

315th Meeting

Monday, 10 June 1985, at 9.30 a.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 9.45 a.m.

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

Article 14. Failure or impossibility to act (continued)

1. Mr. SONO (Secretary of the Commission) said that the Commission had only one more week in which to finalize the Model Law. He appealed to speakers to bear that situation in mind when discussing the remainder of the draft, the whole of which had received detailed consideration in the Working Group on International Contract Practices.
2. Mr. SCHUETZ (Austria) withdrew his Government's written proposal (A/CN.9/263, p. 26, para. 1) in the interests of speeding the Commission's work.
3. Mr. SCHUMACHER (Federal Republic of Germany) said that he would withdraw his Government's written proposal (A/CN.9/263, p. 26, para. 2) if there was no strong support for it.
4. Mr. SEKHON (India) said that the agreed text called for at the previous meeting (A/CN.9/SR.314, para. 73) would be circulated in writing. It would remove some overlapping between articles 14 and 15 by transferring certain wording from the latter to the former, and would include a proposed text for article 15 as well.
5. Mr. LAVINA (Philippines), commenting on the Secretary's remark, said that he appreciated the need for rapid progress on the draft text. However, many developing

countries had been unable to attend the meetings of the Working Group and naturally wished to express their views on the draft text to other countries during the present session.

6. Mr. RAMADAN (Egypt) drew attention to the change in the article proposed by his delegation at the preceding meeting (A/CN.9/SR.314, para. 71). He too appreciated the need for the Commission to make quick progress but wished to point out that the Commission must take into account the fact that some of the developing countries had been unable to discuss the draft text in the Working Group.

7. Mr. PAES de BARROS LEAES (Brazil) proposed that, in the first sentence, the words "*de jure* or *de facto*" should be deleted and the words "with appropriate speed" be added after the word "act"; and that in the second sentence the word "otherwise" should be deleted.

8. Mr. HERRMANN (International Trade Law Branch) said that the Working Group had included the words "*de jure* or *de facto*" in order that the provision should be quite clear and also consistent with the UNCITRAL Arbitration Rules. In substance, the word "unable" would of course cover both cases.

9. Mr. HOLTZMANN (United States of America) said that his delegation favoured the proposal of the Federal Republic of Germany because it clarified the intent, although it did not change the substance. The UNCITRAL Arbitral Rules provided in general that the parties could determine how best to conduct their arbitration; in the draft text, the first sentence of article 14, taken together with article 2 (c), expressed that idea as well, and did so in a manner consistent with article 13 (2) of the Rules.

10. The CHAIRMAN noted that the Commission awaited the written text in course of preparation by the *ad hoc* drafting party set up at the previous meeting.

Article 14 bis

11. The Commission did not comment on article 14 bis.

Article 15. Appointment of substitute arbitrator

12. Mr. SEKHON (India) said that the *ad hoc* drafting party's proposed text for article 14 entailed the deletion from article 15 of the words "or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties". In addition, article 15 should be amended to include a time-limit for the appointment of a substitute arbitrator and should read "are applicable" instead of "were applicable".

13. The CHAIRMAN said that the Commission would consider those amendments when it had the *ad hoc* drafting party's written proposal before it for articles 14 and 15.

14. Mr. REINSKOU (Observer for Norway) drew attention to his Government's written proposal, reproduced in A/CN.9/263 (p. 27, para. 2), to simplify article 15 by deleting the passage commencing with the words "under article 13 or 14" and ending with the words "termination of his mandate".

15. The CHAIRMAN suggested that the Observer for Norway should discuss his proposal with the drafting party with a view to the production of a consolidated text for articles 14 and 15.

16. *It was so agreed.*

17. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that the consolidated text would need to be examined carefully to make sure that it did not contain any changes of substance. Article 14 covered the case where an arbitrator's mandate must be terminated, and in that circumstance the Model Law should permit an ensuing dispute to be settled in court. Article 15, on the other hand, referred to cases in which an arbitrator withdrew for his own reasons; in that situation, there might be no controversy which could be subject to any judicial control.

18. Mr. HOLTZMANN (United States of America) drew attention to an anomalous situation which could arise under article 15: if the claimant failed to nominate the substitute arbitrator, the effect of the earlier part of the draft would be that he would be nominated by the court in the respondent's country. He thought that article 15 should contain a proviso to prevent that.

19. The CHAIRMAN suggested that the problem might be solved by appropriately redrafting article 11, and that it should be left to a drafting committee.

