330th Meeting

Wednesday, 19 June 1985, at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 9.35 a.m.

International commercial arbitration (*continued*)
A/CN.9/246, annex; A/CN.9/263 and Add.1-2; A/CN.9/264; A/CN.9/XVIII/CRP.9, 11, 12)

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

1. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said that, since the Commission had decided to delete the phrase "under the law applicable to them" from article 34 (2) (*a*) (i), the same phrase should be deleted from article 36 (1) (*a*) (i).

2. Mr. BOGGIANO (Observer for Argentina) supported that suggestion which conformed with the current trend towards greater party autonomy.

3. Mr. MTANGO (United Republic of Tanzania) said that his delegation had opposed the deletion of the phrase "under the law applicable to them" in article 34 (2) (*a*) (i); it could not now support the same amendment to the article under discussion.

4. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that it should be made clear in the Commission's report that the amendment was only a drafting change and did not affect the interpretation of the 1958 New York Convention.

5. Mr. LOEFMARCK (Sweden), speaking on article 36 (1) (*a*) (v), asked what would happen if enforcement of a foreign arbitral award were sought as soon as the award became binding, but before the expiry of the three-month period for instituting setting-aside proceedings. The competent court might, for instance, find errors which could cause the award to be set aside, or it might know that setting-aside proceedings had already been initiated. The point should be raised in the Commission's report so that States adopting the Model Law could introduce appropriate national legislation if necessary.

6. The CHAIRMAN said that, under his country's legal system, enforcement could be suspended if the competent court thought it likely that a claim for setting aside would be brought. The Model Law should not contain a specific reference to the enforcement of foreign arbitral awards since

such a provision might conflict with existing national legislation. The point would, however, be covered in the report.

7. Mr. SEKHON (India) said that the concept of "public policy" existed also in States with a civil law system, but referred essentially to the law of contracts. His delegation therefore suggested that subparagraph (*b*) (ii) should be deleted from article 36 (1).

8. Mr. HERRMANN (International Trade Law Branch) said that in the corresponding subparagraph (*b*) (ii) of article 34 (2) the Commission had decided to retain the term "public policy", but to indicate in the report the possible interpretations of that term. The Commission had also decided to bring the wording of article 34 (2) (*a*) (ii) into line with that of article 19 (3) by inserting a reference to the principle of equal treatment of the parties.

9. Mr. GRAHAM (Observer for Canada), supported by Mr. RICKFORD (United Kingdom), said that his delegation had understood the term "public policy" in the sense of the French "*ordre public*", rather than in the restricted common law sense.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the phrase "under the law applicable to them" in article 36 (1) (*a*) (i) and to retain the reference to "public policy" in article 36 (1) (*b*) (ii).

11. *It was so agreed.*

Article 15. Appointment of substitute arbitrator (continued) (A/CN.9/XVIII/CRP.11)

12. Mr. HERRMANN (International Trade Law Branch) said that the document under discussion (A/CN.9/XVIII/CRP.11) had been prepared before the Commission had reached a final decision on the text of article 14. Since, however, it had been decided to leave article 14 in its original form, the amendment to article 15 contained in that document was no longer necessary.

13. Mr. SEKHON (India), speaking on behalf of the *Ad Hoc* Working Party, withdrew the amendment.

Article 1. Scope of application (continued) (A/CN.9/XVIII/CRP.12)

14. Mr. HERRMANN (International Trade Law Branch), introducing the secretariat proposal on a new paragraph (1 *bis*) for article 1 (A/CN.9/XVIII/CRP.12), said that it gave expression to the Commission's tentative decision to adopt a strict territorial scope of application for the Model Law. It had been decided that the provisions of the Model Law would apply where the place of arbitration was in the particular State which had adopted it, except for articles 8, 9, 35 and 36, which would apply irrespective of the place of arbitration. On another point, the Commission had not as yet decided whether the court assistance referred to in articles 11, 13 and 14 should be made available even before the place of arbitration had been determined; if it decided that issue in the negative, the proposed new paragraph (1 *bis*) would take a much simpler form, which was presented as an alternative in document A/CN.9/XVIII/CRP.12.

15. Since article 1 (1 *bis*) would thus explicitly state that articles 8, 9, 35 and 36 were excepted from the strict territorial scope of application, there was a risk of misinterpretation if the global scope of application in some of those articles were explicitly restated. If the Commission wished to make the point clear in respect of articles 35 and 36, the heading of chapter VIII of the Model Law could be amended to indicate that the articles in that chapter covered recognition and enforcement of awards irrespective of the countries in which they were made.

