UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/263/Add.2
21 May 1985

ORIGINAL: ENGLISH

28251

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Eighteenth session
Vienna, 3-21 June 1985

INTERNATIONAL COMMERCIAL ARBITRATION

Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration

Report of the Secretary-General

Addendum

INTRODUCTION

1. This addendum to document A/CN.9/263 contains comments of the United Kingdom of Great Britain and Northern Ireland on the draft text of a model law on international commercial arbitration. Since these comments are of a basic character and often relate to more than one issue or article, they are reproduced here in the order in which they were submitted.

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SOME COMMENTS BY THE UNITED KINGDOM

GENERAL OBSERVATIONS ON THE DRAFT TEXT

2. The United Kingdom has consistently supported the project for the establishment of a model law and after extensive consultation on the draft prepared by the Working Group this attitude remains unchanged. For those States which already have a developed law and practice of arbitration the model law will provide a valuable stimulus for a reappraisal of the existing system, in the knowledge that other States will be engaged upon a similar exercise, all in the context of a single carefully formulated proposal for a harmonised law of international commercial arbitration. For those States which have not yet had the occasion to work out a comprehensive system of their own, the model law, with its associated commentaries, will form a most valuable basis for legislation.

3. The United Kingdom also continues to emphasise the two principles which it has sought to bring forward during the deliberations of the Working Group. First, that arbitration is a consensual procedure. The practical needs of the parties to the arbitration agreement are paramount. The only proper objective for any law of arbitration is to ensure that commercial men have their disputes decided fairly, in the manner which they have expressly or impliedly agreed, and in a manner appropriate to the nature of the dispute in question. The value of a uniform law is recognised. Nevertheless, it must be constantly borne in mind that disputes are not uniform, and that there is no single procedure which is appropriate to them all. A law of arbitration should provide no more than a supportive framework for the conduct of the arbitration in a way which conforms with the requirements of the individual case. The model law will fail in its purpose if it inhibits the flexibility and freedom of choice which is the prime advantage of arbitration.

4. The second principle is a corollary of the first. No system is perfect. There will inevitably be a minority of cases where the parties do not have the benefit of a procedure which is fair, or in accordance with their agreement. Justice demands that the injured party should have a remedy, and the court is the only medium through which the remedy can be made available. Attractive as it may be in theory to dissociate the arbitral process from judicial control, the fact remains that in practice this is an impossible aim. Wide consultation with users of the arbitral process, whose wishes and needs are paramount, has convinced the United Kingdom that the commercial man recognises the need to have in reserve a prompt and effective means of recourse. It is for this reason, and not at all because of any doctrinaire preference for judicial control over the independence of the arbitral process, that the United Kingdom has adopted the position which it has already made clear during the deliberations of the Working Group. Quite the reverse, for the United Kingdom wholeheartedly supports all measures which will enable that process to flourish in the manner which ensures the parties an effective performance of their agreement to arbitrate.

5. The process of consultation has inevitably brought to light several matters of detail, which can readily be raised during the meetings of the Commission. There are, however, certain issues of central importance upon which it may be helpful for the United Kingdom to express its views in writing.

TERRITORIAL SCOPE OF THE LAW AND JURISDICTION OF COURTS

6. It is necessary for the model law to adopt a stance on these separate but closely connected issues.

7. The issue of jurisdiction arises in this way: suppose two parties with places of business in two different States, A and B, choose to arbitrate in State B. (The model law does not at present exclude an application to the courts of State A under Articles 11-14 (though it will do so if it is described to limit its scope of application in a strictly territorial way) or where the "matter" is not governed by the model law.) If the courts of A and B take divergent views, then a conflict of jurisdiction arises.

8. The issue of territorial scope arises in particular when two parties in two different States, C and D, which both have adopted the model law, choose to arbitrate in State D under the arbitration law of State C. Should the model law allow for its "exportation" in this manner?

9. There are of course two possible approaches to the latter issue:-

- To allow the parties to choose the arbitration law of another State adopting it. The effect of Article 6 of the model law would mean, in the example given above, that the courts of State D will be deprived of any jurisdiction over the arbitration taking place within that State's territory. This is because the chosen curial law will give exclusive jurisdiction to the courts of State C. This may be termed the "extraterritorial approach".

