331st Meeting

Wednesday, 19 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 34. Application for setting aside as exclusive recourse against arbitral award (continued)

and

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

1. The CHAIRMAN said that the question had arisen whether the Commission should eliminate the disparity which it had created between articles 34 and 36; the former now incorporated a more extensive list of grounds for court action than the latter, which followed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As the 1958 New York Convention was not concerned with the question of setting aside, it might not be inappropriate for the Commission to accept differing formulations for the two articles.

2. Mr. ROEHRICH (France) said that he would prefer article 34 and article 36 to be worded identically. Even though the two articles were intended to serve different purposes, a disparity in their language might make their interpretation difficult. Moreover, the new article 18 *bis* set out a general rule on the conduct of arbitral proceedings which should meet the concerns of those who wanted article 34 to be more detailed.

3. Mr. SZASZ (Hungary) said that he agreed with the representative of France that articles 34 and 36 should be identical. The Commission's report should make it clear that anything not covered by article 18 *bis* was covered by those two articles.

4. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he fully endorsed the comments made by the representatives of France and Hungary. It would be extremely difficult to amend article 34 (2) (*a*) (ii) by incorporating in it a reference to article 19 (1) or article 18 *bis* without duplicating the provisions of article 34 (2) (*a*) (iv).

5. Mr. DUCHEK (Austria) said that the interpretation of article 34 (2) (*b*) (ii) was that it did not refer exclusively to an award but also covered the procedures that led to an award. As long as that broad interpretation of "award" was clearly reflected in the Commission's report, he would favour the wording of article 34 as proposed by the Working Group on International Contract Practices.

6. Mr. RICKFORD (United Kingdom) said that his delegation would be reluctant to agree to any action by the Commission to align articles 34 and 36 that implied a reversal of its decision to expand the scope of article 34. However, the Commission might perhaps take the view that the purpose of that decision could equally well be achieved by the incorporation in the report of wording conveying the broad inter-

pretation of article 34 (2) (*b*) (ii). If so, his delegation could accept that as a substitute for the Commission's earlier decision.

7. Mr. GRIFFITH (Australia) said that, if that suggestion was adopted, the report should make it clear that any breach of the obligations imposed by article 18 *bis* was intended to be covered by the wording of article 34 (2).

8. The CHAIRMAN said that the course of action outlined by the representatives of the United Kingdom and Australia would allow the wording of article 34 to be brought back into line with that of article 36. He would therefore take it, unless he heard any objection, that the Commission wished to reverse its decision to expand the grounds for setting aside enumerated in article 34 (2) and, instead, to include in its report the wording referred to by the United Kingdom and Australian representatives.

9. *It was so agreed.*

Additional points suggested for inclusion in the Model Law

Counter-claim

10. Mr. HOLTZMANN (United States of America) said that he supported the written proposal made by the Government of Mexico (A/CN.9/263, p. 55, para. 1) for the inclusion in the Model Law of an express reference to counter-claims and defences to counter-claims. Although those steps were intended to be covered *mutatis mutandis* wherever the text spoke of claims and defences, they were often a very important part of arbitral procedure and should be mentioned specifically. That was proved by experience with the UNCITRAL Arbitration Rules, which did make an explicit reference to them. The matter was a question of suitable drafting.

11. Mr. RUZICKA (Czechoslovakia) endorsed the view expressed by the representative of the United States and drew attention to his own Government's written observations, which also contained a proposal for dealing with the matter (A/CN.9/263, p. 55, para. 3).

12. Mr. SEKHON (India) said that he too supported the view expressed by the representative of the United States. In the Indian legal system, a clear distinction was made between the procedural steps in question.

13. The CHAIRMAN said that the Commission seemed to favour the idea of including an express reference to counter-claims and defences to counter-claims in the Model Law. He suggested that all interested delegations should participate in drafting a form of words suitable for the purpose.

14. *It was so agreed.*

Burden of proof

15. Mr. HOLTZMANN (United States of America) drew attention to article 24 (1) of the UNCITRAL Arbitration Rules, which read: "Each party shall have the burden of proving the facts relied on to support his claim or defence." Although such a requirement might be self-evident to legal experts, its inclusion in the Rules had proved extremely useful in practice and should be included in chapter V of the Model Law.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his country had made a similar suggestion in its written observations (A/CN.9/263, p. 56, para. 9). The principle was truly important in practice and should be clearly enunciated in the Model Law. The wording read out by the United States representative would be suitable for the purpose.

17. Mr. MTANGO (United Republic of Tanzania) said he recognized the necessity for evidence to be produced in support of a claim or a defence, but he doubted whether it was appropriate for the Model Law to stipulate that the burden of proof fell on the parties. The Model Law was concerned with arbitral proceedings, which were different from court proceedings and aimed at reaching an amicable agreement between the parties. He would not object to a simple statement of the need for the parties to produce evidence, but he felt that to impose on them the burden of proving the facts relied on to support their claim or defence would be going unnecessarily into legal technicalities. He therefore had grave misgivings about duplicating the UNCITRAL rule in the Model Law. A milder version would not preclude the parties from agreeing to the burden of proof if they so wished.

