327th Meeting

Monday, 17 June 1985, at 7 p.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 7.05 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 (continued)

1. Mr. KIM (Observer for the Republic of Korea) saw no need to include the phrase "conflict of laws" but proposed, as a compromise, to insert after the words "conflict of laws rules" the additional wording "and/or the general rules and principles of private international law". He further proposed an additional clause to the effect that in cases where the parties agreed, or the tribunal deemed it necessary, the tribunal could apply any established custom or usage of international trade.

2. The CHAIRMAN said that that proposal would involve the reconsideration of article 28 (1) since it would give wider powers to the arbitrators than to the parties, thereby reversing the present position.

3. Mr. TANG Houzhi (China) suggested that the deletion of the words "conflict of laws" might lead to a situation where courts in developing countries were excluded. Where the parties designated in their agreement a third country as the place of arbitration but failed to state which law applied, then it was likely that the law of that third country would apply, because it would be considered that such was the intention of the parties. However, if the reference to conflict of laws rules was retained, the arbitral tribunal would use those rules in determining which law to apply, and where one of the parties was from a developing country, the law of that country might thus be considered as the applicable law. That possibility of applying the law of a developing country should not be excluded.

4. He felt that consistency between paragraphs (1) and (2) was not the most important consideration. To avoid discrepancy, it would in any case be better to retain the text as drafted by the Working Group.

5. Mr. SEKHON (India) said that he preferred article 28 (1) to be formulated as in article 33 of the UNCITRAL Arbitration Rules. His delegation also now felt that article 28 (2) should be retained as it stood, since deletion of the reference to "conflict of laws" would give the arbitral tribunal too wide a discretion. It would be prudent to retain some degree of regulation.

6. Mr. VOLKEN (Observer for Switzerland) favoured deleting the words "conflict of laws" because they contributed little to the powers of the tribunal. In any event, an arbitral tribunal would have to justify its choice of applicable law. Under article 28 (2) as drafted, it would in addition have to justify its choice of conflict of laws rules, so that two justifications would be required. He also feared that the choice of conflict of laws rules, and the justification of that choice, would be influenced by the result desired. Deletion of the reference to conflict of laws did not exclude choice by the arbitrators and was therefore the better solution.

7. Mr. MTANGO (United Republic of Tanzania) thought that article 28 (2) should be retained as it stood.

8. Mr. BONELL (Italy) recalled that the Commission, despite divided opinion, had accepted change (the replacement of "rules of law" by "law") in paragraph (1); to be consistent, it should now accept the proposed change in paragraph (2), namely the deletion of "conflict of laws", on which opinion was also divided. Since that would be unsatisfactory, he proposed, as a compromise, that the decision relating to paragraph (1) should be reversed and that both paragraphs (1) and (2) should be retained as drafted.

9. The CHAIRMAN said that paragraph (1) had already been decided. The difficulty in the case of paragraph (2) was that without the reference to conflict of laws, it would no longer be in harmony with paragraph (1). Moreover, opinions on that point were equally divided.

10. Mr. JOKO-SMART (Sierra Leone) suggested that paragraphs (1) and (2) should be taken together. Once the parties had chosen the law to be applied, that law would include both substantive law and conflict of laws rules. There would therefore be no need to attempt to distinguish them.

11. Mr. MOELLER (Observer for Finland) said it was clear that the arbitrators must use some rules to determine the applicable law, and he supported the proposal by the representative of Italy.

12. Mr. RUZICKA (Czechoslovakia) said his delegation supported the text as it stood. With reference to the comments by the Observer for Switzerland, he stressed that the arbitral tribunal should pay main attention to the contract and should therefore deal with the conflict of laws rules first.

13. Mr. KADI (Algeria) favoured the retention of article 28 (2) as it stood.

14. Mr. MOURA RAMOS (Observer for Portugal) favoured keeping article 28 (2) as drafted. With regard to the problem raised by the Observer for Switzerland, he felt that, once the choice of conflict of laws rules had been justified, no further justification would be required. Moreover, if the phrase "conflict of laws" were deleted, it would allow the arbitrators to choose any substantive law they wished, and that would give them far too great a latitude.

