as a mistake in the context of international arbitration. He also noted that the text made no provision for the court to extend the period in cases of hardship. He did not think that 15 days was a practical possibility.

23. Mr. SAMI (Iraq) said that 15 days was very short; he favoured 30 days. The phrase "such a request is pending" was ambiguous, and he suggested that it should be replaced by "which request has not been decided by the court".

24. Mr. ROEHRICH (France) said he had considerable difficulty with the compromise of introducing a new recourse to the courts in article 16 (3), which meant that article 34 would no longer provide the only means of recourse, as the secretariat's commentary on that article suggested (A/CN.9/264, p. 71, para. 1). However, since such was the case, he thought that the additional recourse should be as limited as possible. There should certainly be no question of appeal from the decision of the court, and the period should not be longer than 15 days. There were specific provisions in national legislation for extending that period in cases where the distance separating the parties concerned was considerable.

25. Mr. GRIFFITH (Australia) said that the same arguments were valid for extending the period in article 13 from 15 to 30 days.

26. Mr. SZURSKI (Observer for Poland) said that 15 days was not a practical period not only for reasons of distance but also because of the need for consultations.

27. Mr. HOLTZMANN (United States of America) noted that so far only one speaker had favoured a period of 15 days. He himself supported a 30-day period.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to specify a period of 30 days in article 16 (3) and, for reasons of consistency, also in article 13; it was understood that 30 days meant 30 calendar days.

29. *It was so decided.*

Article 35. Recognition and enforcement and

Article 36. Grounds for refusing recognition or enforcement

30. Sir Michael MUSTILL (United Kingdom) proposed that before engaging in a detailed discussion of article 35, the Commission should first consider the general question of whether articles 35 and 36 should be retained at all.

31. *It was so agreed.*

32. Mrs. RATIB (Egypt) said that article 35 (1) made it incumbent upon a State which had adopted the Model Law to recognize and enforce an arbitral award except in the situations described in article 35 (2) and (3). Article 36 set out a comprehensive list of grounds for refusing recognition or enforcement. Those issues were, however, covered by the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the success of which was universally recognized. States which had already ratified or acceded to that Convention would have no need for articles 35 and 36 of the Model Law, which would simply create useless duplication within their domestic legislation. The articles were likely to be useful only to a minority of States, which would probably accede to the 1958 New York Convention sooner or later anyway. There was therefore no reason to keep articles 35 and 36, and she proposed their deletion.

33. It might be argued that the articles should be retained because some provisions of the 1958 New York Convention were defective or ambiguous, but the solution should then be sought not by creating a potentially confusing duplication, but by reviewing that Convention and making a serious attempt to improve it.

34. Should that proposal to delete the two articles be rejected, the problems of setting aside and enforcement would

coexist within the Model Law, a phenomenon which to her knowledge was unprecedented in international texts.

