

333rd Meeting

Friday, 21 June 1985, at 10 a.m.

Chairman: Mr. LOEWE (Austria)

The discussion covered in the summary record began at 10.40 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.14 and Add. 1)

*Draft text of a model law on international commercial arbitration**Article 2 and articles 28-36**Article 2*

1. Mr. RICKFORD (United Kingdom) raised the question of interconnection between chapter VI of the Model Law and the version of article 2 (d) which the Commission had adopted at its previous meeting. In order to take account of a particular concern in relation to article 28 (1), article 2 (d) had been amended so that it did not apply to any of chapter VI, which contained, however, a series of references to agreement between the parties and the choice of parties. Perhaps the Commission had made the wrong amendment to article 2 (d).

2. Mr. HERRMANN (International Trade Law Branch) said that the amendment had been made because concern had been expressed that it was inappropriate to recognize the freedom of the parties to authorize third parties or institutions to make decisions as to the law applicable to disputes. Perhaps the amendment had gone too far. He suggested that a more appropriate wording for the opening phrase of article 2 (d) would be: "where a provision of this Law, except article 28, leaves the parties . . ."

3. Mr. GRIFFITH (Australia) supported the Secretariat proposal.

4. The CHAIRMAN said that, if he saw no objection, he would take it that the Commission wished to amend the text of article 2 (d) in the manner just proposed by the secretariat.

5. *It was so decided.*

Article 28

6. Mr. GRIFFITH (Australia) said that the Commission had decided to include in article 28 a provision modelled on article 33 (3) of the UNCITRAL Arbitration Rules, (A/CN.9/XVIII/CRP.2/Add.15, paragraph 11). However, the text of that rule had been reproduced in article 28, paragraph (4). As a result, the word "contract" had been used for the first time in the Model Law. In conformity with the general approach in that document, he thought that an expression such as "agreement between the parties" would be more appropriate.

7. Mr. HERRMANN (International Trade Law Branch) said that article 28 (4) was not the first time that the word "contract" had been used. It appeared in article 16 (1). The expression "agreement between the parties" was frequently used in the Model Law in connection with the arbitration agreement and not with the main contract on substance. It would therefore not be an appropriate substitute for the word "contract".

8. Mr. GRIFFITH (Australia) withdrew his proposal.

9. *Article 28 was adopted.*

Article 29

10. *Article 29 was adopted.*

Article 30 (1) and (2)

11. Mr. SEKHON (India) recalled that his delegation had suggested that, in article 30 (1), "record the settlement in the form of an arbitral award on agreed terms" be replaced by "record the settlement and make the award on agreed terms" and that, in article 30 (2), "and shall state that it is an award" be deleted.

12. Mr. HERRMANN (International Trade Law Branch) said that the proposal had been referred to the drafting group, which had decided to retain the wording set out in the text.

13. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to retain the text of article 30 unaltered.

14. *It was so agreed.*

15. *Article 30 was adopted.*

Articles 31 and 32

16. *Articles 31 and 32 were adopted.*

Article 33 (1)

17. Mr. LAVINA (Philippines) said that the wording of article 33 (1) (b) was somewhat clumsy; "if so agreed by the parties, a party, with notice to the other party," should be replaced by "a party, with the agreement of the other party".

18. The CHAIRMAN recalled that in its discussion of the subparagraph, the Commission had agreed that the other party must be assured of an opportunity to give its opinion. Although the wording was less than elegant, it was the best way that had been found of making the point absolutely clear. If he heard no objection, therefore, he would take it that the Commission wished to adopt article 33 (1) unaltered.

19. *Article 33 (1) was adopted.*

Article 33 (2)

20. *Article 33 (2) was adopted.*

Article 33 (3)

21. Mr. GRIFFITH (Australia) proposed that the final sentence of article 33 (3) be amended to conform to the

wording of the penultimate sentence of article 33 (1), i.e. to read: "If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days."

22. *It was so agreed.*

23. *Article 33 (3), as amended, was adopted.*

Article 33 (4) and (5)

24. *Article 33 (4) and Article 33 (5) were adopted.*

25. *Article 33 as a whole, as amended, was adopted.*

Article 34 (1)

26. *Article 34 (1) was adopted.*

Article 34 (2)

27. The CHAIRMAN said that "Court" should be replaced by "court".

28. Mr. GRIFFITH (Australia) noted that "arbitrator(s)" was the term used in article 36 (1) (a) (ii) and asked whether the same term should not be incorporated in article 34 (2) (a) (ii).

29. Mr. HERRMANN (International Trade Law Branch) suggested that conformity might better be achieved by amending article 36 (2) (a) (ii) than by amending article 34 (2) (a) (ii). The important principle involved was that the parties should be notified of the appointment of *each* of the arbitrators. Although "the arbitrator" was the term in the 1958 New York Convention, it would be better to use different wording in order to make the point absolutely clear.