16. The CHAIRMAN said that the Commission had tentatively decided to include a provision on the territorial application of the Model Law if it could agree on a suitable text, and otherwise to keep the original text, despite the risk of varying interpretations.

17. Mr. ROEHRICH (France) supported the inclusion of a provision on territorial scope of application and expressed a preference for the second, shorter version of the new paragraph (1 *bis*). However, his delegation had doubts about the further criteria which had been suggested for the court functions mentioned in articles 11, 13 and 14, namely the place of business of the claimant or the respondent, and felt that a better definition was needed of the court which would provide the assistance. The shorter version of the proposed new paragraph (1 *bis*) would not allow for court assistance before the place of arbitration had been determined, but that assistance was rarely requested at such an early stage.

18. Mr. SZASZ (Hungary) endorsed the comments of the representative of France. It was essential for the Model Law to include a rule on the territorial scope of application, and he supported the shorter of the two versions submitted. He welcomed the secretariat's submission of two drafts, since it would be important for those drafting national law to read the discussion and understand the reasons that had led to the Commission's decision.

19. Mr. BONELL (Italy), while appreciating the arguments advanced in favour of the shorter text, supported the longer version. In the first place, the words "except articles 8, 9, 35 and 36" in the shorter text could be misconstrued as meaning that those articles would apply only if the place of arbitration was not in the territory of the State concerned. His main reason, however, was that the longer version provided for cases where court assistance was needed but the place of arbitration had not yet been determined. It was true that the Commission had to decide whether to deal with such cases or not, but he felt that a provision on the subject should, if possible, be included. The secretariat's proposal was realistic and could meet many, if not all, of the circumstances which might arise in practice. There might be problems with the intervention of different courts in the same arbitral proceedings, but they would not be avoided by ignoring them. It was not always possible for the parties to determine the place of arbitration, and in those cases the court would have to decide. A further reason for preferring the longer version was its provision that, in that context, the criterion should be the place of business of the respondent.

20. The CHAIRMAN suggested that the first point raised by the representative of Italy might be solved if the longer version was taken and it was specified that the provisions of the law should apply "only" if the place of arbitration was in the territory of the State.

21. *It was so agreed.*

22. Mr. PELICHET (Observer for The Hague Convention on Private International Law) said that, for technical reasons of legislative drafting, he had serious doubts about the value

of the proposed paragraph. The Model Law would be incorporated into national law and, in that context, to state that a law would apply in the country adopting it would be to state a legally self-evident proposition. With the proposed paragraph, it might be argued by *a contrario* reasoning that a legislator adopting the Model Law would, for example, not allow parties abroad to use the Model Law for their arbitral proceedings. In his opinion, the proposed article would not serve any useful purpose.

23. Mr. HOLTZMANN (United States of America) agreed with the representative of Italy that, if possible, it would be useful if the Model Law could provide for cases where the parties had not agreed on the place of arbitration. He had reluctantly concluded, however, that at the present juncture—and without a working group to deal with the complexities of the problem—it was not feasible to address that situation.

24. Among the problems that would have to be resolved was whether the court chosen to provide assistance should be that of the claimant or that of the respondent, or some other court. He could not agree to the choice of the respondent's court. For reasons which he would not explain unless the longer version were adopted for the new paragraph, he felt that its provisions were inconsistent with those of the existing article 1. He therefore supported the shorter version, on the understanding that the Italian representative's drafting point and the Chairman's solution, to which he agreed, would be referred to the drafting committee.

25. He suggested that it should be noted in the report that questions of assistance in situations covered by articles 11, 13 and 14 were clearly not matters governed by the Model Law. It was up to the parties to solve that problem—a resolution that was possible if the parties showed goodwill—otherwise they would be left only with any remedies available under domestic laws.

26. *It was so agreed.*

27. Mr. STROHBACH (German Democratic Republic) said that he was in favour of having a new paragraph and supported the shorter version, with the Italian drafting amendment.

28. Mr. BROCHES (Observer, International Council for Commercial Arbitration) supported the idea of a general article and also preferred the shorter version. He agreed with the territorial scope of application as defined elsewhere in the Model Law.

29. Mr. VOLKEN (Observer for Switzerland) said that he did not entirely agree with The Hague Conference Observer, because national law could perfectly well contain a rule governing its scope of application or restricting that scope; the latter would be a self-limiting rule.

30. Regarding the secretariat's proposal, he preferred the shorter version but suggested that it should be couched in more general terms, without listing the articles, on the following lines: "The provisions of this Law apply if the place of arbitration is in this State or if a court of this State is called upon to solve a legal question concerning arbitration". That would cover all the cases where a court of the State in question was called upon to settle an issue related to a case of international commercial arbitration.

