321st Meeting

Thursday, 13 June 1985, at 9.30 a.m.

Chairman: Mr. PAES de BARROS LEAES (Brazil)

The meeting was called to order at 9.45 a.m.

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

Article 20. Place of arbitration

Paragraph (1)

1. Mr. SEKHON (India) proposed that the following words should be added at the end of the paragraph: "having regard to the circumstances of the arbitration, including the convenience of the parties".

2. Mr. BROCHES (Observer, International Council for Commercial Arbitration) said that such a change would be consistent with the view taken earlier of the notion of the place of arbitration, at a stage in the history of the Model Law when factors of that kind had been considered relevant for inclusion. It was somewhat out of harmony, however, with current opinion on the matter, in which the selection of the place of arbitration was associated with the determination of the applicable law.

3. Mr. GRAHAM (Observer for Canada) supported the proposal and said it was a reasonable one.

4. Lord WILBERFORCE (Observer, Chartered Institute of Arbitrators) said that the idea was useful as a guide but it should be expressed in a comment separate from the article itself.

5. Mr. HOLTZMANN (United States of America) supported the suggestion made by the preceding speaker. However, the comment should be confined to mentioning the circumstances of the arbitration. That would be in line with article 16 (1) of the UNCITRAL Arbitration Rules. If the convenience of the parties was mentioned it would appear to give it more prominence than other relevant factors, say, enforceability of the award or whether a State had adopted the Model Law. With a comment of the kind he had mentioned, the actual text of the Model Law would leave the arbitrators' discretion clear and unqualified, and that was probably desirable for a piece of legislation.

6. Mr. ROEHRICH (France) strongly supported the Indian proposal. The wording should be added to the article itself. A rule of that kind would provide sound guidance for the arbitral tribunal.

7. Mr. BOUBAZINE (Algeria) and Mr. LAVINA (Philippines) said they approved the Indian amendment and its inclusion in the article itself.

8. Mr. TANG Houzhi (China) likewise supported the Indian amendment and favoured its inclusion in the article, since the convenience of the parties was an important factor. While it was right to take the UNCITRAL Arbitration Rules into account, there was no need to copy them word for word.

9. Mr. JOKO-SMART (Sierra Leone) said that he was unable to support the Indian proposal, excellent though the idea was. In the first place, there were the reasons mentioned by the United States; also, the parties might not be able to specify a place convenient to both of them.

10. Mr. de HOYOS GUTIERREZ (Cuba) said he favoured the inclusion of the wording of the Indian proposal in the text of the article. It was important to give the arbitral tribunal guidance on the need to take account of the parties' convenience.

11. Mr. CHO (Observer for the Republic of Korea) supported the Indian proposal except for the inclusion of the reference to the convenience of the parties. It would be best to keep to what was in article 16 (1) of the UNCITRAL Arbitration Rules, since there could be a conflict between the parties about what place was convenient for them. Moreover, the meaning of convenience was implicit in the words "the circumstances of the arbitration".

12. Mr. LOEFMARCK (Sweden) opposed the idea of amending the text of the article itself, for the reasons given by the Observer for the Chartered Institute of Arbitrators and the representatives of the United States of America and Sierra Leone. He could accept a separate comment mentioning the UNCITRAL Rules and the circumstances of the arbitration, but not the parties' convenience.

13. Mr. OLUKOLU (Nigeria) supported the Indian proposal for the reason given by the representative of France. It was important to take the convenience of the parties into account.

14. Mr. ABOUL ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that he approved the Indian proposal and the inclusion of the wording in the article itself.

15. Mr. TORNARITIS (Cyprus) observed that the circumstances in question were normally taken into consideration by arbitrators anyway. He could nevertheless accept the Indian proposal and agreed that the wording should be added to the text of the article.

16. Mr. BARRERA GRAF (Mexico) said that he approved the proposal to add to paragraph (1) a reference to the circumstances of the arbitration, which would be in keeping with the UNCITRAL Arbitration Rules. He did not agree about the proposed reference to the convenience of the parties, a subject which would be more appropriate for the last paragraph of article 19. He shared the views of the Observer for the Republic of Korea and the United States representative.

17. Mr. SCHUETZ (Austria) said he approved the text as it stood but was prepared to accept the addition of a reference to the circumstances of the arbitration and a mention in a comment that they included the question of the convenience of the parties. His delegation suggested that course of action as a compromise. It particularly supported the view expressed by the representative of Sierra Leone.

18. Mr. BONELL (Italy) supported the Indian proposal.

19. Mr. HJERNER (Observer for the International Chamber of Commerce) said that it was not appropriate to include directives in a law. He supported the view expressed by the Observer for the Chartered Institute of Arbitrators. If, however, a criterion for determining the place of arbitration had to be mentioned, it should be enforceability of the award.