30. Mr. ROEHRICH (France) supported the comments made by the representative of the secretariat.

31. *Article 34 (2) was adopted.*

Article 34 (3) and (4)

32. *Article 34 (3) and article 34 (4) were adopted.*

33. *Article 34 as a whole was adopted, subject to the minor drafting change mentioned by the Chairman.*

Article 35

34. *Article 35 was adopted.*

Article 36

35. Mr. SAMI (Iraq) suggested an amendment to the Arabic version of article 36 (1) (a) (i).

36. The CHAIRMAN said that it would be taken into account by the secretariat.

37. Mr. GRIFFITH (Australia) said he assumed that, in article 36 (1) (a) (ii), "the arbitrator(s)" was to be amended to read "an arbitrator".

38. The CHAIRMAN said that that was correct.

39. *Article 36 (1), as amended, was adopted.*

Article 36 (2)

40. *Article 36 (2) was adopted.*

41. *Article 36 as a whole, as amended, was adopted.*

Proposal for a new provision on counter-claims

42. The CHAIRMAN recalled that the representatives of the United States and Czechoslovakia had drafted a new provision for article 2, which would become article 2 (f) and which was contained in document A/CN.9/XVIII/CRP.15.

43. Mr. de HOYOS GUTIERREZ (Cuba) suggested a drafting change in the Spanish version.

44. Mr. ROEHRICH (France) suggested a drafting change in the French version.

45. Mr. LAVINA (Philippines) pointed out a typographical error: "article" should be amended to read "articles".

46. The CHAIRMAN said that the secretariat would take those comments into account.

47. Mr. SAWADA (Japan) said that his delegation did not oppose the inclusion of a provision on counter-claims but felt that such a provision should contain a more exhaustive definition of counter-claims than did the proposal before the Commission.

48. The CHAIRMAN said that, in its decision to include a provision on counter-claims, the Commission had recognized that it was necessary to be brief and to indicate merely which rules should apply to counter-claims.

49. Mr. VOLKEN (Observer for Switzerland) suggested that, since the proposed provision was not a definition but rather an extension of the scope of the Model Law, it should be included in article 1 rather than in article 2.

50. The CHAIRMAN pointed out that the heading of article 2 was not simply "Definitions" but "Definitions and rules of interpretation" and that the provision in question was in fact a rule of interpretation.

51. Mr. HOLTZMANN (United States of America) suggested that the provision be revised by the insertion, after "article", of "7 (2) and".

52. Mr. HERRMANN (International Trade Law Branch) said that he had doubts whether it was appropriate to mention article 7 (2) in that context.

53. Mr. HOLTZMANN (United States of America) said that his delegation would not insist on the revision.

54. Mr. RICKFORD (United Kingdom) said that the representative of the International Trade Law Branch had a good point, but that unless article 7 (2) was included among the list of exceptions to article 2 (f), an agreement made in respect of the subject-matter of a counter-claim could result in the closing of the entire dispute. Under English law, contracts would have to state expressly that article 2 (f) applied *mutatis mutandis*.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of article 2 (f) contained in document A/CN.9/XVIII/CRP.15.

56. *It was so agreed.*

57. *The draft text of a model law on international commercial arbitration (A/CN.9/XVIII/CRP.14 and Add.1) as a whole, as amended, was adopted.*

58. Mr. SONO (Secretary of the Commission) suggested that the title of the text the Commission had just adopted should be the UNCITRAL Model Law on International Commercial Arbitration, that the Commission should request the Secretary-General to transmit the text, with its *travaux préparatoires*, to Governments, arbitration institutions and other interested bodies at the close of its eighteenth session, that it should invite the General Assembly to recommend to States that they consider using the Model Law when they revised their laws to meet the current needs of international commercial arbitration, and that the secretariat should send a *note verbale* to Governments informing them of that recommendation.

59. Mr. MTANGO (United Republic of Tanzania) asked whether the Model Law would be transmitted to States before or after the General Assembly had adopted it.

60. Mr. SONO (Secretary of the Commission) said that, when the UNCITRAL Arbitration Rules had been adopted, they had been transmitted to Governments immediately after their adoption but before endorsement by the General Assembly, and that the Model Law should be given the same treatment.

61. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the matter was a very important one as it would be included in the Commission's report to the Sixth Committee and the General Assembly. He suggested that the secretariat should produce a working paper on the subject in at least one of the working languages so that delegations could give it due consideration.

62. Mr. ROEHRICH (France) said that his delegation agreed with the Soviet Union representative. He suggested that the secretariat might transmit the Model Law to Governments as a working paper and indicate that it had been adopted by UNCITRAL and would be submitted to the next session of the General Assembly.

63. Mr. LAVINA (Philippines) said that he agreed with the view that the Commission should submit the Model Law to the General Assembly for adoption; however, if there was a precedent for not doing so, he could go along with the proposals made by the Secretary of the Commission.

64. The CHAIRMAN, referring to document A/CN.9/XVIII/CRP.2/Add.19, paragraphs 8 and 9, noted that the General Assembly would not be asked to adopt the Model Law but to make a recommendation that Member States use it. If he heard no objection, he would take it that the Commission wished to adopt the proposals made by the Secretary of the Commission.

65. *It was so agreed.*

The discussion covered in the summary record ended at 12 noon.