31. The CHAIRMAN suggested that the proposed amendment, which was a matter of presentation, should be left to the drafting committee.

32. *It was so agreed.*

33. Mr. MOELLER (Observer for Finland), while not disagreeing with The Hague Conference Observer that the rule in the proposed new paragraph was self-evident, felt that it was nevertheless a useful provision. He supported the shorter version, subject to drafting.

34. Mr. LOEFMARCK (Sweden) endorsed the views of the representative of Italy. While he would prefer the longer version for the new paragraph, he would bow to the majority if it was in favour of the shorter one. He regretted, however, that the latter would rule out the possibility of using the court specified in the Model Law.

35. Mr. LEBEDEV (Union of Soviet Socialist Republics) expressed regret that so little time was left to deal with a very important issue. In that regard, he drew attention to his delegation's proposal in its comments under article 6 (A/CN.9/263, p. 8, para. 5). That proposal was close to the idea—mooted during the discussion—of combining the territorial criterion and party agreement. In the circumstances, however, he was prepared to join the majority in supporting the shorter version for the new paragraph on the understanding, indicated by the United States representative, that the case where the place of arbitration had not yet been agreed upon should remain outside the scope of the Model Law.

36. Mr. MTANGO (United Republic of Tanzania) shared the Soviet Union representative's regret that there was not sufficient time to study the implications of the present issue. He therefore preferred the approach suggested by the United States representative and elaborated upon by the Soviet Union representative.

37. Mr. SAWADA (Japan) also supported the shorter version but agreed with the Soviet Union representative that if the place of arbitration were not yet decided, rather than declare that court assistance was not available under articles 11, 13 and 14, it would be better to leave the matter to the law of the State concerned.

38. The CHAIRMAN said he took it that the Commission agreed that the shorter version of the new paragraph (1 *bis*), subject to drafting changes, should be referred to the drafting committee.

39. *It was so agreed.*

Article 27. Court assistance in taking evidence (continued)

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, as he understood it, the adoption of the new paragraph (1 *bis*) for article 1 in the shorter version would also settle the question left pending under article 27. In that connection, he drew attention to the Soviet delegation's suggestion to delete the words "under this Law" (A/CN.9/263, p. 38, para. 1).

41. The CHAIRMAN suggested the deletion of the whole of the opening phrase "In arbitral proceedings held in this State or under this Law"; the article would then read: "The arbitral tribunal or a party . . .". There was no need to repeat the principle of territoriality because it was now embodied in the new paragraph (1 *bis*) of article 1.

42. *It was so agreed.*

Article 8. Arbitration agreement and substantive claim before court (continued)

43. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) supported the Secretariat suggestion concerning the chapter heading relating to article 8.

44. The CHAIRMAN said that he doubted whether any change was really necessary because the new paragraph (1 *bis*) of article 1 specified that the territorial restriction did not apply to articles 35 and 36.

45. Mr. SZASZ (Hungary), supported by Mr. LEBEDEV (Union of Soviet Socialist Republics), asked whether the footnote to the title of article 1 and the article headings generally would be retained in the final version of the Model Law.

46. Mr. HERRMANN (International Trade Law Branch) explained that, since practice differed, it had been thought useful in the Model Law to indicate that the headings did not form part of the Commission's decision but had been added for reference purposes only and should not be used for purposes of interpretation. It was for each State to decide if it wanted to indicate the purpose of the headings.

47. The CHAIRMAN said he took it that there was no objection to keeping the footnote.

48. *It was so agreed.*

Article 2. Definitions and rules of interpretation (continued) (A/CN.9/XVIII/CRP.13)

49. The CHAIRMAN said that, since there were no comments, he would take it that the Commission agreed to adopt the proposal by the delegation of the German Democratic Republic and the Observer of The Hague Conference on Private International Law (A/CN.9/XVIII/CRP.13).

50. *It was so agreed.*

Article 19. Determination of rules of procedure (continued)

Article 19 (2)

51. Mr. MTANGO (United Republic of Tanzania) recalled that the Commission, at its 316th meeting, had decided to postpone consideration of the paragraph until completion of the consideration of article 28 (A/CN.9/SR.316, paras. 76-77), and that the United States delegation had been requested to submit a text for consideration by the Commission.

52. Mr. HOLTZMANN (United States of America) said that his delegation had not prepared a text but thought that the written proposal made by the International Chamber of Commerce (ICC) on article 7 (A/CN.9/263/Add.1, p. 7, para. 8) might be used, though not necessarily in article 19, but with the following amendments: the words "administered by a permanent arbitral institution" should be replaced by "under particular arbitration rules"; the words "the rules of such arbitral institution" should be replaced by "such rules"; and the words "mandatory provisions of this Law" should become "the provisions of this Law from which the parties cannot derogate".

