

## 328th Meeting

Tuesday, 18 June 1985, at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

*The discussion covered in the summary record began at 11.10 a.m.***International commercial arbitration (continued)**

(A/CN.9/246, annex; A/CN.9/263 and Add.1-2, A/CN.9/264)

*Article 30. Settlement**Article 30 (1)*

1. Mr. SEKHON (India) suggested that the last part of the paragraph should be reworded to read "record the settlement and make the award on the agreed terms".
2. The CHAIRMAN suggested that the amendment should be sent to the drafting committee.
3. *It was so agreed.*
4. Mr. GRIFFITH (Australia) said that his delegation considered that if the parties settled their dispute, they should be entitled to obtain a record of the settlement in the form of an arbitral award. There was no reason why the arbitral tribunal should have discretion not to make an award in those circumstances. He therefore proposed that the words "and not objected to by the arbitral tribunal" should be deleted.
5. Mr. GRAHAM (Observer for Canada) said that his delegation considered that it should be sufficient if the award was requested by one party. He therefore suggested that the words "requested by the parties" should be replaced by the words "requested by one of the parties".
6. Mr. HOELLERING (United States of America) said that the arbitral tribunal should have discretion not to approve a settlement, since an arbitral award recording agreed terms might include something they considered inappropriate.
7. Mr. MOELLER (Observer for Finland) said that he was in favour of the arbitral tribunal having the discretionary power, for the reasons stated in paragraph 2 of the secretariat's commentary (A/CN.9/264, p. 65) and emphasized by the United States representative. He would prefer the paragraph to remain unchanged.
8. Mr. SAMI (Iraq) supported the Australian proposal. If the two parties reached agreement, the proceedings should be terminated in a form appropriate to them if they so requested.
9. Mr. GRAHAM (Observer for Canada) opposed the proposal, for the reasons set forth in paragraph 2 of the secretariat's commentary. There were antitrust and other considerations which the arbitral tribunal should be able to take account of, regardless of any agreement by the parties.
10. Mr. de HOYOS GUTIERREZ (Cuba) said that the arbitral tribunal should not be able to object to a settlement being recorded in the form of an award. In the event of one of the parties failing to fulfil the agreement, the award would constitute useful evidence if the other party sought to enforce the settlement.
11. Mr. ROEHRICH (France) supported the Australian proposal and considered it reasonable. Arbitration was only a manifestation of private justice, and an arbitral tribunal should not therefore have powers which conflicted with the will of the parties.
12. Mr. BARRERA GRAF (Mexico) also supported the Australian proposal.
13. Mr. HOELLERING (United States of America) said that his delegation felt very strongly that arbitrators should not be forced to concur in a settlement which might, for example, violate antitrust laws or income tax laws or be in furtherance of a conspiracy between the parties. The wording should remain unchanged; otherwise the arbitrators might simply be forced to resign from the case. There were also the UNCITRAL Arbitration Rules to consider.
14. In reply to a question from the CHAIRMAN as to what would happen if the arbitrators refused the parties' request, Mr. HOELLERING (United States of America) said that instances had been rare in which an arbitrator had not signed the award and the parties had been forced to rely on a private settlement agreement instead.
15. Mr. SZASZ (Hungary) said that a distinction must be made between the duty to terminate the proceedings and the duty to sign an award. It was true that if the parties reached agreement the arbitration proceedings could not continue. But the arbitrators should still be free to say that they did not agree with a settlement because it was against the law. If, therefore, the text was amended as suggested, it must make a distinction between the question of termination and the question of the award.
16. Mr. STROHBACH (German Democratic Republic) said that he entirely agreed with the preceding speaker.
17. Mr. GRIFFITH (Australia) withdrew his amendment in the light of the objections raised to it by other speakers, in particular the United States and Hungarian representatives.
18. The CHAIRMAN suggested that it should be noted in the report that the question of making an award should be left to the discretion of the arbitrators.
19. Mr. BONELL (Italy) agreed with the Chairman's suggestion. Regarding the Canadian proposal, he felt that if the text was amended to refer to a request by only one of the parties, it could easily be understood as implying that no further agreement was needed to transform the contractual agreement into an award. That would be unacceptable. He was strongly in favour of maintaining the existing text.
20. The CHAIRMAN suggested that since there seemed to be no strong feeling in favour of amending paragraph (1), it should remain as it was and be sent to the drafting committee in regard to the change suggested by the representative of India.
21. *It was so agreed.*

*Article 30 (2)*

22. Mr. SEKHON (India) said that if his amendment to paragraph (1) was accepted, the words "and shall state that it is an award" in paragraph (2) would be redundant.

