

329th Meeting

Tuesday, 18 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)

Article 31. Form and content of award (continued)

1. The CHAIRMAN said that the discussion seemed to be moving towards an agreement that article 31 should contain some definition of when an award became binding. One view

was that the date should be that of the rendering of the award and the other that it should be the date on which the award was received by one or other party, or if there were two dates, the later of the two.

2. Mr. HOLTZMANN (United States of America) thought that for simplicity's sake it would be better to select the date of the award, which was known and certain. The date of

receipt would require proof, and the later of two dates would require two sets of evidence. Any possible unfairness that might result from using the date of the award, such as the curtailment of the period for recourse, could be remedied in the later articles.

3. Mr. LOEFMARCK (Sweden) doubted whether there was any point in specifying that an award became binding on a certain date. If other delegations felt strongly that a date should be set, however, his delegation would not object.
4. Mr. GRIFFITH (Australia) also felt that the proposed addition was unnecessary. If there must be a date, however, it should be that of the award.
5. Mr. SAWADA (Japan) believed that if a date had to be determined, it should be the date on which the party was informed of the award, and possibly several different dates because there might be several different parties. It would seem very strange if the award were to become binding without the parties knowing of it. He was still not certain, however, that any date should be set.
6. Mr. de HOYOS GUTIERREZ (Cuba) endorsed the principle of the Czechoslovak proposal but felt that a definite time should be set for the award to become binding, in other words, to have the force of *res judicata* and be enforceable in courts. A period of time must elapse, however, before an award became final. His delegation therefore considered that the proposal would be acceptable if it was made clear that the award would only become binding three months after the time of its receipt.
7. Mr. MTANGO (United Republic of Tanzania) was also doubtful as to the advantage of specifying a date on which the award would be regarded as binding. If the consequences of the award had to run from a certain date, however, that date must be the one on which the party received it. Questions of enforcement and setting aside were involved, and if a date was set, it must be that on which the award was actually received by the party concerned.
8. Mr. VOLKEN (Observer for Switzerland) said that the point at issue was whether a specific date was actually necessary. The Model Law contained three articles for which such a date could be useful, namely articles 33, 34 and 36. In article 33 (1), which dealt with the correction and interpretation of awards, a date was specified, namely "within thirty days of receipt of the award". In article 34 (3), on application for setting aside, there was again a specific time period, namely "an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award". Article 36, on grounds for refusing recognition or enforcement, contained in its paragraph (1) (a) (v) a provision to the effect that recognition or enforcement could be refused at the request of the party against whom it was invoked if there was proof that the award had "not yet become binding". If the Model Law did not anywhere define the point of time at which an award became binding, a party making a request for refusal on those grounds would not know when that point was. He felt, therefore, that it was necessary to specify the time somewhere in the Model Law and agreed with those representatives who were in favour of the date of the award itself.
9. Mr. SCHUMACHER (Federal Republic of Germany) supported the Czechoslovak proposal; the question of when an award became binding was an important one, and it was inappropriate for it to be dealt with only implicitly, through

article 35. His delegation considered that the time should be the latest date of receipt by the parties.