53. The aim of the ICC proposal was to make the Model Law even clearer concerning the importance of arbitration rules. However, the inclusion of the provision was not absolutely necessary since the Model Law emphasized the right of the parties to make agreements, including agreements concerning arbitration rules.

54. The CHAIRMAN noted that article 19 (1) and article 2 (*d*) both implied that agreement between the parties concerning arbitration rules formed a part of the agreement of the parties. Perhaps the Commission's report should note that that was the common understanding on the subject and that the ICC proposal had been omitted merely because it was not necessary.

55. Mr. BONELL (Italy) said that he agreed with the Chairman's comment on the implications of article 19 (1) and article 2 (*d*). During the earlier discussion on article 19, he had drawn attention to his Government's written comment on article 19 (2) (A/CN.9/263, p. 32, para. 4). The Commission should now consider deleting the second sentence of that paragraph. Otherwise, the difficulties referred to in his Government's submission might arise.

56. The CHAIRMAN suggested that the problem might be overcome by inserting the words "subject to article 28".

57. Mr. BONELL (Italy) said that if the Chairman's suggestion was accepted, he would withdraw his proposal for deletion.

58. Mr. HOLTZMANN (United States of America) said that one reason why parties chose arbitration was to be free of the technical rules of evidence, be they procedural or substantive. The aim of the Model Law was precisely to avoid the application of technical rules of evidence. He therefore thought that the Commission should adopt the Working Group's text.

59. The CHAIRMAN said that since there was little support for the deletion or amendment of the second sentence of paragraph (2), he would take it that the Commission agreed that the paragraph should remain unchanged.

60. *It was so agreed.*

Article 19 (3)

61. The CHAIRMAN recalled that the only point to be decided was whether article 19 (3) should remain where it was or be transferred to an earlier place in the text.

62. Mr. SAMI (Iraq), supported by Mr. MTANGO (United Republic of Tanzania) and Mr. RICKFORD (United Kingdom), said that article 19 (3) embodied a general principle that should govern all phases of the arbitration proceedings and not merely the two cases covered in paragraphs (1) and (2) of article 19. It should therefore be moved up in the text.

63. Mr. SEKHON (India) agreed with the representative of Iraq and noted that, in the event of relocation, the words "In either case" would have to be deleted.

64. Mr. LOEFMARCK (Sweden) said that the provision contained in article 19 (3) enshrined too important a rule to be hidden in article 19 under the heading "Determination of rules of procedure".

65. The CHAIRMAN suggested that article 19 (3) should be converted into a new article 18 *bis* and become the first article in chapter V, and that the drafting committee should propose a suitable heading for it. Article 19 would then follow under its present heading but with only two paragraphs. If there was no objection, he would take it that the Commission agreed to adopt that suggestion.

66. *It was so agreed.*

Article 12. Grounds for challenge (continued)
(A/CN.9/XVIII/CRP.9)

67. Mr. HOLTZMANN (United States of America) said that the *Ad Hoc* Working Party had reconsidered its proposal (A/CN.9/XVIII/CRP.9) and had concluded that there was some ambiguity as to whether the term "justifiable doubts" qualified the words "or as to any other qualification agreed by the parties". It now proposed that those words should be replaced by "or if he does not possess qualifications agreed by the parties".

68. The CHAIRMAN suggested that the Commission should accept the proposal by the *Ad Hoc* Working Party.

69. *It was so agreed.*

Article 34. Application for setting aside as exclusive recourse against arbitral award (continued)

and

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

70. Mr. GRIFFITH (Australia) said that if the drafting committee was to propose an amendment to article 34 (2) (*a*) (ii), a similar amendment would have to be made to article 36 (1) (*a*) (ii).

71. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, as far as he remembered, the decision to request an amendment from the drafting committee applied only to article 34. No decision had been taken to include a similar amendment in article 36, especially since paragraph (1) (*a*) (ii) of that article deliberately reproduced the wording of the corresponding provision of the 1974 New York Convention (Article V (1) (*b*)). If such an amendment was made to article 36, the conditions of enforcement of an arbitral award would be more burdensome under the Model Law than under the 1958 New York Convention. That was not the Commission's intention.

72. Mr. HERRMANN (International Trade Law Branch) said that his understanding of the situation was that the Commission needed to take a decision as to whether article 36 should be made consistent with article 34 along the lines indicated by the representative of Australia.

The meeting rose at 12.35 p.m.