- To specify that the model law applies only to arbitrations within the territory of the State adopting it, regardless of the choice of a foreign curial law of the parties. This deprives the parties of their freedom of choice, but ensures that the court of the arbitral forum has jurisdiction in all cases and since the model law is not "exportable" then, in the example given above, the courts of State D will have exclusive jurisdiction only in respect of arbitrations taking place within their territory.

10. A third approach, allowing the choice of a foreign curial law but giving the courts of the arbitral forum a concurrent jurisdiction, is precluded by the structure of the draft and in particular Article 6. The other possibility, again like the third separating the issue of territorial scope from the question of court jurisdiction, is to allow the parties to choose the foreign curial law but override the resulting choice of the foreign court - but a fortiori this is precluded by the draft as presently worded.

11. The United Kingdom prefers a territorial approach: the model law should apply only to arbitrations within the territory of the State adopting it whose courts should have exclusive jurisdiction over the arbitral proceedings and recourse actions under Article 34. It would be unacceptable to have the jurisdiction of the local court completely ousted in respect of arbitrations taking place within its territory. Difficulties will also arise under Article 36(1)(a)(iv) (and also under the New York Convention) if the foreign procedural law differs from that of the arbitral forum. The courts of the arbitral forum are the most logical choice as the courts of recourse - they

are best placed to enforce any orders made, are convenient for the parties and and may be taken to be their choice (especially under a "territorial" model law).

12. Difficulties do however arise where, in the example given above, State C has adopted the law but State D has not. Under the territorial approach the model law is not exportable and the courts of C can only control arbitrations within the territory of C (as a result of Article 6). The courts of State D may not have jurisdiction under their own law because the parties have chosen another. This problem may be more academic than real. Only if the question of jurisdiction is separated from that of territorial scope can it be dealt with in a satisfactory manner.

ARTICLES 34 AND 36

13. Although the "Analytical compilation of comments by Governments and international organizations" (A/CN.9/263 and Add.1) contains nothing to suggest any opposition to the continued inclusion of article 34 in the model law, the matter was the subject of some debate during meetings of the Working Group. The United Kingdom thinks it appropriate briefly to restate its position on the matter. Two points are made.

14. First, the United Kingdom regards it as essential that the right to intervene in the case of procedural injustice should not be confined to the stage of execution. To do so would ignore the important effect of an award before any attempt is made to enforce it. One may postulate a situation where the proceedings were subject to a defect which beyond any doubt would enable the defendant to resist execution under Article 36 or the New York Convention. If Article 34 were excluded, the defendant would be powerless to put forward his complaint, until at a time and place of his own choosing the claimant instituted proceedings for execution: a choice determined, not by any connection between the arbitration, or the subject matter of the arbitration and the chosen place, but by the question where the defendant happened to have any assets available for execution. Meanwhile, the award would to all appearances be valid, and would make the issues between the parties res judicata. True it is, that the defendant could decline to pay the amount awarded, but to dishonour an award is a step which a respectable businessman would take with the utmost reluctance, and which might cause grave damage to his commercial reputation. The defendant if a company would have to make provision for the unsatisfied award in its balance sheet, and if it was of any size it would be likely to have an adverse effect on the availability of credit. All this would produce a serious injustice, and it is no recompense to the defendant to say that at some unknown time and place he will be able to vindicate his dishonouring of the award by successfully resisting enforcement. What is required is an opportunity for the defendant to intervene promptly, so that he can free himself from the burden of an award which should not have been made.

15. Secondly, the United Kingdom submits that Article 36 or the New York Convention which it closely follows would not if they stood alone provide an adequate protection to the defendant from the consequences of a procedural injustice. The grounds set out in the Convention were undoubtedly formulated on the assumption that, before the award is brought forward for execution, there will already have been an opportunity for the defendant to have recourse

against the award in the local court. (This is indeed made explicit by Article 36(1)(a)(iv)). If this assumption were to be falsified by the exclusion of Article 34, and the consequent abolition of any active right of recourse against the award, the list of grounds set out in the Convention and Article 36 would give the defendant only part of the protection which was envisaged when the list was drawn up.

THE FORM OF THE ARBITRATION AGREEMENT

16. Article 7(2), in requiring a document signed by the parties or an exchange of letters or telecommunications recorded in a tangible form, is not sufficient to encompass trade practice. A number of valid arbitration agreements are evidenced in documents not signed by the parties. Perhaps the most important of these are bills of lading. The United Kingdom prefers the approach adopted in Article 17 of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments, as amended, which refers to agreements which are "in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware."