10. Mr. RICKFORD (United Kingdom) agreed with the doubts that had been expressed as to the desirability of specifying a date in the Model Law. If the general feeling was that a date should be determined, a number of considerations should be taken into account. The uniform rules of the Model Law ought to be subject to the agreement of the parties, who might wish to delay the binding effect of the award between themselves until after the expiry of a certain period. Room should also be left for the award itself to state that it was not binding until a certain time had elapsed. If some presumptive date was required, however, his delegation would endorse the view of the Federal Republic of Germany. The United States proposal had considerable value in terms of certainty, but it was difficult to reconcile with article 36 (1) (a) (v). On the whole, however, his delegation had grave doubts as to the wisdom of adding such a rule.
11. Mr. STROHBACH (German Democratic Republic) supported the Czechoslovak proposal to the effect that it should be expressly stated that an award was definite and binding on the parties. As to the date on which that should occur, he shared the view of the United States representative as being the most practical way of arriving at a uniform date and preventing additional subsequent disputes. He did not think that it would be helpful to bring up the question of party agreement. He therefore proposed that the date should be that of the award itself, without leaving open any possibility for the parties to prescribe an additional period. He did not think it would be necessary to make any change in article 36, since that article referred to the recognition or enforcement of awards made under the Model Law and under other systems.
12. Mr. HOLTZMANN (United States of America) agreed with the Observer for Switzerland that, if a definition of when an award became binding was needed in the Model Law, it was for the purposes of article 36. If no provision was made in the Model Law, the matter might be covered by local law, which might require filing, registration and so on. Accordingly, a provision stating that an award became binding at the moment it was signed by the arbitrators would be helpful. The necessity of proving receipt, which would arise if the last date of delivery was accepted, could cause many practical difficulties, especially where time was an important consideration.
13. Mr. TORNARITIS (Cyprus) agreed in principle with the Czechoslovak proposal. In order, however, to cover certain legal effects governed by other provisions of the Model Law, it might be well to state that the award became binding from the date on which it was rendered, unless otherwise provided by law.
14. Mr. PAULSSON (Observer for the Chartered Institute of Arbitrators) endorsed both the Czechoslovak proposal and the United States suggestion in regard to a date. He noted that in French law the matter had been considerably developed. There had been many cases in French judicial practice prior to 1980 in which the finding was that an award was binding as from the moment it was rendered. A provision to that effect, included in the law on arbitration, which had been adopted in 1980, had become very important in practice and was frequently invoked. The rendering of an award created certain abstract rights which could be of great interest and which did not necessarily require for their existence an awareness on the part of the party which enjoyed them.

15. Mr. LAVINA (Philippines) thought that the formula proposed by the United States delegation was both practical and realistic and would result in a uniform date. He agreed that it was also necessary for the purposes of article 36 (1) (a) (v).

16. The CHAIRMAN noted that some delegations considered that it was useful and necessary to fix a date on which an award became binding, though omitting the reference to *res judicata* and enforceability, while others felt that such a provision would not be very useful. As for the actual time to be set, there seemed to be a slight majority in favour of the date of the rendering of the award.

17. Mrs. RATIB (Egypt) said that her delegation considered that the date should be that on which the parties received notification of the award.

18. Mr. LOEFMARCK (Sweden) said that his delegation would prefer the date of the award. At the same time, if a specific date was decided on, it would be necessary to clarify what was meant by an award that was binding.

19. Mr. MTANGO (United Republic of Tanzania) agreed that it would be necessary to know the meaning of "binding" before deciding on a date. Delegations would have to be clear on that point in order to advise their Governments, which might be considering adopting the Model Law.

20. Mr. BONELL (Italy) felt that the Commission could not embark at that stage on a discussion of the implications of the binding effect of an award. His delegation would favour including a provision drafted on the lines suggested by the delegations of the Soviet Union and the United States and specifying the date of the rendering of the award.

21. Mr. ROEHRICH (France) said that, if the provision was included, the date set should be that of the award, as being the only known and certain date.

22. Mr. GRAHAM (Observer for Canada) said that it was customary in many countries to specify in the arbitration agreement when precisely an award became binding. As far as the Model Law was concerned, if the last date of receipt was taken as the relevant one, the problem would remain of ascertaining that date. The point could be solved by the provision in article 2 (e) which laid down when a written communication should be deemed to have been received. While his delegation would prefer the United States suggestion, it would therefore not object strongly to the proposal to use the date of receipt.

23. Mr. TORNARITIS (Cyprus) still believed that a distinction should be made between the validity of the award and its legal consequences. It should be stated that the award became valid as from the date of its rendering and that it produced its legal effects at that time, unless otherwise expressly provided in "this Law".