20. *It was so agreed.*

21. Mr. PAES de BARROS LEAES (Brazil) suggested that the words "unless the parties agree otherwise" at the end of the article should be deleted, as they could cause complications by permitting a situation in which there might be no provision for the appointment of a substitute arbitrator.

22. The CHAIRMAN said the effect of that change would be to place the parties in the same position with regard to the appointment of a substitute arbitrator as with regard to the appointment of the original arbitrator. The matter would thus be governed by article 11. He thought the Commission would wish to accept the Brazilian suggestion.

23. *It was so agreed.*

Article 16. Competence to rule on own jurisdiction

Article 16 (1)

24. Mr. SEKHON (India) suggested that the words "unless otherwise agreed by the parties" should be inserted at the beginning of the paragraph, with a view to the provision gaining wider acceptance.

25. The CHAIRMAN said he felt that the Commission might prefer to indicate in the report that parties could contract out of the provision in paragraph (1).

26. Mr. BONELL (Italy) supported the Chairman's suggestion.

27. Mr. MTANGO (United Republic of Tanzania) said that the words "the arbitral tribunal has the power to rule on its own jurisdiction" were too strong and might conflict with national laws. If the Commission's aim was to provide a Model Law for Governments and not to change the existing pattern of national legislation, it should perhaps use less forceful wording for provisions which might give rise to conflicts of that kind. He therefore suggested amending the words "has the power" to read "may be granted the power".

28. Mr. SZURSKI (Observer for Poland) said that the first sentence of paragraph (1) might give the impression that an

arbitral tribunal would not be competent to rule on its own jurisdiction unless an objection had been raised by one of the parties. In that connection, paragraph 3 of section A of the secretariat's commentary on the article (A/CN.9/264, p. 38) suggested that the tribunal should be able to make certain determinations *ex officio*, for example on the arbitrability of a dispute. He therefore suggested that the word "objections" should be replaced by the word "questions".

29. The CHAIRMAN agreed that the tribunal should be able to take such decisions of its own motion. They would not of course be final ones, because of the judicial setting-aside procedure, but he doubted whether the change suggested by the Observer for Poland would make the matter any clearer.

30. Mr. RAMADAN (Egypt) said that his delegation read article 16 as implying that the parties could resort to the court under article 8 for a decision on the validity of an arbitration agreement. However, the draft text also contained article 34, the aim of which was that only one opportunity for judicial recourse should be available to them. His delegation would make a proposal under article 34, designed to eliminate the possibility of objections to the validity of an arbitration agreement being made to a court more than once.

31. He did not think it was necessary for the Commission to adopt the Tanzanian suggestion since the national legislator would be able to eliminate conflicts between the Model Law and existing national legislation.

32. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that article 16 was very important for arbitrators: an arbitral tribunal must be clear about its power to rule on its own competence. The Tanzanian representative had suggested that the rule should be expressed less forcefully. He himself did not think that the present wording would create a problem for the Institute or for most States, but perhaps the point might be met by substituting the word "may" for the words "has the power to".

33. Mr. MTANGO (United Republic of Tanzania) accepted that suggestion.

34. Mr. MATHANJUKI (Kenya) said that the Working Group on International Contract Practices had deleted from the Model Law the article dealing with concurrent court control, namely article 17. It therefore seemed necessary for the Commission to clarify the role of the court in the event of a dispute between the parties concerning jurisdiction. Under article 5, the court could not intervene except where the Model Law so provided. Article 16 should therefore provide some linkage with the court system in regard to decisions by an arbitral tribunal about its competence.

35. Mr. HOLTZMANN (United States of America) said that he could accept the substitution of the word "may" for the words "has the power to" provided that it was understood that it would not render the paragraph weaker than article 21 (1) of the UNCITRAL Arbitration Rules, which used the words "shall have the power to".

36. The CHAIRMAN noted that there was no objection to the suggestion made by the Chartered Institute of Arbitrators, and that this formulation was no weaker than the original.

Article 16 (2)

37. Mr. LEBEDEV (Union of Soviet Socialist Republics) referred the Commission to his delegation's written com-

ments, reproduced in A/CN.9/263 (p. 28, para. 3). In order to meet the need for promptness in raising pleas of excess of authority, his delegation proposed that the third sentence of paragraph (2) should be replaced by the following wording, taken from article V(1) of the 1961 European Convention: "Pleas based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure." That change would not affect the substance of the paragraph and would make its intention clearer.