18. Mr. de HOYOS GUTIERREZ (Cuba) said that it was an elementary principle of law that the burden of proof fell on the claimant. The principle applied to both judicial and arbitral proceedings and that was why it was included in the UNCITRAL Rules. He felt, therefore, that the Model Law should repeat the UNCITRAL provision, although even if it did not the rule would be followed in practice because it was a fundamental principle of law.

19. Mr. SCHUMACHER (Federal Republic of Germany) said that article 24 (1) of the UNCITRAL Rules expressed a fundamental principle of court proceedings. Since there was no reason why the principle should not apply in arbitrations also, his delegation supported the proposal to include it in the Model Law.

20. Mr. VOLKEN (Observer for Switzerland) pointed out that if such a provision was introduced, it might conflict with paragraphs (1) and (2) of article 19 and with article 28. The problem would be particularly acute in regard to the applicable law. Substantive law, for example, sometimes contained rules providing which of the parties must furnish a particular kind of evidence.

21. Mr. JOKO-SMART (Sierra Leone) supported the United States proposal: notwithstanding that the provision in article 24 (1) of the UNCITRAL Rules was common to most judicial systems, it should be included in the Model Law.

22. Mr. RAMADAN (Egypt) said that since it had been claimed that the principle of the UNCITRAL rule was already implicit in article 19 (2), the rationale for introducing it as a new paragraph seemed doubtful. Nor did the Model Law always have to follow the UNCITRAL Rules: for example, article 23 of the Model Law differed from article 18 of the UNCITRAL Rules. His delegation was not in favour of the proposal.

23. Mr. ROEHRICH (France) said that it was not clear what the relationship of the new provision would be to paragraphs (1) and (2) of article 19. Would it take precedence over paragraph (1), thus limiting the freedom of the parties to agree on the procedure to be followed by the arbitral tribunal? Would it even limit the freedom left to the arbitral tribunal by paragraph (2)? The proposal should perhaps be

examined more closely from that point of view. There were difficulties also with the text of the UNCITRAL rule. For example, what would the position be if the respondent relied on the same facts as the claimant? It might not be appropriate simply to reproduce the UNCITRAL rule. On the whole, therefore, he was opposed to its inclusion.

24. Mr. TANG Houzhi (China) said he did not think that the UNCITRAL rule should necessarily be incorporated in the Model Law. Since burden of proof was a matter common to all legal systems, its inclusion in the Model Law would be superfluous. His delegation therefore opposed the proposal.

25. Mr. LAVINA (Philippines) supported the proposal, for the reasons put forward by the representative of Cuba.

26. Mr. BOUBAZINE (Algeria) associated his delegation with those which opposed to the proposal to include the UNCITRAL rule in the Model Law.

27. Mr. STROHBACH (German Democratic Republic) said that his delegation supported the proposal. It was a question of transferring from the UNCITRAL Rules to the Model Law a point that should be made in the latter for the reasons stated in the written comments of the Soviet Union and the United States (A/CN.9/263, pp. 56-57). The provision might best be inserted as a new paragraph (3) of article 19.

28. Mr. SEKHON (India) said he felt that it would be unnecessarily burdening the Model Law to state such a self-evident proposition. It would also be likely to create difficulties in respect of articles 19 and 28. A further question was the evidence of the experts whom the arbitrators were empowered to call on. Such matters would be governed by the applicable law, in which the different provisions adopted by different countries would appear. His delegation therefore opposed the proposal.

29. Mr. SCHUMACHER (Federal Republic of Germany) endorsed the comment of the Observer for Switzerland about article 28. The application of the proposed rule should be subject to the relevant provision of the applicable substantive law.

30. Mr. MOELLER (Observer for Finland) said that his delegation had difficulty in supporting the proposal because of the conflict the new rule might raise with article 28 and the question whether or not it would be mandatory.

31. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that her delegation approved the inclusion of the proposed rule. She did not see how it could fail to apply whether the parties wished it or not, since any agreement to proceed otherwise would be contrary to the provisions of the new article 18 *bis*, which dealt with equality of treatment.

32. The CHAIRMAN suggested that the Commission's report should show that the Commission had agreed that the rule on burden of proof in article 24 (1) of the UNCITRAL Arbitration Rules should usually be applied; and that it had decided not to include the rule in the text of the Model Law for three reasons: first, in some legal systems, the burden of proof was a matter of substantive and not procedural law; second, article 19 of the Model Law gave some latitude to the arbitral tribunal on the subject; third, whereas the UNCITRAL Arbitration Rules were applicable by the agreement of parties, the provisions in the Model Law would be mandatory. If he saw no objection, he would take it that the Commission accepted his suggestion.