24. The CHAIRMAN said that since it was apparently not possible to satisfy all points of view, the Commission would have to keep the text as it stood and not insert a new paragraph. The report would state that there had been a lengthy discussion, with several delegations in favour of inserting a provision of the kind proposed, some of them being in favour of specifying the time of the award, others the time of its receipt by the parties and, in the case of one delegation, the time of the expiry of the period laid down for making application to set aside the award. If there were no objection, he would take it that the Commission agreed to approve article 31 on that basis.

25. *It was so agreed.*

Article 32. Termination of proceedings

Article 32 (1)

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his delegation's written comment in document A/CN.9/263 (p. 44). The Commission had already approved in article 30 (1) the principle that if there was a settlement between the parties, the proceedings should be terminated by the arbitral tribunal. For the sake of consistency with that, the reference to the agreement of the parties should be transferred from paragraph (1) of article 32 to paragraph (2). He thought that was only a drafting point. Also, by describing the award as "final", the article introduced a new concept.

27. The CHAIRMAN said that he regarded the points raised by the Soviet Union representative as a drafting matter. If that representative saw no objection, they would be referred to the drafting committee.

28. *It was so agreed.*

Article 32 (2)

29. Mr. MTANGO (United Republic of Tanzania) questioned the inclusion of the proviso in paragraph (2) (a). If the claimant withdrew his claim, there was no longer a dispute. Even if that assumption was wrong, there was still the matter of costs. If the respondent insisted on the proceedings continuing, could the original claimant be held responsible for the costs arising out of that insistence? How could that matter be settled? He would like the proviso to be deleted.

30. Mr. HERRMANN (International Trade Law Branch) said that the Working Group on International Contract Practices had discussed the point raised by the representative of the United Republic of Tanzania and had decided that the arbitral tribunal should be given a certain discretion in the matter. As between the parties, the withdrawal of a claim might mean either a withdrawal from the current proceedings to enable the claimant to bring the dispute before another tribunal or a waiver of the rights alleged in the claim. It was not the intention of the Model Law to pronounce on that point. However, the Working Group had realized that the other party might have a certain interest in the current proceedings being pursued in order to reduce the risk of harassment by a claimant repeatedly bringing a claim and then withdrawing it. The question of costs was directly involved, and there had been a proposal to include a reference to liability for them in the text. That had not been done, because in general the Working Group had been reluctant to deal with the matter of costs in the Model Law. The present formulation of paragraph (2) (a) was an attempt to describe instances in which, in the objective judgement of the arbitral tribunal and not only in the view of the respondent, the latter had a legitimate interest in obtaining a final settlement of the dispute.

31. Mr. MTANGO (United Republic of Tanzania) said he still felt that the provision was open to abuse by the respondent: cases might occur, for example, in which the latter insisted on the proceedings continuing before an arbitral tribunal which was subsequently found incompetent. However, he would not press the point.

32. Mrs. RATIB (Egypt) said that paragraph (2) (b) provided the following: "when the continuation of the proceedings . . .

becomes unnecessary or inappropriate” the arbitral tribunal “may issue an order of termination”. The word “may” indicated a right and not an obligation. It followed that in spite of its conviction that the proceedings were unnecessary or inappropriate, the arbitral tribunal might, for reasons unspecified in the text, order them to be pursued. It was clear that the continuation of such proceedings could only be a waste of time and money. She therefore proposed that paragraph (2) should be amended to read:

“(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

“(a) the claimant withdraws his claim . . . [text unchanged];

“(b) the continuation of the arbitral proceedings for any other reason becomes unnecessary or inappropriate.”

33. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the meaning of the word “inappropriate” was not sufficiently clear. In the corresponding text in the UNCITRAL Arbitration Rules (article 34 (2)), the phrase used was “unnecessary or impossible”. He suggested that the drafting committee might consider replacing the word “inappropriate” by the word “impossible”.