THE JURISDICTION OF THE ARBITRATOR

17. The United Kingdom attaches great importance to the reintroduction into the text of the previous Article 17. Without it, an incorrect ruling by an arbitrator in favour of his having jurisdiction can only be challenged in an action for setting aside under Article 34. By the time the award has been made the parties will have been put to a great deal of expense and to have to litigate the matter further will cause considerable delay. Instead of preventing dilatory tactics by a defendant the deletion of Article 17 provides for them. Sufficient safeguard against abuse of Article 17 was contained in Article 17(2), which allowed the arbitration proceedings to continue during the challenge before the court (except where the court ruled otherwise - which it would no doubt refrain from doing save in a clear case). A discretionary power for the tribunal to make an interim award is not a sufficient protection for the parties.

A RIGHT TO A HEARING

18. As to Article 24 the United Kingdom wishes to endorse the view expressed by the Secretariat in its commentary (A/CN.9/264, commentary to article 24, para. 4). In the absence of agreement between the parties, one party should have the right to require that oral hearings should be held. The present text appears to be in conflict with Articles 19(3) and 34(2)(a)(ii).

JUDICIAL INTERVENTION: ARTICLE 5

19. Although Article 5 was introduced at a comparatively late stage in the deliberations of the Working Group, it has rightly been regarded as a valuable attempt to reflect the philosophy underlying the model law. The United Kingdom recognises the desirability of a clear statement which will enable the draftsman of any resulting legislation, and any party to an arbitration

conducted under such legislation, to know whether or not in any given situation recourse to the court is permissible. Accordingly, no objection is taken to the introduction of a provision on the lines of Article 5. It is, however, suggested that important aspects of the article remain to be thoroughly explored, before the form of the article can be finalised. Four questions are raised for consideration:-

1 What matters are "governed by the model law"?

2 At what stages of the arbitral process does the model law permit the court to intervene?

3 In what circumstances may a court properly intervene, when it is proved that the award is the result of a procedural injustice?

4 Should the parties be enabled to vary by consent the incidence of judicial intervention?

What matters are governed by the model law

20. The general intent of Article 5 has been explained by those responsible for introducing it as follows: The model law does not embody a complete code of judicial intervention. The model law is addressed only to certain types of situation in which the question of judicial intervention may arise. Where a party seeks judicial intervention in one of those situations, the court is permitted to intervene only in the manner expressly prescribed by the model law, and in the absence of any express provision the court must not intervene at all. By contrast, where the situation is not of a type to which the model law is addressed, the court may intervene or decline to intervene in accordance with the provisions of the relevant domestic arbitration law.

21. Whilst the general intent is well understood, the United Kingdom feels obliged to observe that there are objections to the present form of Article 5 which could make it unworkable in practice. The problem may be illustrated as follows. Assume that a factual situation "X" developed in the course of an arbitration, and that the situation causes one of the parties to seek the intervention of the court. Plainly, the court must ask itself the question whether it has jurisdiction to intervene. The first step is to see whether the situation is covered by the express words of the model law. (Strictly speaking the words in question will be those of the domestic legislation enacting the model law, but for brevity we shall continue to refer to the model law). If the court finds that there are words which cover the situation, it need look no further. The remedies prescribed for that situation, and no others, may properly be applied. But what if the court finds that the situation is not covered by any express words? The court could surmise that there might be any one of three reasons for this omission:-

1 Those who framed the model law had considered situation X, and had decided that the situation should not be dealt with by the model law.

2 Those who framed the model law had considered situation X, and had decided that there should be no power of judicial intervention in that situation.

3 Those who framed the model law had not considered situation X at all.

22. The court will then be faced with three problems. First, how is the court to know which of these alternatives provides the true explanation for the omission to mention situation X? Recourse to the travaux préparatoires will not necessarily provide the answer. The commentaries cannot, in the nature of things, record every aspect of the debates in the Working Group and the Commission. Moreover, the list of subjects not intended to be governed by the model law, which can be found in document A/CN.9/246 (para. 188) and document A/CN.9/264 (commentary to article 1, para. 8, and to article 5, para. 5), is plainly given for illustration only.

