326th Meeting

Monday, 17 June 1985, at 2 p.m.
Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 2.10 p.m.

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

Article 28. Rules applicable to substance of dispute

Article 28 (1)

1. Mr. BONELL (Italy) said that his delegation welcomed paragraph (1) because most existing national laws on arbitration did not deal with the law applicable to the substance of the dispute. That created difficulties with regard to disputes of an international character. So far, the problem had been solved either by applying the law of the place of arbitration or the law of the procedure selected by the parties, or by leaving it to the arbitral tribunal to determine the rules of private international law it considered appropriate to the case. Both solutions were unsatisfactory; the first because frequently there was very little connection between the place of arbitration and the substance of the dispute, and the second because of the uncertainty to which it could give rise. In both cases it was assumed that, just like a national court, the arbitral tribunal should settle disputes according to the substantive law of a given State. His delegation, on the other hand, considered that parties should be allowed to denation-

alize the dispute by indicating as a basis for its settlement rules and principles of a different nature, taken, for example, from international instruments, whether in force or not, widely observed trade usages and principles or rules common to the national legal systems of both parties.

2. Mr. KIM (Observer for the Republic of Korea) proposed that the title of article 28 should be amended to read "Rules and principles applicable to substance of dispute". The first sentence of paragraph (1) should correspondingly be amended to read "The arbitral tribunal shall decide the dispute in accordance with such rules and principles of law as are designated by the parties". The remainder of the first sentence and the second sentence, which was redundant, should be deleted.

3. Mr. SZASZ (Hungary) said that paragraph (1) introduced a new approach to the choice of applicable law. His Government would have preferred a more traditional one, but if there was massive support for the paragraph, it would accept it. All the same, the term "rules of law" was very imprecise and would give rise to numerous difficulties of interpretation in national legislations. That seemed clear from the written comments on the article. He would recommend that any country adopting the term should provide a definition of it. He approved the second sentence of paragraph (1) for usefully making clear that the position was about conflict of laws rules.

4. The CHAIRMAN observed that without that sentence the parties might find that the legal system of their choice referred them unexpectedly to that of a third State.

5. Mr. HOELLERING (United States of America) approved the existing text of the first sentence and the idea of extending party autonomy to the step of designating the applicable law. The time was ripe for giving parties a new and wider range of options for the rules of law which might apply to the settlement of international commercial disputes. His delegation also approved the second sentence of the paragraph.

6. Mr. SEKHON (India) said he felt that the present text of paragraph (1) would create unnecessary confusion. He would prefer it to be replaced by the formulation used in article 33 (1) of the UNCITRAL Arbitration Rules.

7. Mr. BOGGIANO (Observer for Argentina) said that the text of paragraph (1) should be approved, on the understanding that the expression "rules of law" did not mean exclusively the national law of a given State; the parties would thus be able to subject their dispute to international rules and practices or international conventions as well. In view of the broad scope of application of the Model Law and the wide interpretation it gave to the word "commercial", a large number of relationships might become subject to arbitration. It was therefore appropriate to give parties the greatest possible autonomy, within the limits set by the Model Law in respect of public policy, for subjecting complex contractual and other relationships to rules of their choice.

8. Mr. SCHUMACHER (Federal Republic of Germany) said that in its written comments (A/CN.9/263, p. 40, para. 3) his delegation had already expressed its appreciation of the wide range of options offered to parties by paragraphs (1) and (3) of article 28. In its understanding, the term "rules of law" gave parties the possibility to choose as applicable a mixture of rules from more than one legal system. That followed from paragraph (3), for if parties were free to agree on a decision *ex aequo et bono* they must also be free to agree on the application of legal rules from wherever they were drawn. His delegation was in favour of paragraph (1) as it stood.

9. Mr. ROEHRICH (France) said that his delegation fully approved paragraph (1). The principle of party autonomy required that parties should be free to choose a mixture of different legal systems, or trade usages or international conventions which had not yet entered into force, as the rules of law appropriate for their purposes. He also approved the prohibition of unintentional referral which the second sentence of paragraph (1) provided.