34. Mr. SAMI (Iraq) supported the Egyptian proposal.

35. The CHAIRMAN said that the Egyptian proposal was one of substance. Perhaps wording such as the following might make it clear that it was for the arbitral tribunal to decide whether continuation was unnecessary or impossible: “The arbitral tribunal shall issue an order of termination when it finds that the continuation of the proceedings for any reason is unnecessary or impossible.” If there was no objection, he would send the paragraph to the drafting committee for reformulation along those lines.

36. *It was so agreed.*

Article 32 (3)

37. *The Commission did not comment on paragraph (3).*

Article 33. Correction and interpretation of awards and additional awards

Article 33 (1)

38. Mr. HUNTER (Observer for the International Bar Association) said that as a practitioner he was concerned about the power of the arbitral tribunal under paragraph (1) (b) to interpret its award. He therefore supported the written proposal of the German Democratic Republic (A/CN.9/263, p. 45 (article 33), para. 1) that it should not be dealt with in the Model Law. He felt that subparagraph (b) might encourage an unseemly race between the winning party to request an interpretation, if he perceived any grounds in the text of the award for his opponent seeking to annul it, and the losing party to bring an action for recourse. He would therefore prefer paragraph (1) (b) to be deleted, but if the Commission wished to retain it, he hoped that it would be made non-mandatory by the addition of the formula “unless the parties otherwise agree”.

39. Mr. GRIFFITH (Australia) agreed that the parties should be able to exclude the application of paragraph (1) (b).

40. Mr. HOELLERING (United States of America) said that his delegation too had had second thoughts about the

desirability of giving the arbitral tribunal power to interpret its award. The provision invited attempts on the part of both the winner and the loser to get changes made in the merits of the award. While that might be acceptable by agreement between the parties, it should not occur at the unilateral request of one of them. That would encourage further proceedings and undermine the principle of the finality of the arbitral award. Furthermore, if the intention of the Commission was to harmonize arbitral law, he was not aware of any statute containing such a provision.

41. Mr. MTANGO (United Republic of Tanzania) said that he shared the views expressed by the previous speakers. In addition to the problems already mentioned, there were also the questions whether the interpretation could be contested and when it would become part of the award. It would be better to delete subparagraph (1) (b).

42. Mr. de HOYOS GUTIERREZ (Cuba) said he would prefer the provision to be amended. Various arbitration rules authorized an arbitral tribunal to clarify a specific point or part of an award.

43. Mr. ROEHRICH (France) drew attention to the fact that interpretation of an award was possible under article 35 (1) of the UNCITRAL Arbitration Rules. The principle of interpretation of decisions was also admitted in the judicial system, in order to avoid subsequent litigation. He could therefore approve the text as it stood, provided that a very short time-limit was imposed. He would have no objection to making the provision non-mandatory.

44. Mr. STROHBACH (German Democratic Republic) said that under paragraph (1) (b) the losing party had the right to seek interpretation of merely a part of the award. Over what period of time should he be able to exercise that right? In his view, the provision must either be deleted or be amended to make it more precise and to limit action by the losing party designed solely to postpone compliance with the award. He would prefer deletion, because he thought that the needs of the parties were sufficiently met by the possibility of the arbitral tribunal making corrections and additional awards.

45. Mr. MOELLER (Observer for Finland) said he also felt that the subparagraph should be deleted. Finland had had such a provision in its legal system but it had not functioned satisfactorily and it had been repealed. He could also support the Czechoslovak written suggestion to restrict the provision (A/CN.9/263, p. 45 (article 33), para. 1), but that proposal would not satisfy those who wanted the arbitral tribunal to retain its power of interpretation. A possible compromise would be to make interpretation subject to the agreement of both parties. In that case the arbitral tribunal should give the other party an opportunity to comment before it made its interpretation. However, that would entail prolonging the period of time specified.