20. Mr. SCHUMACHER (Federal Republic of Germany) said that he approved the Indian proposal in principle, but felt that the question of the convenience of the parties should be dealt with in a separate comment referring to the principles laid down in article 19 (3).

21. Mr. MTANGO (United Republic of Tanzania) also supported the Indian proposal. Although it could be argued that it would make little difference whether the second part were included or not, he felt that it helped to clarify the article and would therefore assist users of the Model Law.

22. Mr. HOLTZMANN (United States of America) endorsed the Austrian compromise suggestion. However, in mentioning the convenience of the parties, the comment should make it clear that not only physical convenience but other relevant factors, such as the suitability of the law of the place of arbitration and the effect of the choice of place on the enforceability of the award under the New York Convention or bilateral agreements, should be taken into account by the arbitrators.

23. Mr. BONELL (Italy) agreed with the previous speaker's remarks.

24. Mr. SAMI (Iraq) said that he supported the idea of adding to the article, which should make it clear that the place of arbitration must be convenient for the parties. That was very important, especially for developing countries. At a recent meeting of the Asian-African Legal Consultative Committee, delegates had pointed out the undesirability of choosing a place which would involve heavy travel costs for the parties; they had stressed that it should be in or near to where one of the parties resided, and in the developing country in the case of an arbitration between a party in a developing country and one in a developed country. There were also the considerations mentioned by Norway in its written comments, reproduced in document A/CN.9/263 (p. 33, para. 2). The arbitrators should give due heed to all the criteria mentioned by the United States representative, especially the enforceability of the award.

25. The CHAIRMAN said that there seemed to be considerable support for the Indian proposal. Unless he heard any objections, he would take it that the Commission wished to approve the paragraph as amended by that proposal.

26. *It was so agreed.*

Paragraph (2)

27. Mr. LAVINA (Philippines) said that account should be taken of the laws of the place at which it was envisaged hearing witnesses, experts or parties.

28. *The Commission approved paragraph (2).*

Article 21. Commencement of arbitral proceedings

29. Mr. RUZICKA (Czechoslovakia) drew attention to his country's written proposal concerning limitation of claims, reproduced in document A/CN.9/263, (p. 34 (article 21), para. 2). His delegation considered that the date of the start of the arbitration had extremely important consequences for the extinction of a party's claim and that it would be useful if the Model Law made them clear.

30. Mr. ROGERS (Australia) said that the proposal would involve changes in national statutory limitations which went beyond the functions of the Model Law. While appreciating the thought that had gone into the proposal, he felt it would be disadvantageous to adopt it.

31. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation welcomed the idea underlying the Czechoslovak proposal, which took account of practical situations and sought to establish a unified rule on prescription. If arbitral proceedings began shortly before the expiry of the claimant's time-limit for bringing his claim and the respondent raised the question of jurisdiction, it might be only after a long delay that the arbitrators were found not to have jurisdiction; the claimant would then be debarred from taking his claim to a court because the time-limit for doing so would have expired. The problem was dealt with *expressis verbis* in very few existing national legislations and it often proved difficult to settle. He thought that most delegations would agree that it would be useful to incorporate a clear rule on the subject in the Model Law. If the Commission accepted the Czechoslovak proposal in principle, it would not be difficult to draft wording suitable for that purpose.

32. Mr. SCHUETZ (Austria) said that the Working Group on International Contract Practices had decided that the Model Law should not include a provision along the lines of the Czechoslovak proposal precisely because views on the matter differed so much. He agreed with the representative of Australia that the issue was too closely connected with material law for it to be included in the Model Law.

33. Mr. MOELLER (Observer for Finland) said that he had some sympathy for the Czechoslovak proposal. Nevertheless, if the provisions suggested were included in the Model Law, the Commission would be exceeding its mandate and venturing into an area where there were big differences among legal systems.

34. Mr. ROEHRICH (France) said that he understood the concerns expressed by the representatives of Czechoslovakia and the Soviet Union but did not think it would be feasible to include the proposed wording in the Model Law. Perhaps the Commission's report could draw the attention of Governments to the possible need for regulating the matter. Legislators could then, if they wished, adopt a unified provision on the subject for their internal law and for international commercial arbitration.

35. Mr. STROHBACH (German Democratic Republic) said that his delegation supported the Czechoslovak proposal, in which the paragraph referring to limitation was particularly important. He noted that the aim of the Model Law was to promote international commercial arbitration and it was appropriate, therefore, that it should include such a provision.

36. Mr. BOGGIANO (Observer for Argentina) said that his delegation, too, supported the Czechoslovak proposal, although it was not sure whether it related to material law or procedural law. The proposal would promote the effectiveness of the arbitration system and help to protect the substantive rights of the parties.