10. Mr. GRAHAM (Observer for Canada) said that he was in favour of paragraph (1) as it stood.

11. Mr. LEBEDEV (Union of Soviet Socialist Republics) referred to his delegation's written comments on paragraph (1) (A/CN.9/263, p. 41, para. 5), in which it expressed its desire for a more traditional approach to a complex and controversial issue than the paragraph provided. Instead of using the very vague concept of "rules of law", the paragraph should refer to "law" as that term was understood in international conventions in force and in the UNCITRAL Rules and other similar international documents. That was the traditional approach; it had proved effective in practice and would be understood by those applying the Model Law. The expression "rules of law" was an innovation the use of which had not really been justified or well defined by its proponents. He agreed with them that parties should have an opportunity to select the laws not of one country but of several, a process which had begun with the introduction into French jurisprudence of the concept known as *dépeçage*. However, the use of the expression "rules of law" did not address that issue, which would have to be solved by national conflict of laws rules and international conventions dealing with them.

12. The proponents of change had also said that it was desirable to allow arbitrators to settle disputes on the basis of rules designated by the parties. That would be a matter of the terms of the contract between the parties, which could refer to model rules or model contracts in various fields of trade. The point had also been made that parties should be free to call for the application of trade usages. He thought it would be better to adopt *expressis verbis* the approach to those questions set out in article 33 (3) of the UNCITRAL Arbitration Rules, which required the arbitrators to apply the terms of the contract and take into account the usages of the trade. In that way the desiderata he had mentioned would be accommodated directly and not, as in the present text, indirectly by the use of the nebulous expression "rules of law".

13. Mr. KADI (Algeria) supported the changes proposed by the Soviet Union representative. He was in favour of the text of paragraph (1) in all other respects.

14. Mr. VOLKEN (Observer for Switzerland) said that he too did not care for the term "rules of law". The Soviet Union representative had drawn attention to the fact that its use seemed intended to permit the process known as *dépeçage*. The 1980 Rome Convention on the Law Applicable to Contractual Obligations had gone a step in that direction in that it permitted different parts of a contract to be subject to different law, but it did that as an exception, whereas the present text of paragraph (1) might suggest that *dépeçage* was the basis of the rule. With such a provision there was a danger of allowing the contract as a whole to be split up into too many parts. For that reason, his delegation would prefer a text on the lines of article 33 (1) of the UNCITRAL Arbitration Rules.

15. Mr. OLUKOLU (Nigeria) said that his delegation had difficulty in accepting paragraph (1). Like the representatives

of India and the Soviet Union, he would advocate the adoption of the UNCITRAL Rules on the subject.

16. Mr. DUCHEK (Austria) said that his approach was much the same as that of the Hungarian representative. His delegation could accept the present wording of paragraph (1) but it would not be disappointed if the paragraph mentioned the notion of "law" instead of "rules of law". He had nothing against permitting parties to combine laws from more than one national legal system, but in practice such an arrangement rarely appeared in contracts. As to international conventions, it was a matter of technique whether parties wrote the rules concerned into their contract or made a general reference by name to the relevant convention as, for example, the 1980 United Nations Convention on Contracts for the International Sale of Goods. Although he did not share the concerns expressed by the Soviet Union representative, he thought it was essential for the Commission's understanding of the paragraph to be clarified in the report. The reference in the secretariat commentary to "rules of law" as providing the parties with a "wider range of options" (A/CN.4/264, p. 61, para. 4) was far too vague to serve that purpose.

17. Mr. STROHBACH (German Democratic Republic) endorsed the views expressed by the Soviet Union representative. He too would like the paragraph to refer to the terms of the contract and trade usages and to employ the expression "law", well known in the context, instead of "rules of law". He therefore advocated the reformulation of paragraph (1) along the lines of the UNCITRAL Arbitration Rules.

18. Mr. GOH (Singapore) said that his delegation was happy with the existing draft, which gave recognition to widely accepted practices. In his understanding, the terms "rules of law" and "law" conveyed the same meaning, and any distinction drawn between them was largely a question of semantics.

19. Mr. MOELLER (Observer for Finland) said that his delegation would prefer the term "law" to "rules of law", since many of those in Finland who had been asked to comment on the draft had had difficulty in understanding the latter term. However, there was not much difference in substance or in practice between the two terms, and if many delegations were strongly in favour of the term "rules of law", his delegation could accept it.