23. The CHAIRMAN suggested that the matter should be referred to the drafting committee.

24. *It was so agreed.*

*Article 31. Form and contents of award**Article 31 (1)*

25. Mr. LAVINA (Philippines) said that the words "provided that the reason for any omitted signature is stated" should be deleted. In his view, whether the reason for an omitted signature was stated or not, the signatures of the majority of the members of the arbitral tribunal should be sufficient to validate the award. He asked what the position would be if the reason for an omitted signature was not given.

26. The CHAIRMAN said that paragraph (1) represented a compromise between two extreme positions: on the one hand, that the majority of the arbitrators could take any decision they wished; on the other, that all the arbitrators must sign an award. The latter position could lead to difficulties in the event of an arbitrator's death, illness, prolonged absence or refusal to sign. If the reason for an omitted signature was not given, the users of the arbitral award should request the reason from the arbitrators. He noted that a similar provision to paragraph (1) was found in article 32 (4) of the UNCITRAL Arbitration Rules. He suggested that the Commission should retain the existing wording.

27. *It was so agreed.*

*Article 31 (2)*

28. The Commission did not comment on paragraph (2).

*Article 31 (3)*

29. Mr. GRIFFITH (Australia) proposed that the provision in the second sentence should apply to the date as well as the place of the award.

30. Mr. BONELL (Italy) said that the application of the second sentence might create a legal fiction, since the place where the award was deemed to have been made might not necessarily be the same as the actual place of arbitration.

31. Mr. GRIFFITH (Australia) said that a similar legal fiction might arise with regard to the date of the award.

32. Mr. SZASZ (Hungary) said that there was an important difference between the date of the award and the place of arbitration. It was right, for reasons of the enforcement of the award, that the provision in the second sentence of paragraph (3) should apply to the place of the award. However, in the case of the date of the award, the parties should have the right to argue that the date on the award was not the true date.

33. Mr. HOLTZMANN (United States of America) said that he was inclined to favour the Australian proposal, which filled a gap. An arbitral award was often circulated by mail

among the arbitrators for signature, and the date on the award could be a deemed date just as the place of the award might be a deemed place. There were legal implications with regard, for example, to the payment of interest from the date of an award.

34. Mr. ROEHRICH (France) said that he could not really understand the Australian proposal. While there could be two places concerned, namely the place of arbitration and the place of the award, there could be only one date, namely the date on which the proceedings ended.

35. The CHAIRMAN pointed out that there could be several possible dates relating to the award: the date of signing it, the date of making it or the date of its notification to the parties. The aim of the Australian proposal was to prevent any litigation concerning the date of the award, but the Commission might not see any reason to forbid such litigation.

36. Mr. ROEHRICH (France) said that there could be litigation concerning the date, even with the existing text. The main thing was that the arbitrators should fix the date of the award; in that respect, the present text was satisfactory. The introduction of the notion of a deemed date might be more likely to lead to litigation than leaving the sentence as it was.

37. Mr. MOELLER (Observer for Finland) said that the purpose of the second sentence was to specify an irrebuttable presumption about the place of arbitration. The date of the award should not be treated in the same way. He did not favour the Australian proposal but thought that the drafting committee might find a way of overcoming the problem it addressed.

38. Mr. VOLKEN (Observer for Switzerland) said that the present text should be retained. He noted that a deemed date might have implications for the application of article 34 (3) concerning the time-limit for the setting aside of an award.

39. Mr. BONELL (Italy) said that arbitration rules or arbitration agreements often set a time-limit for the making of the award. It sometimes happened that the arbitrators were not able to keep within the time-limit. If the date of the award could not be rebutted, difficulties might arise, for example in connection with the discovery of new evidence.

40. Mr. HOLTZMANN (United States of America) said that the discussion had made it clear that the place of the award should be an irrebuttable presumption, while the date of the award should be a rebuttable one.