46. Mr. NEUTEUFEL (Austria) endorsed the comments of the Observer for the International Bar Association.

47. Mr. RUZICKA (Czechoslovakia) said that while he saw no justification for deleting the subparagraph, it might be desirable to limit the permissible interpretation to interpretation of the reasons upon which the award was based, as had been suggested in his Government’s written comments. Interpretation of the award itself might result in a reopening of the case and the drawing-up of a new award.

48. Mr. JOKO-SMART (Sierra Leone) favoured the retention of the subparagraph, although the word “interpretation”, if

taken in its strict legal sense, was perhaps too strong; the parties should be given an opportunity to ask for a clarification or explanation of the award.

49. Mr. LOEFMARCK (Sweden) said there might be a justification for the provision in the fact that the losing party or the enforcement authority might not know how they were required to act. If the provision was retained, therefore, it should not be restricted to the reasons upon which the award was based. However, he was in favour of its deletion.

50. Mr. SCHUMACHER (Federal Republic of Germany) also favoured the deletion of the provision. A request for an explanation on specific points might give the losing party an opportunity to make the arbitral tribunal waste time unnecessarily. A possible compromise would be to make the provision subject to the agreement of both parties, but he would prefer its deletion.

51. Mr. SEKHON (India) said that he favoured the deletion of the provision since it could be abused and might frustrate one of the basic aims of arbitration, which was the speedy resolution of disputes. He could accept a compromise wording allowing both parties to agree to seek a clarification of the award. There was not much justification for the provision to refer specifically to the reasons for the award, since that matter was already covered by article 31 (2).

52. The CHAIRMAN asked whether the Commission was prepared to accept the retention of subparagraph (1) (b), subject to its reformulation by the drafting committee to contain a proviso that both parties should have agreed before the award was made to allow an interpretation of it by the arbitral tribunal, or should by common accord ask for an interpretation after the award had been made.

53. *It was so agreed.*

54. Mr. GRIFFITH (Australia) said that he agreed with the suggestion made by Sweden and the United States in their written observations (A/CN.9/263, p. 45 (article 33), para. 3) that an arbitral tribunal which had received a request from a party under article 33 should give the other party an opportunity to respond to the request. That should be implicit from a reading of article 19 (3), and a provision to that effect need not be incorporated in article 33 (1), but he wished to make it clear that that was how the article should be interpreted. Article 33 (3) stipulated that the arbitral tribunal should make an additional award "if it considered the request to be justified", and that proviso should apply to correction and interpretation as well. He therefore suggested that the words "if it considers the request to be justified" should be added at the end of the penultimate sentence of article 33 (1).

55. The CHAIRMAN said that article 33 (1) should not be read to mean that the arbitrators had to comply blindly with requests by the parties; it was clear that they were expected to exercise discretion.

Article 33 (2)

56. Mr. HOELLERING (United States of America) said that there should be one period during which the other side could object to a request and another during which the arbitrators could act after a party had filed its objection or after the date for filing had expired.

57. Mr. ROEHRICH (France) said that article 33 (2), when read in conjunction with articles 19 (3) and 33 (1), could have

the effect of facilitating the reopening of a case under the pretext of a request for a correction. However, if drafting changes were made to prevent such an interpretation, they would complicate still further an already complex article.

58. The CHAIRMAN said that it would be placed on record that the Commission did not desire to make any changes in the text of the paragraph.

Article 33 (3)

59. Mr. SEKHON (India) said that a party other than the one requesting the additional award should be able to file an objection or be given a hearing on the matter; that was in accordance with both common law and civil law procedure.

Article 33 (4) and (5)

60. *The Commission did not comment on paragraphs (4) or (5).*

Article 35. Recognition and enforcement (continued)

Article 35 (3) (continued)

61. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the Working Group on International Contract Practices had decided to insert the paragraph in the draft text for sound reasons connected with the structure of the Model Law and its relationship with the 1958 New York Convention. The Commission, in acceding to the objections raised to the paragraph at its 320th meeting, might perhaps have overlooked those considerations. He felt that the Model Law should state explicitly what article 35 (3) stated. He therefore urged the Commission to give serious consideration to reversing the decision in which it had decided to delete the subparagraph.