20. Mr. SAWADA (Japan) said that "law" on the one hand and a decision *ex aequo et bono* on the other could be regarded as two poles between which lay something else, namely the rules of businessmen and business associations. He agreed with the view of the Federal Republic of Germany that the term "rules of law" should be interpreted in a broad sense to cover that intermediate position allowing deviation from provisions of law. Although the Soviet Union representative had indicated that the term was too nebulous, but the classical concept of "law" would be too narrow. Perhaps the Commission should add to the expression "rules of law" in paragraphs (1) and (2) the term "trade usages" to cover the position fully.

21. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that his delegation would like the wording of paragraphs 1 and 2 of article 33 of the UNCITRAL Rules to be used for paragraphs (1) and (2) of article 28 of the Model Law. It could accept the text proposed by the Working Group for article 28 (3).

22. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that her delegation would be reluctant to accept the first sentence of article 28 (1) as it stood; the expression "rules of law" left the door wide open to extravagant choices by the parties, including the application of a combination of rules drawn from various legal systems and possibly also from an international legal instrument which might or might not have come into force. She favoured instead the use of article 33 (1) of the UNCITRAL Arbitration Rules, which employed the term "law". As to the second sentence, she could accept the wording proposed by the Working Group.

23. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said that if the expression "rules of law" permitted *dépeçage* or dismemberment, it would be a shame to exclude that option by returning to the wording of the UNCITRAL Rules, since the current trend in private international law was to permit *dépeçage*. Also, if "rules of law" was understood as referring to laws not enacted by a State legislature, party autonomy would not be restricted. The main concern was that the parties should be entirely free to choose whatever rule they pleased for their contract.

24. Mr. PAULSSON (Observer for the Chartered Institute of Arbitrators) said that in practice a contract scarcely ever referred to several national bodies of law; however, parties often stipulated that a particular portion of a body of law did not apply to a contract. Swiss law, for example, was often viewed as being appropriately neutral for international contracts but as allowing too much scope for judicially ordered set-off. Consequently, parties often accepted Swiss law for settlement of their disputes with the exception of the provision which established judicially ordered set-off. If the term "law" was incorporated in the text, arbitrators might be tempted to conclude that the parties had made an inappropriate choice.

25. Mr. RAMOS (Observer for Portugal) said that he approved the text as it stood, including the reference to "rules of law", which expanded the range of choice available to the parties.

26. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that he fully approved the text as it stood. Contracts often incorporated a reference to a law as it was worded at a given time but stipulated that any subsequent amendments to it would not necessarily apply to the contract.

27. Mr. MTANGO (United Republic of Tanzania) suggested that the problem facing the Commission might be overcome if the text read "law and/or rules of law".

28. Mr. ROEHRICH (France) said that the important point was that the parties must have the right to choose for the settlement of their dispute a set of provisions which was not necessarily contained in an enacted law and would enable the arbitrators to decide the dispute as flexibly as possible. Above all, parties wished to be certain that it would be settled on the basis of known considerations, which might be trade usage, the provisions of a convention which had not yet entered into force or the legislation of a third country.

29. Mr. BONELL (Italy) said that, at present, parties who entered into an arbitral agreement had only two choices: to ask either that the decision be based on law or that it be made *ex aequo et bono*. Article 28 (1) was intended to show that there were other options: the application, for example, of the rules of law of any given country or of the provisions of a convention which had not yet entered into force. If the Commission reverted to the traditional term "law", it would miss a marvellous opportunity to assist parties in overcoming

the many difficulties that they encountered precisely because the current system offered them only two options.

30. Mr. SZASZ (Hungary) said that international commercial arbitration had evolved in such a way that parties were now able to choose the law of any State for application to their disputes. They were also free to supplement non-mandatory provisions of law in accordance with their declared or presumed will, and some States now permitted the situation that, if parties did not make an express choice, a decision need not be made *ex aequo et bono* and another type of procedure could be applied. The Model Law must allow parties to use, as the applicable law, the provisions of conventions which had not yet entered into force. Mentioning *dépeçage* in article 28 (1) would not leave them as free as did the term "rules of law", which was much broader. The traditional approach, that of using the word "law", would also enable parties to choose separate rules for certain obligations.

31. Mr. VOLKEN (Observer for Switzerland) said that a reference to *dépeçage,* which had been widely acknowledged to be an acceptable practice, should be included in the text of the article.