37. Mr. SONO (Secretary of the Commission) noted that the 1974 New York Convention on the Limitation Period in the International Sale of Goods did not take a position as to whether limitation was a question of substance or procedure. That Convention would shortly enter into force, at almost the same time as the 1980 United Nations Convention on Contracts for the International Sale of Goods, which raised arbitration to the level of normal judicial proceedings and had indirectly helped to enhance the popularity of international commercial arbitration. The 1980 Convention provided that if a claim was filed, through either judicial or arbitration proceedings, the period of limitation ceased to run. The underlying idea of the first paragraph of the Czechoslovak proposal was contained in the 1980 Vienna Convention, while the second paragraph corresponded to a provision in the 1974 New York Convention.

38. Mr. RAMADAN (Egypt) said that he understood the reasons for the Czechoslovak proposal but thought that the issue it covered was better left to the sphere of material law. His delegation supported the Japanese proposal mentioned in document A/CN.9/263 (p. 34 (article 21), para. 3).

39. Mr. GRAHAM (Observer for Canada) said that, for the reasons given by a number of previous speakers, his delegation had difficulty in accepting the Czechoslovak proposal. Furthermore, it represented a departure from article 1 as approved by the Commission; it was similar in nature to the proposal which had been made in document A/CN.9/XVIII/CRP.5 for a new paragraph (4) to article 1, a proposal which the Commission had rejected.

40. Mr. AYLING (United Kingdom) said that the Working Group had considered the matter of prescription and had decided, with his delegation's support, that it would be wrong to include it in the Model Law. The Czechoslovak proposal had merit and the problem it raised was certainly a real one, but it should not be dealt with in the Model Law.

41. Mr. SZURSKI (Observer for Poland) said that his delegation supported the Czechoslovak proposal. It would promote the Commission's purpose, which was to enhance the effectiveness of international commercial arbitration.

42. Mr. VOLKEN (Observer for Switzerland) said that he could not understand the reservations which some delegations had concerning the Czechoslovak proposal. The problem was one often encountered in practice and, since the purpose of the Model Law was to promote international commercial arbitration, the Commission should try to deal with practical problems. His delegation could accept the Czechoslovak proposal but thought that it might be better for it to appear as a separate article rather than as part of article 21.

43. Mr. de HOYOS GUTIERREZ (Cuba) said that his delegation supported the principle expressed in the Czechoslovak proposal but thought that the wording needed to be reworked in the drafting committee.

44. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that her delegation could not support either part

of the Czechoslovak proposal because both portions conflicted with domestic legislation on a matter lying outside the scope of the Model Law.

45. Mr. SAWADA (Japan) said that his delegation would be unable to accept the Czechoslovak proposal, which conflicted with his country's domestic law. He pointed out that the title of article 21 was "Commencement of arbitral proceedings", and he commended to the Commission his country's written proposal which dealt precisely with that point and had already been supported by the representative of Egypt.

46. Mr. BARRERA GRAF (Mexico) said that his delegation preferred the existing text of the article. The Czechoslovak proposal raised the complex problem of prescription, which could hardly be dealt with in a Model Law. The Working Group had come to that conclusion and there was no need for the debate on the subject to be repeated in the Commission.

47. Mr. ENAYATI (Observer for the Islamic Republic of Iran) said that, for the reasons given by previous speakers and in the light of the explanation given by the Secretary, he had no difficulty with the Czechoslovak proposal. He did, however, have doubts about the Japanese proposal.

48. Mr. PENKOV (Observer for Bulgaria) said that his delegation endorsed the statements made by the representative of the Soviet Union and by other speakers in support of the Czechoslovak proposal.

49. Mr. LOEFMARCK (Sweden) said that he understood the purpose of paragraph (1) of the Czechoslovak proposal but he thought that the provision should cover questions of limitation only: he could not accept that the request itself should have the same effects as if filed with a court. Subject to that qualification, his delegation could support the provision. It had no difficulty in accepting paragraph (2) of the proposal.

50. Mr. ILLESCAS ORTIZ (Spain) said that his delegation could not accept the Czechoslovak proposal. It would be very difficult to establish uniform international practice in such a complex matter as prescription.

51. Mr. HOLTZMANN (United States of America) said that the provision proposed by Czechoslovakia would be observed in the United States under existing laws. The provision was a valuable one but should not be included in the Model Law at such a late stage.

52. Mr. MATHANJUKI (Kenya) said that the Czechoslovak proposal did not cover all possible cases.

53. The Japanese proposal made an undesirable distinction between *ad hoc* arbitration and arbitration by a recognized institution, which was not consistent with the new article 3 and the rest of article 21.

54. Mr. SEKHON (India), Mr. JOKO-SMART (Sierra Leone), Mr. ABOUL ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) and Mr. AYLING (United Kingdom) expressed a preference for the original version of the text.