33. *It was so agreed.*

Admissibility of written evidence

34. Mr. HOLTZMANN (United States of America) proposed the inclusion in the Model Law of article 25 (5) of the UNCITRAL Arbitration Rules, a provision which authorized the evidence of witnesses to be presented in the form of written statements signed by them. While he recognized that there was no requirement that the Model Law and the UNCITRAL Arbitration Rules should be identical, the Commission had nevertheless recommended to the Working Group on International Contract Practices that there should be consistency between them. He was aware that some legal systems regulated the admissibility of written evidence and also that the second sentence of article 19 (2) of the Model Law implicitly gave the arbitral tribunal the power to accept written statements if it so decided. However, in view of provisions in certain national legal systems, it would be helpful for the Model Law to make that point explicitly. Governments adopting it would thus accede to what was an established procedure in modern arbitration and one which, as experience had shown, had significantly reduced the costs of arbitral proceedings.

35. The CHAIRMAN said that the acceptance of article 19 would already be a considerable step forward for legal systems in which written statements were never admitted in evidence. It would be difficult for legislators to introduce a law which expressly allowed arbitrators to receive written evidence if that form was forbidden to judges.

36. Mr. HOLTZMANN (United States of America) said that, in view of the Chairman's comments, he withdrew his proposal.

37. The CHAIRMAN suggested that the report should state that the matter was covered by article 19 (2).

38. *It was so agreed.*

Requirement of reciprocity as a condition for recognition or enforcement

39. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to the written proposals of several Governments (A/CN.9/263, p. 51, paras. 9-13) that there should be a possibility for States to require reciprocity for recognition or enforcement of foreign awards. It might be appropriate to provide for that in article 35. Article I (3) of the 1958 New York Convention made provision for such a possibility, and a number of countries had availed themselves of it. The adoption of the Model Law by countries might turn upon whether they would want to enter a reservation on the matter of reciprocity. It was therefore essential to state in the Model Law that such a possibility existed.

40. The CHAIRMAN said he felt it would be inappropriate to introduce into a Model Law a provision which more naturally belonged in a convention. When adopting the Model Law, States could modify its provisions. He thought that a statement might appear in the report to the effect that the situation with regard to a requirement for reciprocity would be similar to that under the 1958 New York Convention.

41. Mr. LEBEDEV (Union of Soviet Socialist Republics) thought that something more was required than a statement in the report. It would be possible to provide for the matter in the Model Law in one of two ways: either by inserting in article 35 a reference to reciprocity together with a footnote

stating that its inclusion or non-inclusion in the legislation would be determined by each State when adopting the Model Law; or, alternatively, by providing a footnote to the effect that each State in adopting the Model Law might consider the inclusion in the legislation of the requirement of reciprocity.

42. Mr. RUZICKA (Czechoslovakia) associated himself with the views of the Soviet Union representative.

43. Mr. HOELLERING (United States of America) said that his delegation also supported the principle of reciprocity, as it had stated in its written comment on the subject (A/CN.9/263, p. 51, para. 13). However, he thought it would be sufficient to have a statement on the matter in the report.

44. Mr. RAMADAN (Egypt) said that no footnote should appear in the Model Law. His country had ratified the 1958 New York Convention without entering any reservations, and article I (3) of that Convention made the principle of reciprocity optional. When the Commission had discussed article 35, the argument had been that it was desirable to keep it in harmony with the New York Convention.

45. Mr. ROEHRICH (France) said that he had no objection to allowing for the requirement of reciprocity but it would be necessary to define its exact scope more precisely. Would the requirement be satisfied by the enactment of identical provisions by another country or was something more involved? He felt that the subject could more readily be dealt with by means of a discussion at some length in the report rather than a brief footnote in the text.

46. Mr. VOLKEN (Observer for Switzerland) said the hope was that at some future date the principles of arbitral procedural law in many countries would be, if not identical, considerably harmonized by the influence of the Model Law. If that result was achieved, it would not greatly matter in which country proceedings were held. In the context of the legislative work on which the Commission was engaged, the concept of reciprocity, whether factual or legislative, was difficult to accommodate—in fact it almost ran counter to the present work of the Commission. If it was to be mentioned, it should not be given too much importance.

47. The CHAIRMAN said the weight of opinion seemed to favour clarification of the matter in the report. The wording of article 35 did not imply that all States adopting the Model Law should necessarily extend the benefits of that article to all foreign awards indiscriminately. A State could limit the application of article 35 by the requirement of reciprocity to awards from countries where its own awards would be enforced in the same way and under the same conditions. The comments on the subject in the report should be placed in a prominent position at the beginning of the section on article 35. If he saw no objection, he would take it that the Commission accepted his suggestion.

48. *It was so agreed.*

Possibility of a preamble to the Model Law

49. Mr. TANG Houzhi (China) said that no decision had been taken as to whether the Model Law required a preamble.

50. The CHAIRMAN said that he thought there should be no preamble, as the Model Law would not be an international instrument.

51. *It was so agreed.*

52. The CHAIRMAN said that if he saw no objection, he would take it that the Commission had agreed on the contents of the Model Law and that no substantive issues would be reopened. The Commission would merely review the text from the drafting group to ensure that they faithfully reflected the decisions taken by the Commission and that they were satisfactory from the linguistic viewpoint.

53. *It was so decided.*

The discussion covered in the summary record ended at 3.35 p.m.