41. Mr. GRAHAM (Observer for Canada) said that the arbitrators could sit in one jurisdiction and make the award in another. The purpose of the provision was to give the arbitral tribunal flexibility in stating the place of the award.

42. Mr. JOKO-SMART (Sierra Leone) suggested that the Commission might dispose of the issue by redrafting the paragraph as follows: "The award shall state its date, the place where it is made and the place of arbitration as determined in article 20 (1)."

43. The CHAIRMAN said that he thought the suggestion made by the representative of Sierra Leone would lead to a very long discussion. Since there seemed to be little support for the Australian proposal, he would take it that the Commission wished to leave the paragraph unchanged.

44. *It was so agreed.*

*Article 31 (4)*

45. Mr. de HOYOS GUTIERREZ (Cuba) suggested that the paragraph should provide for the date of notification of the award, because any time-limit with respect to enforcement would run from that date. The date of notification could be determined by the criterion either of the date of dispatch or of the date of receipt.
46. The CHAIRMAN said that he did not see how the date of notification could be known in advance and indicated in the award. Proof of the date of dispatch or receipt could be obtained only after the event. He suggested that the Commission's report should refer to the point made by the representative of Cuba, indicating the importance of the date of notification and the need for proof of it to be provided where possible.
47. Mr. RUZICKA (Czechoslovakia) said that the status and effects of an award made under the Model Law could usefully be included in the article under discussion. His Government had proposed in its written comments (A/CN.9/263, p. 44) that a new paragraph should be added to the effect that an arbitral award made in accordance with the article had the force of *res judicata* and would be enforceable in the courts.
48. Mr. MOELLER (Observer for Finland) supported the Czechoslovak proposal because it emphasized the fact that an award did not need to be filed, registered or deposited with a court in order to be recognized or enforced.
49. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that the text should not be changed. The Czechoslovak amendment would not be consistent with the provisions concerning suspension of the setting-aside proceedings in article 34 (4).
50. Mr. ROEHRICH (France) said that the Czechoslovak proposal would duplicate the provisions of article 35 (1), which stated that an arbitral award should be recognized as binding irrespective of the country in which it was made.
51. Mr. HOLTZMANN (United States of America) pointed out that, under some legal systems, the concept of *res judicata* might be too limited for the purposes of the article under discussion.
52. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that it was important that the Model Law should specify whether the arbitration award became binding on the date it was made, the date on which it was notified to the parties or at the end of the three-month setting-aside period mentioned in article 34 (3). The point was relevant to the recognition and enforcement of foreign arbitral awards under the 1958 New York Convention. The date on which an arbitral award became binding could be indicated in a separate paragraph or simply in a separate sentence.
53. Mr. BONELL (Italy) agreed with the Soviet Union representative that the date on which an award became binding should be indicated in the Model Law. He would prefer that to be done in article 31 (3) or article 31 (4). His delegation considered that the arbitral award should be binding from the date on which it was made. However, the Czechoslovak proposal was not an acceptable way of dealing with the matter because of its reference to *res judicata*.
54. The CHAIRMAN said that, in his personal opinion, the arbitral award should be binding from the date of its notification to the parties. If that view was acceptable, a statement might be added to article 31 (4) to the effect that the award was binding upon the parties from the date of its delivery to each party. If the award became binding from the day it was made, it would be binding on the parties before they had had a chance to study it. On the other hand, three months was too long a period to allow it not to be binding if there was clearly no prospect of either party seeking to set it aside.
55. Mr. HOLTZMANN (United States of America) said that his delegation supported the Soviet Union suggestion in principle but felt that the Commission had not yet had time to consider its implications. The Chairman's suggestion could mean that the arbitral award would become binding on each party on a different date.
56. The CHAIRMAN said that, in that case, the later of the two dates should be taken as the date on which the award became binding.
57. Mr. VOLKEN (Observer for Switzerland) asked why the matter had not been made clear in the original draft text of the Model Law.
58. Mr. HERRMANN (International Trade Law Branch) said that the issue had been raised in connection with article 35 but had not been dealt with in the text. It seemed best for an award to become binding on the date on which it was made, but as a safeguard, article 34 (3) stated that an application for setting aside could be made for three months from the date of notification of the award rather than from the date on which the award was made.

*The meeting rose at 12.30 p.m.*