35. Mr. MOELLER (Observer for Finland) said that in its written observations, Finland had urged that "no provisions on recognition and enforcement of foreign awards should be included in the Model Law, unless they are more favourable" than those contained in the 1958 New York Convention (A/CN.9/263, p. 50, para. 5). Since that was unlikely, articles 35 and 36 should be deleted.
36. Mr. SCHUETZ (Austria) supported the proposal to delete articles 35 and 36. There was an internationally recognized and satisfactory convention on the subject already, and the incorporation of similar provisions in the Model Law would cause difficulties in respect of awards made outside a State adopting it. It was, moreover, unnecessary to provide for recognition and enforcement of awards made inside the territory of a State, because under the law of many countries, including his own, an award had the same legal effect as a court ruling. For that reason as well, his delegation favoured the deletion of articles 35 and 36.
37. Mr. GRAHAM (Observer for Canada) said that his country had not been able to adopt the 1958 New York Convention because under the Canadian constitution, arbitration fell within the legislative competence of the separate Provinces and not that of the Federal Government of Canada. It therefore favoured retaining articles 35 and 36.
38. Sir Michael MUSTILL (United Kingdom) said he agreed that, in respect of awards made in foreign countries, articles 35 and 36 could be deleted but felt that the situation regarding domestic awards might be different. In the United Kingdom, for example, such awards were not self-enforcing.
39. Mr. de HOYOS GUTIERREZ (Cuba) said that his country, which had ratified the 1958 New York Convention and the 1961 Geneva Convention, believed that articles 35 and 36 added nothing to the Model Law but could cause problems; he accordingly favoured their deletion.
40. Mr. SEKHON (India) said that his delegation would also like to see the articles deleted for the reasons stated by the United Kingdom representative.
41. Mr. SAMI (Iraq) said that the articles were neither important nor useful to States which had acceded to the 1958 New York Convention. For various reasons, however, nearly half of the States Members of the United Nations, including his own, had not done so. The Commission should therefore give serious consideration to enabling States which had not ratified the Convention to ensure the enforcement in their territory of awards handed down in other countries and thereby achieve uniformity in international commercial arbitration. There was no harm in keeping the articles in the Model Law, and he supported the Canadian proposal to retain articles 35 and 36.
42. Mr. LOEFMARCK (Sweden) said that his delegation had initially advocated the deletion of the articles but it now felt that there would be a substantial gap in the Model Law if no reference was made therein to the enforcement of awards. The articles would be useful to those States which had not acceded to the 1958 New York Convention.
43. Mr. HOELLERING (United States of America) said that he favoured the retention of articles 35 and 36. Many countries might find it much easier to use the Model Law than to accede to the 1958 New York Convention. Article 35 would be needed even if foreign awards were not covered in the Model Law; his delegation would, however, prefer provisions on both domestic and foreign awards to be incorporated. Lastly, in the footnote to article 35, the word "onerous" seemed somewhat too strong.
44. Mr. ROEHRICH (France) said that although his country had ratified the 1958 New York Convention, he would prefer articles 35 and 36 to be retained. If they were deleted, the Model Law would contain no reference to ways of facilitating the recognition and enforcement of arbitral awards. He proposed, however, that when the Model Law was transmitted to the General Assembly, it should be accompanied by an UNCITRAL request to the Sixth Committee to invite States that had not yet done so to consider ratifying the 1958 New York Convention or to be guided by that Convention in their domestic legislation and in the conclusion of bilateral agreements. Consistent provisions on international commercial arbitration would be an indispensable supplement to national legislation.
45. Mr. JOKO-SMART (Sierra Leone) said that the only reason advanced for the deletion of articles 35 and 36 had been that they duplicated provisions in the 1958 New York Convention. Many countries, however, had not ratified that Convention, including his own. Sierra Leone was extremely interested in the Model Law and believed that in order to make it as comprehensive as possible, articles 35 and 36 should be retained.
46. Mr. TAN (Singapore) said that his country was not a party to the 1958 New York Convention; since articles 35 and 36 would be of assistance to States like his, they should be retained.
47. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Model Law was intended to promote both consolidation and comprehensiveness of national legislation. Some countries might have legislation that was superior to the provisions of the Model Law, but others did not. The only substantial argument advanced against articles 35 and 36 had been that they were superfluous, but that was not the case for all countries. The Commission was expected to produce a finished product, and without provisions on recognition and enforcement, the Model Law would be incomplete. Even if the articles did not embody a better régime than that provided for in the 1958 New York Convention, some provisions on recognition and enforcement would still be useful in the Model Law. Moreover, since article 1 (1) provided that the Model Law did not affect multilateral or bilateral agreements, there would be no problem of conflict with such agreements.
48. Even though it had been highly praised, the 1958 New York Convention had been adopted by only 60 or 70 countries. At least some of those which had not so far adopted the Convention could, by using the Model Law, make essential changes in their domestic legislation. He supported the proposal by the representative of France that when the Model Law was transmitted to the Sixth Committee, the Commission should at the same time refer to the numerous General Assembly resolutions which had invited countries that had not yet ratified the 1958 New York Convention to do so as soon as possible.