32. Mr. BONELL (Italy) said that his delegation could not accept that.

33. The CHAIRMAN said that although the Commission still seemed to be divided as to how to deal with paragraph (1), considerable support had been expressed for the idea that the reference to "rules of law" should be replaced by a reference to "law" and that the latter notion should be interpreted in a broader sense than previously in the light of developments in international commercial arbitration practice. It also seemed to be a widely held view that the paragraph should at least contemplate allowing the parties to engage in the process known as *dépeçage,* in other words, the specification of different rules as being applicable to different parts of the contract.

34. Accordingly, if he heard no objection, he would take it that the Commission wished to replace the words "rules of law" by the word "law" in the first sentence of paragraph (1); to refer the paragraph to the drafting committee with a view to the incorporation in it of wording which reflected the notion of *dépeçage*; and to explain in the report that the term "law" should be understood in a broader sense than previously.

35. *It was so agreed.*

36. Mr. TORNARITIS (Cyprus) said that the decision to use the word "law" instead of the words "rules of law" in paragraph (1) was consistent with paragraph (2), where the term "law" was also used. The difficulty that the Commission had experienced arose partly from the fact that the English language had only one word for the two notions expressed in French as "*droit*" and "*loi*". He saw paragraph (1) in terms of principles of law rather than rules of law. Thus, paragraph (1) would give the parties liberty to adopt any principles of law that they chose, and failing any designation by them, the law applicable would be that referred to in paragraph (2).

Article 28 (2)

37. Mr. BONELL (Italy) withdrew the amendment proposed by his delegation in its written comments (A/CN.9/263, p. 41, para. 7).

38. Mr. SAWADA (Japan) said that paragraph (2), in referring to conflict of laws rules, conformed to article 33 (1) of the UNCITRAL Arbitration Rules. However, he favoured removal of the reference to the conflict rules for two reasons: (1) it would be simpler directly to designate a substantive law; (2) the conflict rules would point only to the "narrow" law and that would not accord with the decision just taken to give a wide meaning to the term "law" in the first paragraph.

39. Mr. SCHUMACHER (Federal Republic of Germany) said that in its written comments his delegation had expressed reservations in regard to paragraph (2) but was now prepared to allow more discretion to the arbitrators than it had earlier thought desirable. It therefore withdrew its objection to the paragraph, which was in conformity with the 1961 European Convention, the ICC rules and the UNCITRAL Arbitration Rules.

40. Mr. HOELLERING (United States of America) said that his delegation had reached the conclusion that the conflict of laws provision should be deleted in order to provide for a more flexible and modern approach to the international commercial arbitration process. In that connection, it agreed with the written comments of Sweden (A/CN.9/263, p. 40, para. 2) and ICC (A/CN.9/263/Add.1 (article 28), p. 16, para. 1).

41. His delegation strongly recommended that paragraph (3) or some other part of the article should contain a reference to the terms of the contract and to trade usages. That language had been deleted from the draft text by the Working Group on International Contract Practices at its sixth session (A/CN.9/245, para. 99). However, it was to be found in article 33 (3) of the UNCITRAL Rules and had been adopted and recommended by the General Assembly as being acceptable to countries with different legal systems. It was also to be found in article VII (1) of the 1961 European Convention.

42. Mr. STROHBACH (German Democratic Republic) said that paragraph (2) should remain as it was, as being in harmony with the 1961 European Convention.

43. Mr. BOGGIANO (Observer for Argentina) said that he was in favour of deleting the reference to the conflict of laws rules. Its removal would allow a wider interpretation of the word "law", which would then be consistent with its use in paragraph (1). His delegation would agree to the deletion on the understanding that the arbitrators could apply a conflict of laws rule if they deemed it necessary but could also use more direct means to find the appropriate law.

44. Mr. ROEHRICH (France) said that one reason for deleting the reference to conflict of laws rules was that it was counter to the modern trend in international commercial arbitration practice.

45. Mrs. RATIB (Egypt) said that her delegation was in favour of paragraph (2) as it stood. A point to bear in mind was that under article 1 (2) (*c*) the parties to a dispute could expressly agree that the subject-matter of the arbitration agreement related to more than one country; in other words, two nationals of the same country could agree that the subject-matter of the arbitration was of an international character. The arbitration process would then take place in the territory of the two nationals but the arbitrators would be free to decide to apply the law of a different territory. She doubted whether that was advisable.