15. Mr. LAVINA (Philippines) favoured retaining paragraph (2) as it stood for the reasons given by several representatives, including those of the Soviet Union, China and Japan. He also felt that consistency between paragraphs (1) and (2) was required and that it would therefore be better to retain the words "rules of law" in paragraph (1). As a matter of procedure, where there was equally divided opinion, the draft as prepared by the Working Group should be retained.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that article 28 was in effect no more than a guideline, since there were no sanctions in the Model Law for failure to observe its provisions. There was, for example, no possibility of setting aside the arbitral decision under article 34 if the arbitrators did not apply the applicable law. A guideline might be useful if its content had been agreed, but the fact was that the Commission could not agree on what was to be included in the article and it might therefore be better to take a more radical approach and delete both paragraphs altogether.

17. Mr. ROEHRICH (France) said that a law on international commercial arbitration could not remain silent on the choice of law governing the arbitration. He agreed with the comments of the representative of the Philippines. Lastly, with regard to the choice of rules for arbitration, it was reasonable that the parties should have greater freedom than the arbitral tribunal.

18. Mr. LOEFMARCK (Sweden) said that he agreed with the representative of the Soviet Union and felt that at least the first sentence of paragraph (1) and of paragraph (2) should be deleted. His delegation could, however, also accept the text of the two paragraphs as drafted by the Working Group.

19. Mr. GRIFFITH (Australia) said that, looking at article 28 as a whole, it would be better for the Commission to retain the text as drafted by the Working Group. Where there was not clear support for a change, it was appropriate to retain the text drafted by the Working Group.

20. Mr. MTANGO (United Republic of Tanzania) proposed the inclusion of both the alternative wordings for paragraph (1), leaving it to individual States to select whichever they felt appropriate. It would then be possible to retain paragraph (2) as it stood.

21. Mr. HOELLERING (United States of America) opposed the deletion of paragraphs (1) and (2). The two paragraphs were interrelated and had been discussed at length in the Working Group, which had reached a consensus on the

drafting of the text. A reasonable solution, therefore, would be to accept the text as it stood. He did not favour leaving options open, as the role of the Commission was to give guidelines.

22. Mr. JOKO-SMART (Sierra Leone) agreed with the representatives of the United States and France that article 28 could not be omitted from the Model Law. He could accept the text as it stood.

23. Mr. HOELLERING (United States of America) proposed the insertion of a new paragraph (3) to provide that the arbitral tribunal should decide in accordance with the terms of the contract and take account of the usages of the trade applicable to the transaction, in line with article 33 (3) of the UNCITRAL Arbitration Rules.

24. Mrs. VILUS (Yugoslavia) supported the United States proposal, although with reservations regarding the inclusion of the reference to terms of contract and the use of the wording "take into account".

25. Mr. BONELL (Italy) withdrew the Italian written proposal for an addition to the present article 28 (3) (A/CN.9/263, p. 42, para. 11).

26. Mr. BROCHES (International Council for Commercial Arbitration) suggested that the terms *amiable compositeur* and *ex aequo et bono* should be described as equivalents (for instance by using *amiable compositeur* in the French text, followed by *ex aequo et bono* in brackets, and dealing similarly with the English text) to avoid their being possibly interpreted as involving different procedures.

27. The CHAIRMAN thought that was a drafting point. He hoped that the proposal to include a new paragraph (3) relating to usages would adopt the wording of article 33 (3) of the UNCITRAL Arbitration Rules, in order to avoid a lengthy drafting discussion.

28. Mr. MTANGO (United Republic of Tanzania) supported the suggestion that the proposed new article 28 (3) should conform to article 33 (3) of the UNCITRAL Arbitration Rules.

29. Mr. AYLING (United Kingdom) said it was essential to introduce the rule proposed by the United States representative, which was similar to the one in the UNCITRAL Arbitration Rules, since the pre-eminent obligation of the arbitral tribunal was to determine the matter in dispute by applying the terms of the contract. His delegation therefore strongly supported the United States proposal.

30. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said there was a contradiction between article 28 and article 2 (*c*), which permitted parties, when allowed to do so by "this Law", to decide on such matters as giving decision-making authority to a third party or institution. First, it was certainly not the intention of the Working Group to allow a body such as the International Chamber of Commerce to decide on which law to apply to a substantive dispute. Secondly, even if the parties allowed the arbitrators to do so, that would conflict with the provisions of article 28, whereunder the arbitral tribunal was bound to decide the dispute in accordance with the law chosen by the parties. If the two provisions remained as they stood, the arbitrators would not know whether they had freedom of choice or were bound instead by article 28. His organization had therefore proposed the inclusion in article 2 (*c*) of a reservation concerning article 28 (A/CN.9/263/Add.1, p. 5, para. 2 *in fine*).

31. Mr. VOLKEN (Observer for Switzerland) said he agreed with the Observer for The Hague Conference. Article 2 (*c*) was intended to deal with technical aspects and not with choice of the applicable substantive law.

32. Mr. BOGGIANO (Observer for Argentina) supported the view expressed by the Observer for The Hague Conference.

33. Mr. AYLING (United Kingdom) said that he could not accept the proposition that a dispute concerning the applicable law was not capable of being determined by an arbitral tribunal, since it was no different from any other dispute.

34. Mr. ROEHRICH (France) said that the provisions of article 2 (*c*) related only to the functional matters involved in the constitution of an arbitral tribunal. They did not extend to the substantive matters referred to in article 28 (2).

35. Mr. MATHANJUKI (Kenya) was opposed, at that late stage, to reopening discussion of the definitions contained in article 2 (*c*).

36. Mr. STROHBACH (German Democratic Republic) said that a solution would be to state in article 2 (*c*) where, in the Model Law, the parties were free to decide certain issues.

37. The CHAIRMAN suggested that that was a drafting problem and invited the Observer for The Hague Conference and the representative of the German Democratic Republic to submit a draft for consideration by the Commission.

38. With regard to article 28 as a whole, the feeling of the Commission appeared to be that paragraph (1), contrary to the earlier ruling, should be retained as drafted by the Working Group, that paragraph (2) should remain as drafted by the Working Group, that a new paragraph (3), corresponding to article 33 (3) of the UNCITRAL Arbitration Rules, should be inserted and that the former paragraph (3) should be renumbered paragraph (4).

39. *It was so agreed.*

Article 29. Decision-making by panel of arbitrators

40. Mr. GRIFFITH (Australia) said that he assumed that the reference to "a presiding arbitrator" in article 29 implied that the presiding arbitrator would be the third arbitrator chosen by the arbitrators appointed by the parties. As he understood it, it was also implicit in the Model Law that, in the absence of any express requirement to the contrary, it was not necessary for arbitrators to be formally present in order to take decisions. Decisions could be taken by telephone, telex or similar means of communication; that point should be recorded in the commentary on the Model Law for the guidance of national legislators.

41. Difficulties were bound to arise if, as stated in the second sentence of article 29, the arbitral tribunal were empowered to authorize a presiding arbitrator to settle procedural questions. In common law countries at least, the distinction between procedural and substantive matters was not always clear. That was not important where it was the parties that authorized a presiding arbitrator to take decisions and not the arbitral tribunal. In order also to avoid possible conflict between the arbitrators on such questions, he proposed the deletion of the words "or the arbitral tribunal".

42. The CHAIRMAN said the Commission might perhaps agree that it would be sufficient to mention in the report the matters referred to by the representative of Australia.

43. Mr. SEKHON (India) said he was concerned that, unlike in article 7 of the UNCITRAL Arbitration Rules, the Model Law contained no definition of the presiding arbitrator, nor did it indicate the manner of his appointment.

44. Mr. HERRMANN (International Trade Law Branch) said that the question of definition and appointment of the presiding arbitrator was encapsulated in the very careful wording of the second sentence of article 29. In English, the use of the indefinite article "a" before the words "presiding arbitrator" meant that there need not necessarily be such an appointment. With regard to the distinction between procedural and substantive matters, it had been felt, when drafting the article, that since the arbitral tribunal had powers to decide on matters both of procedure and of substance, it should also have power to decide on the distinction between them.