49. Mr. RUZICKA (Czechoslovakia) urged the retention of the articles, which would not prevent countries from ratifying the 1958 New York Convention.
50. Mr. BONELL (Italy) said that he favoured the retention of the articles for the reasons advanced by the representative of the Soviet Union.
51. Mr. TORNARITIS (Cyprus) said that although the Egyptian argument about duplication was convincing, his delegation supported the retention of the articles.
52. Mr. TANG Houzhi (China) said that his Government was considering accession to the 1958 New York Convention. He had no strong feelings about the deletion of the articles but hoped that, if the Commission decided to retain them, their content would not go beyond what was set out in that Convention.
53. Mr. LAVINA (Philippines) said that his delegation associated itself with the views expressed by the delegations of the United States, Sierra Leone and the Soviet Union. The place of arbitration and the place of award were not always the same, and there might be a hiatus in enforcement if provisions like those in articles 35 and 36 were not included in the Model Law. Moreover, there was no conflict between the Model Law and the 1958 New York Convention; the Model Law would actually supplement that Convention.
54. Mr. VOLKEN (Observer for Switzerland) said that the main argument put forward in favour of the deletion of the articles had been that there was already a Convention on the subject, but only about 64 countries had actually ratified or acceded to it. Article 1 (3) of the 1958 New York Convention stated that, when signing, ratifying or acceding to it, any State could declare that it would apply it to the recognition and enforcement of awards made only in the territory of another contracting State. Thirty-eight countries had chosen to take advantage of that provision. That left only 26 States which applied the Convention *erga omnes* and which would not be served by the inclusion of similar provisions in the Model Law. For that reason, articles 35 and 36 should be retained.
55. Mr. SONO (Secretary of the Commission) noted that 66 States had now ratified or acceded to the Convention, Guatemala and Panama being the most recent.
56. The CHAIRMAN noted that the majority seemed to favour the retention of the articles. If he heard no objection, he would therefore take it that the Commission could commence a detailed discussion of the provisions of the articles.
57. *It was so agreed.*
58. The CHAIRMAN invited comments on article 35 (1).
59. Mr. BONELL (Italy) thought that it might be advisable to specify the type of award envisaged in articles 35 and 36. It should be made clear that they referred only to awards rendered in respect of international commercial arbitration as defined in article 1.
60. Mr. HERRMANN (International Trade Law Branch) said that the secretariat had been requested to prepare a draft provision on the territorial scope of application of the Model Law for consideration by the Commission and to indicate the possible exceptions to it. He felt that the best procedure would be to await the outcome of the Commission's debate in order to ascertain whether there was a need to retain the phrase "irrespective of the country in which it was made" in articles 35 and 36. It might be possible to express that thought in the context of the territorial scope of application. The Italian representative's suggestion, however, also involved the substantive point of whether articles 35 and 36 should be wider in scope than international commercial arbitration only; that would, in a sense, be in line with the 1958 New York Convention. Purely from the point of view of drafting, it would be better to postpone the decision on whether to retain an explicit reference to the idea that the recognition and enforcement provisions covered an arbitral award irrespective of the country in which it was made, and to take that decision after deciding on the question of the territorial scope of application.
61. Mr. ZUBOV (Union of Soviet Socialist Republics) said that his delegation's views on article 35 were outlined in its written comments (A/CN.9/263, p. 52, para. 2). There were, however, a number of other considerations to be envisaged in regard to the article. For example, the draft contained no explicit provision as to the time at which an award became recognized as binding, although subparagraph (a) (v) of article 36 (1) said that enforcement of an arbitral award could be refused if the award had not yet become binding on the parties. The question of when the award became binding must be decided in accordance with the law applied by the State in which the award had been made. In the case of an award made "in this State", there should probably be an indication that it became binding in accordance with the law of "this State". In article 31, on the form and content of the award, a provision could appropriately be inserted to require an indication of the time at which an award became binding.
62. The CHAIRMAN said that the general question as to when an award became binding related more to the earlier articles. The question whether a decision to recognize an award should have a retroactive effect or not was a question that ought perhaps to be dealt with in article 35.
63. Mr. ROEHRICH (France) said that the retroactivity of the effect of the recognition of an award was a very controversial point that was best left open. The general question of when an award became recognized as binding on the parties should perhaps be dealt with.
64. The CHAIRMAN thought it would be advisable to leave that point to the discussion on the articles relating to awards which came before article 31. He believed that the point raised by the Italian delegation had been settled by the explanation from the secretariat.
65. Mr. BONELL (Italy) still thought that difficulties would arise unless it was specified that article 35 referred to arbitral awards rendered in respect of disputes that fell within the scope of article 1 of the Model Law. As far as awards rendered within the territory of the same State were concerned, that could go without saying, but problems could arise in respect of awards rendered abroad. For example, an award rendered in Italy that was not of a character dealt with by the

Model Law would not fall under articles 35 and 36, whereas an award of the same kind rendered abroad would fall under them.

66. Mr. HOLTZMANN (United States of America) asked what would happen in the case of a domestic arbitration in a State (other than the State in which enforcement was sought) which did not meet the standards of international commercial arbitration according to any of the established tests, a case where, after the award had been rendered in that State the losing party took all its property to another State; the winning party then sought to enforce that purely domestic award in the latter State because that was where the losing party's assets were lodged. Was article 35 intended to provide for recognition in such a case or not? It would be provided for in the 1958 New York Convention and, as he saw it, the provision in the Model Law would also cover it.

67. The CHAIRMAN believed that it would not, if the case was not one of international commercial arbitration within the Commission's definition. Article 35 could not exceed the field of application of the other provisions of the Model Law. The Commission's task was to consider matters of international trade law. Arbitration that was purely domestic, or not commercial, would not be covered by the Model Law.

68. Mr. HOLTZMANN (United States of America) said that, in that case, it would be wise, for purposes of clarity, to meet the point made by Italy.

69. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) felt that the provision was quite unambiguous. The award in question must be an award to which the Model Law was directed. If the award whose application was sought was domestic, it was covered by the 1958 New York Convention.

70. Mr. JARVIN (Observer for the International Chamber of Commerce) suggested that, in order to clarify the position, the grounds for refusing recognition might be expanded to include the fact that the award was not an international award within the meaning of the Model Law.

71. Mr. CHO (Observer for the Republic of Korea) said that it might be better to make a distinction in the character of arbitral awards even if the Commission accepted the territorial scope of application, and to state the exceptions clearly. Awards made within the territory of "this State" under the Model Law and other provisions of domestic law could be enforced under the provisions of the Model Law. On the other hand, awards made outside the territory of "this State" and under foreign law were dealt with by the 1958 New York Convention. There were other situations, as his delegation had pointed out in its comments (A/CN.9/263, p. 49, para. 2), for example an award made outside the territory of "this State" under "this Law" or made in the territory of "this State" under a foreign law. There should be guidelines for the recognition and enforcement of such awards.