23. The second problem will arise if the court finds that situation X can be said to be of the same general type as situations which are expressly dealt with by the model law. We believe that the framers of Article 5 might answer that all situations of that type are "governed by" the model law, and that the absence of any reference to situation X shows that the framers of the model law intended that the court should have no power to intervene in that situation. Whilst we see the force of this in principle, we can envisage serious procedural difficulties in deciding whether or not a situation is of a type dealt with by the model law. Is one to consider whether situation X would, if it had been specifically dealt with in the model law, have fallen within one of the individual chapters? If so, this is to attribute great weight to what is only a matter of arrangement, and which has never been fully debated. The article headings cannot be relied upon to establish the "type": see the footnote to Article 1. We are not at present clear in what way the court is to know whether situation X is close enough to other situations expressly dealt with in the model law to entail that it is governed by the model law.

24. (In this respect it may be helpful to draw attention to the description of the principle of Article 5 contained in paragraph 4 of the commentary on that Article 5 in A/CN.9/264, where it is stated that the Article "is limited to those issues which are in fact regulated, whether expressly or impliedly, in the model law". The crucial words here are "or impliedly". The United Kingdom submits that the Commission could usefully discuss the meaning of these words, and consider whether there is any way in which that meaning could be embodied in the text of the law itself.)

25. The third problem will arise if the situation in question is one which the framers of the model law had never considered at all. In paragraph 188 of A/CN.9/246 it is stated that Article 5 would not exclude court control or assistance in those matters "which the Working Group had decided not to deal with in the law". This would seem to suggest that in situations not foreseen by the Working Group, where accordingly the Working Group did not decide anything about them, Article 5 does operate to exclude judicial control. Is this really the intention of the model law?

26. The United Kingdom wishes to emphasise that these are not theoretical objections raised out of hostility to the principle of Article 5, but reflect genuine uncertainties expressed by those users of the arbitral process consulted by the Government of the United Kingdom as a preliminary to the meeting of the Commission. It is of particular importance that these uncertainties should be resolved because, quite apart from the position of any

court confronted with a request to intervene in a case not expressly dealt with in the model law, any legislature contemplating the enactment of the model law would need to have a clear idea of the extent to which the law would affect the existing rules, whether statutory or otherwise, governing judicial intervention.

The stage at which judicial control is permissible

27. This problem may be dealt with more briefly. Circumstances may arise during the reference in which the arbitration is being conducted in a manner which is an abuse of the defendant's rights, and which the arbitrators cannot or will not correct. In such circumstances, it would appear proper that the court, as being the only body in a position to protect the defendant, should have a residual power to intervene. Is it the intention that this power should entirely be taken away?

28. This question illustrates the problems previously discussed. The model law does contain, in Articles 9 and 27, provisions enabling the court to give supportive assistance during the reference; and Articles 11, 14 and 15 give the court a limited role in relation to the constitution and reconstitution of the arbitral tribunal. These are, however, powers of a quite different kind from those now under discussion. Moreover, although Article 34 confers certain powers to intervene where the reference has been conducted in contravention of the defendant's rights, these are only to be exercised by recourse against the award. The model law therefore does not deal with recourse during the reference. Does this mean that such recourse is not "governed by" the model law, and is therefore not within the scope of Article 5?

Intervention on the ground of procedural injustice

29. The United Kingdom attaches great importance to a correct understanding of the rights of recourse against the award under Article 34(2) in cases where it is proved that the award has resulted from serious procedural injustice. It is possible that some misunderstanding has arisen during the discussion of this topic during the meetings of the Working Group.

30. In the course of those discussions it was suggested by the United Kingdom that it would be desirable to give the court a general discretion to intervene in such a case, by reference to some words such as "misconduct", because of the difficulty in defining the jurisdiction in specific terms without the risk of inadvertantly excluding the right to intervene in cases where it is obviously required. Objection was taken to this suggestion on the ground that it lacked precision, and the weight of adverse opinion was such that the United Kingdom does not intend to pursue it. Nevertheless, it remains important to be clear whether: (a) (as was suggested on several occasions during the meetings of the Working Group) the model law already confers a right of recourse in respect of all serious procedural injustice, or (b) the model law intentionally withholds a right of recourse in certain of such cases.