45. Mr. GRIFFITH (Australia) said that a presiding arbitrator authorized by the arbitral tribunal might not necessarily be the third arbitrator appointed by the arbitrators of the parties. In such a case, questions of procedure might be decided by an arbitrator designated by one of the parties alone. That would remove proceedings from the control of the parties, which was contrary to the intentions of the Model Law. His delegation would therefore prefer that the words "or the arbitral tribunal" should be deleted, but if that did not prove acceptable, it would prefer to retain the text as it stood.

46. Mr. MELIS (Austria) said he felt it was already implied in the first sentence of article 29 that the arbitral tribunal was empowered to authorize one of its members to take decisions. The reference to "the parties" in the second sentence should be deleted, since it was inconsistent. A problem could arise where two arbitrators authorized a presiding arbitrator to take decisions but that arbitrator refused to act alone. That problem could be avoided if a unanimous decision of the arbitral tribunal were required for the authorization of a presiding arbitrator.

47. Mr. MOELLER (Observer for Finland) said that where the arbitral tribunal could not reach a majority decision, the presiding arbitrator should decide as if he were sole arbitrator. It was essential, to avoid the wasting of time and money by the parties, that the arbitral tribunal should always reach a decision. With regard to the second sentence, he supported the proposal of the representative of Austria.

48. Mr. HOLTZMANN (United States of America) said that his delegation favoured the requirement of a majority decision. Where a presiding arbitrator was empowered to decide in the absence of a majority, he was in effect a sole arbitrator. If that was what parties wished, it would be cheaper and more practicable to appoint a sole arbitrator in the first place. In addition, the requirement of a majority decision made it more likely that all issues would be fully considered as a result of the need to reach agreement. Moreover, the parties would more readily accept the decision, thus reducing the likelihood of subsequent litigation or appeals. He therefore favoured the retention of article 29 as drafted.

49. Mr. LOEFMARCK (Sweden) said that he agreed with the representative of Finland that where there was no majority, the presiding arbitrator should decide. The parties wanted a decision, and that a decision should be reached was more important than the manner of reaching it.

50. Mr. MELIS (Austria) agreed with the United States representative that where the parties had appointed three or more arbitrators, all should contribute to the decisions. However, in the entire history of the ICC, whose rules allowed a presiding arbitrator to take decisions where there was no majority, he knew of only two instances when that had in fact occurred. In practice, therefore, he foresaw little difficulty in the matter. Also, there was nothing in the first sentence of article 29 to prevent the parties, where the arbitral tribunal was unable to reach a decision, from authorizing a presiding arbitrator to decide alone. The first sentence of article 29 should therefore be retained as drafted.

51. Mr. ROEHRICH (France) agreed with the United States representative that, for the reasons stated by him, article 29 should be retained as drafted.

52. Mr. AYLING (United Kingdom) said that his delegation agreed that article 29 should be retained.

53. Mr. HOLTZMANN (United States of America) opposed the Australian proposal to delete the words "or the arbitral tribunal". To do so would make it inconsistent with the UNCITRAL Arbitration Rules and thus create a serious risk of conflict where the parties had agreed to use those rules.

54. Mr. TANG Houzhi (China) said he would like to delete the second sentence of article 29 altogether. Failing that, he preferred the Austrian proposal to insert the word "unanimously" at an appropriate place in that sentence.

55. Mr. MELIS (Austria) said that the real problem with the second sentence arose from the use of the word "however", which implied an alternative power to that given in the first sentence. That word should therefore be deleted.

56. Mr. SZASZ (Hungary) said that the Working Group had drafted the article in that form in order to clarify expressly the rights and powers of the parties and of the arbitral tribunal.

57. The CHAIRMAN proposed that the second sentence of article 29 should become a separate paragraph and that the word "however" should be deleted. It would also be specified that the arbitral tribunal's decision to authorize a presiding arbitrator to decide questions of procedure would have to be taken unanimously.

58. Mr. GRIFFITH (Australia) said that he favoured the retention of article 29 as drafted, subject to the amendments thus proposed.

59. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to approve article 29 as drafted, subject to the proposed amendments.

60. *It was so agreed.*

The meeting rose at 9.20 p.m.