62. The CHAIRMAN said that the Commission would not wish to overturn one of its decisions without very strong reasons for doing so. Unless he heard any objection, he would take it that the Commission maintained its decision to delete article 35 (3).

63. *It was so agreed.*

64. Mr. HOLTZMANN (United States of America) said that his delegation wished to register its dissatisfaction that insufficient time was being provided for a discussion of the important points raised by article 35 (3) and to which the Observer for ICCA had drawn attention.

Article 36. Grounds for refusing recognition or enforcement (continued)

Article 36 (1)

65. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that, having decided to deal with both domestic and foreign awards in the Model Law, the Commission must remember that the same provisions should not always apply to both; the grounds for refusal that had to be proved by the parties should not be the same in both cases, and the grounds for refusal set out in article 36 (1) (b) should not be compulsory for domestic awards. To make that distinction clear, article 36 should be reworded; it was already difficult to read as it was, however, and redrafting might

make it all the more complex. Another possibility would be to make article 36 apply solely to foreign awards and to add a new article 37 which would reproduce the language of article 36 but be applicable only to domestic awards; that would create repetition in the text but render it easier to grasp.

66. Mr. VOLKEN (Observer for Switzerland) proposed that the words "irrespective of the country in which it was made" be deleted and the word "foreign" be inserted before the words "arbitral award" in article 36 (1). The Model Law would then mirror the 1958 New York Convention by applying only to foreign awards.

67. Mr. LOEFMARCK (Sweden) said that from a logical point of view, foreign awards should be dealt with separately from domestic awards; from a practical point of view, however, he doubted whether that was in the interest of individual countries. He would advocate leaving the text of article 36 as it was.

68. Mr. ROEHRICH (France) said that he too favoured leaving the text as it was. The Model Law was intended to apply to international commercial arbitration and it was of no use to limit article 36 to foreign awards, especially as it established similar grounds for refusal of enforcement as did article 34 for setting aside.

69. Mr. SZASZ (Hungary) said that one of the main points raised during the discussion of article 35 had been that the Model Law was not a simple repetition of the 1958 New York Convention but an innovation in that it established a unified common régime for international commercial arbitration. If the scope of article 36 was to be limited to foreign awards as understood under the 1958 New York Convention, articles 35 and 36 would be entirely superfluous and could be deleted. The Commission should seek, rather, to establish a system for

recognition and enforcement which was completely different in scope from that of the 1958 New York Convention but which incorporated the lessons learned from its application.

70. Mr. BONELL (Italy) said that he endorsed the comments made by the representative of Hungary.

71. Mr. VOLKEN (Observer for Switzerland) said that, in view of the remarks of the representative of Hungary, he withdrew his proposal.

72. Mr. LOEFMARCK (Sweden) said that in some jurisdictions, notably the Swedish and Finnish, it was not a court but another authority which was involved in the enforcement of domestic awards. He therefore suggested that the words "or other authority" be inserted after the words "competent court" in article 36 (1) (a).

73. Mr. MOELLER (Observer for Finland) said that he felt the problem was solved by the definition of "court" given in article 2 (c).

74. Mr. BOGGIANO (Observer for Argentina) recalled the question of the jurisdiction of the arbitral tribunal which had been raised during the discussion of article 1 (2) (c). If a dispute could be made international merely by the will of the parties, recourse to arbitration could be a means for them to escape the jurisdiction of the country in which the dispute had arisen. Under article 36 (a) (i), however, the court in which enforcement was sought might wish to challenge an agreement on arbitral jurisdiction reached by the parties if it felt that it represented an attempt to evade the jurisdiction of a country with which the dispute was directly linked. He referred in addition to his country's written observations (A/CN.9/263, p. 53, para. 1) on how the article should be interpreted.

The meeting rose at 5 p.m.