31. If the Commission concludes that interpretation "(a)" is correct, the United Kingdom would not seek to promote any amendment to the relevant provision of the draft, since (so understood) it would confer all the desired

protection. The United Kingdom does, however, draw attention to the way in which the model law defines the circumstances in which intervention is permissible:

1 Article 34(2)(a)(ii)

" ... the party making the application was not given proper notice ... of the arbitral proceedings or was otherwise unable to present his case";

2 Article 34(2)(a)(iv) read with Article 19(3)

" ... the arbitral procedure ... was not in accordance with this Law ... "

" ... the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case ... "

3 Article 34(2)(b)(ii)

" ... the award or any decision contained therein is in conflict with the public policy of this State."

32. In order to assist in the consideration of this question the United Kingdom suggests the following examples. In all cases it may be assumed that the parties received sufficient notice of the proceedings; that the procedures followed the course demanded by the express provisions of the arbitration agreement, and of the procedures laid down by the arbitral tribunal, and that the tribunal placed no obstacle in the way of the parties in the full presentation of their documents, witnesses and arguments.

(a) The award is founded on evidence which is proved or admitted to have been perjured.

(b) The award was obtained by corruption of the arbitrator or of the witnesses of the losing party.

(c) The award is subject to a mistake, admitted by the arbitrator, of a type which does not fall within Article 33(1)(a).

(d) Fresh evidence has been discovered, which could not have been discovered by the exercise of due diligence during the reference, which demonstrates that through no fault on the part of the arbitrator the award is fundamentally wrong.

33. The United Kingdom ventures to doubt whether these situations (which are only instances of the various ways, not fully predictable in advance, in which an arbitration may go wrong) fall within any of the provisions quoted above, unless they fall to be dealt with as contraventions of public policy. The structure of English arbitration law is such that there has been no need to create any doctrine of public policy in relation to instances such as those stated above: the express statutory power to intervene is sufficient. The United Kingdom is not in a position to say how "public policy" would be understood in the courts of other States, but the decisions referred to in Van den Berg "The New York Arbitration Convention of 1958" at pp. 359 et seq. would

appear to suggest that these words are not in general widely construed. If this continues to be the approach, there will be a risk that an injured party will be powerless to protect himself, even in the case of serious procedural injustice.

34. The comments just made have been expressed in terms of Article 34. They apply also to Article 36, with this added feature that Article 19(3) will not be a ground for intervention unless the law of the country where the arbitration took place incorporated the model law: contrast Article 36(1)(a)(iv) with Article 34(2)(a)(iv).

35. In relation to the questions raised under this heading, the United Kingdom draws attention to article 52 of the Convention on the Settlement of Investment Disputes (Washington 1965), for an example of a more explicit approach to recourse in the event of serious procedural injustice.

The consent of the parties in relation to judicial control

36. It has repeatedly been emphasised that the basic principle of the model law is that of "party autonomy". Arbitration is a consensual process, and the health of the process is best ensured by enabling commercial men to have their arbitrations conducted in whatever way they have agreed to be suitable subject only to certain exceptions designed to ensure that the courts of a State are not required to countenance procedures and awards in circumstances which render them objectionable. The United Kingdom wholeheartedly supports this approach.

37. The question therefore arises whether and to what extent the principle of party autonomy should be applied in the field of judicial control. It is believed to be universally accepted that there must at some stage be some degree of judicial control, although there may be differences as to the appropriate stage and the appropriate degree. Thus the model law must set a minimum of judicial control. It does not follow, however, that the model law should set a maximum, eliminating even those means of judicial control which the parties themselves desire to retain. Would not the principle of party autonomy demand that if the parties have agreed to avail themselves of measures available under the local law, the court should be able to give effect to their agreement?

38. The United Kingdom has raised this question because the recent consultations on the draft of the model law had disclosed a substantial (although of course far from unanimous) body of opinion amongst the businessmen who use the arbitral process in the United Kingdom which favours to retain a possibility of recourse to the court on questions of law. Whilst thoroughly understanding the point of view undoubtedly held by the majority of participants in the Working Group - that the parties should not be compelled to submit to recourse on questions of law - the United Kingdom suggests that the logical consequence of party autonomy is that they should be allowed to have recourse, if that is what they have agreed. The same conclusion applies to other measures of judicial assistance to the arbitral process, also excluded by the draft model law. The United Kingdom invites a reconsideration of the mandatory nature of Article 5.