55. Mr. MTANGO (United Republic of Tanzania) suggested that the widespread support expressed for the Czechoslovak proposal should be reflected in the report.

56. Mr. RUZICKA (Czechoslovakia) withdrew his delegation's proposal for article 21. He said he hoped that the Commission might find time to resume discussion of the matter at a later stage.

57. Mr. LEBEDEV (Union of Soviet Socialist Republics), supported by Mr. HOLTZMANN (United States of America), endorsed the Tanzanian suggestion and hoped that States adopting the Model Law would take the ideas underlying the Czechoslovak proposal into consideration.

58. Mr. SAWADA (Japan) said that his Government's proposal did not intend to discriminate between *ad hoc* arbitration and arbitration by arbitral institutions. It was simply that the date of commencement of arbitration needed to be fixed in the latter case as well, because it affected the prescription period.

59. Mr. MOELLER (Observer for Finland) said that the Japanese proposal was unacceptable. There were many types of arbitral institution with their own rules about the commencement of arbitral proceedings, and these rules would override the provisions of the Model Law.

60. Mr. ROEHRICH (France) said that he, too, found the Japanese proposal unacceptable, since some arbitral institutions did not in fact arbitrate themselves but were merely responsible for making the arrangements. In that case, there would be delay before the respondent was informed of the existence of arbitral proceedings.

61. Mr. de HOYOS GUTIERREZ (Cuba) said that the Japanese proposal would be acceptable in his country because it was consistent with existing laws.

62. Mr. HOELLERING (United States of America) said that the Japanese proposal would at least establish beyond doubt that a request for arbitration had been made. He nevertheless agreed with the French representative and the Observer for Finland that receipt of the request for arbitration by the arbitral institution would not mark the beginning of the arbitral process under all systems.

63. Ms. VILUS (Yugoslavia) said that the Japanese proposal would provide an objective indication of the commencement of arbitral proceedings and her delegation was therefore prepared to accept it.

64. Mr. STROHBACH (German Democratic Republic) pointed out that the Japanese proposal was not consistent with the principle of party autonomy expressed in the existing text of the article and in fact made the article a mandatory provision.

65. Mr. SAWADA (Japan) withdrew his Government's proposal.

66. The CHAIRMAN said that it seemed to be the wish of the Commission to keep article 21 as it stood and to make a reference in the report to the issue raised by the Czechoslovak proposal.

67. *It was so agreed.*

Article 22. Language

68. Mr. RAMADAN (Egypt), supported by Mr. ABOUL ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration), proposed that paragraph (2) should be amended by the addition of the words "or one of the languages" after the words "language or languages". The possibility which the paragraph would then provide could save parties time and money.

69. Mr. JARVIN (Observer for the International Chamber of Commerce) proposed that an addition should be made to the second sentence of paragraph (1) to the effect that a party should be allowed to use the language of his choice on condition that a translation into the language or languages determined by the tribunal was provided.

70. Mr. CHO (Observer for the Republic of Korea) said that paragraph (1) should be worded so as to ensure each party equality and the opportunity to present his case. He supported the written suggestion of the Federal Republic of Germany on that subject (A/CN.9/263, p. 34).

71. Mr. ABOUL ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration), speaking on paragraph (1), said that each party should have the right to ask for oral and written material to be translated into his own language.

72. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) agreed with the Observer for the International Chamber of Commerce that each party should have the right to use his own language in arbitral proceedings. That principle was acknowledged in the secretariat's commentary (A/CN.9/264, p. 50, para. 4).

73. Mr. LAVINA (Philippines) suggested that one or two of the official United Nations languages, or a language widely used in commerce, should be used as the language for arbitral proceedings.

74. Mr. HOLTZMANN (United States of America) said that the principle of the right to use one's own language was already safeguarded in article 19 (3), as the Federal Republic of Germany had pointed out in its written comments (A/CN.9/263, p. 34). However, the considerable cost of providing translations should also be taken into account. A party might request translations of all documents in an attempt to delay arbitral proceedings or harass its opponent. The arbitral tribunal should be given discretion in the matter of translation, as provided in the present text of article 22.

75. The proposal made by the Observer for the International Chamber of Commerce would be difficult to express in the article in its present form. A more flexible course was suggested by the secretariat's commentary (A/CN.9/264, p. 50, para. 4), namely that the party should arrange, or at least pay, for the translation into the language of the proceedings.

76. Mr. SAMI (Iraq) said that the expense of translation services was secondary to the principle that each party had the right to present his case in his own language. Parties entering into arbitration were aware that it was an expensive procedure. He said that, if an arbitral tribunal chose the language of one party as the official language of the proceedings, the costs of translation into the language of the other party should be included in the overall costs of the arbitration.

The meeting rose at 12.40 p.m.