46. Mr. LOEFMARCK (Sweden) said that in its written comments on the article as a whole (A/CN.9/263, p. 40,

para. 2), his delegation had suggested that the article as it stood reflected a rather traditional view of the question and that if it was adopted, there might be a risk of impeding the trend towards a freer judgement of the question of choice of law. His delegation was therefore in favour of deleting the reference in paragraph (2) to conflict of laws rules.

47. Mr. SZASZ (Hungary) said that his delegation was in favour of leaving the text as it stood because it was concerned about the relationship between paragraphs (1) and (2). If the term "law" was going to be taken as encompassing things that were not actually law, it would be difficult to be sure of the meaning of paragraph (2) and would lead to giving it equal status with paragraph (1) as far as the question of law was concerned. However, his delegation would not object strongly to the proposed deletion because there was certainly a trend in international trade law of the kind described by the Swedish representative.

48. Mr. GRIFFITH (Australia) said that his delegation was in favour of deleting the reference to conflict of laws rules. It considered the relationship between paragraphs (1) and (2) to be sufficiently well established.

49. Mr. BONELL (Italy) said that his delegation also supported the Japanese proposal. The term "law" as used in paragraph (1) was to be explained in the report. As far as its use in paragraph (2) was concerned, it should be understood that national legislatures should adopt a consistent approach to the two paragraphs when transferring the Model Law to their own legislation.

50. Mr. SAMI (Iraq) said that the deletion of the reference to the rules of conflict of laws would make paragraph (2) consistent with paragraph (1).

51. Mr. TANG Houzhi (China) said that he was in favour of leaving both paragraphs as they stood. His delegation opposed the suggestion to delete the reference to conflict of laws rules from paragraph (2) because it believed that without it the arbitral tribunal would be likely in most cases to apply the law of the place of arbitration. Furthermore, the UNCITRAL Rules used that wording.

52. Mr. MATHANJUKI (Kenya) said that his delegation too felt some apprehension about the deletion, since it would give too much power to the arbitral tribunal, particularly when two parties coming from two different legal systems were involved in the dispute. The arbitral tribunal ought to have to take into account the law most closely connected with the performance of the contract.

53. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that paragraph (2) should be left as it stood. It represented a well-known compromise that had been achieved in 1961 during the preparation of the European Convention. The aim of the compromise was to establish certainty and predictability in the arbitrators' choice of the applicable law. They would be required to choose one system at the outset of the conflict, on the basis of which they would determine the applicable law. The deletion of the reference to conflict of laws rules would grant the arbitrators absolute freedom in the choice of the applicable law and would constitute a precedent that would be unacceptable to many countries. His delegation considered, therefore, that acceptance of the text proposed by the Working Group was the best course.

54. Mr. GRAHAM (Observer for Canada) said that he favoured the idea of deleting the reference to conflict of laws rules, for the reasons expressed by previous speakers.

55. Mr. DUCHEK (Austria) said it was true that, in matters of international commercial arbitration, predictability was an important criterion. He was not certain, however, that it would be satisfied any more easily with the existing text than with the wording which would result from the deletion. Conflict of laws rules were themselves very flexible and could well allow resort to the law most closely connected with the subject of the dispute. As it stood, the paragraph could create a situation in which the parties might well be surprised by the ultimate ruling as to which law would apply. If they had foreseen such a possibility, they might have come closer to agreeing between themselves on the choice of law. It was important, therefore, for the arbitrators to inform the parties as soon as possible what set of rules their decision would be based on.

56. His delegation therefore considered that, while keeping the reference to conflict of laws rules would not greatly affect the situation, its deletion would make the relationship between paragraph (2) and paragraph (1) awkward. The word "law" used in paragraph (1) could, in the interest of party autonomy, be interpreted as including conventions not yet in force. The situation in paragraph (2) was different, in that "law" would mean existing national law. It might therefore be advisable for the Commission to reconsider its decision to replace the words "rules of law" in paragraph (1) by the word "law" if its intention was to restrict paragraph (2) to law in the sense of a national set of rules. If that was done, his delegation would be able to agree to the deletion of the reference to conflict of laws rules.

The meeting rose at 5.05 p.m.