38. Mr. MOELLER (Observer for Finland), Mr. LOEFMARCK (Sweden) and Mr. HOELLERING (United States of America) supported the Soviet Union proposal.

39. Mr. LAVINA (Philippines) said that in some legal systems objections to jurisdiction could be raised at any stage of the proceedings, but he agreed that under the Model Law they should be made as early as possible.

40. Mr. ILLESCAS ORTIZ (Spain) said that paragraph (2) was generally acceptable to his delegation. He suggested that in the Spanish version of the second sentence the expression "*cuestión de competencia*" should be substituted for the term "*declinatoria*".

41. Mr. BONELL (Italy) supported the Soviet Union proposal. The present wording of the third sentence of paragraph (2) might be misunderstood to mean that the question of acting in excess of authority could not be raised until the arbitrators themselves had declared their intention of so acting. It was possible, however, that during the proceedings a party might raise a matter falling outside the scope of the original arbitration agreement. If the other party did not agree to the arbitrators' terms of reference being broadened to include it, he should raise his objection immediately. The wording of the 1961 European Convention brought that out more cogently than the present draft of the paragraph. It was important that the paragraph should make it clear that a plea of excess of authority could be made as a result not only of an initiative by the arbitrators but also of an act of a party.

42. Mr. ROEHRICH (France) said that his delegation supported the Soviet Union proposal, for the reasons given by the representative of Italy.

43. Mr. SEKHON (India) also supported the Soviet Union proposal. He suggested the deletion of the word "in" from the first sentence of paragraph (2) on the grounds that it was superfluous and also misleading, as suggesting that a plea to the jurisdiction could be raised only in the statement of defence.

44. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that paragraph (2) dealt adequately with two possibilities, namely that the arbitral tribunal had no jurisdiction and that it was exceeding the scope of its authority. He could accept the Soviet Union proposal but marginally preferred the text as it was.

45. Sir Michael MUSTILL (United Kingdom) said that the Working Group had had good reasons for adopting the present wording. However, there appeared to be a strong feeling in the Commission in favour of the Soviet Union proposal, and his delegation would not oppose it.

46. Mr. SZASZ (Hungary) supported the Soviet Union proposal but observed that the system provided for in the 1961 European Convention was less flexible than what the Model Law proposed.

47. Mr. LAVINA (Philippines) pointed out that the Convention referred to an arbitrator exceeding his terms of reference, whereas the Model Law was speaking of an arbitral tribunal. He was not sure how the Soviet Union proposal would overcome that discrepancy.

48. Mr. MTANGO (United Republic of Tanzania) said that if the Commission adopted the wording of the Convention, it would be introducing a rigid procedure that might create problems, especially for the developing countries, where persons involved in arbitral proceedings might lack the experience to realize the need for promptness. He preferred the present text, which was more flexible.

49. Mr. MARTINEZ CELAYA (Observer for Argentina) supported the proposed Soviet amendment. With regard to the drafting change suggested for the Spanish version, his delegation would prefer the word "*declinatoria*" to be retained, since it was quite appropriate in the context.

50. Mr. ALLIN (Observer for Canada) and Mr. STROHBACH (German Democratic Republic) also supported the Soviet Union proposal.

51. Mr. BONELL (Italy) asked whether a party's failure to raise an objection under article 16 would later preclude him from seeking to have the award set aside or from refusing to recognize it or accept its enforcement. The secretariat's commentary (A/CN.9/264, p. 39, para. 9) appeared to support that interpretation. The Model Law should distinguish between an objection that the arbitral tribunal had exceeded its authority, which could not be taken before the court designated in article 6, and an objection on any other ground, which could.

52. The CHAIRMAN proposed that this matter be discussed in connection with articles 34 and 36 and noted that there was no objection.

Article 16 (3)

53. Mr. SAWADA (Japan) said he agreed with the secretariat's remarks in paragraph 14 of its commentary on the article (A/CN.9/264, p. 41) and its suggestion that the arbitral tribunal should be free to cast its ruling either as an award, subject to court control, or as a procedural decision which could only be contested in an action for setting the award aside.

54. Mr. MOELLER (Observer for Finland) said that the second sentence of article 16 (3) was inconsistent with article 8 and should be deleted.

55. Mr. REINSKOU (Observer for Norway) said that his Government's written proposal, reproduced in A/CN.9/263 (p. 29, para. 7 (b)), was a compromise between the present text of article 16 (3) and the article 17 deleted by the Working Party. It would allow the arbitral tribunal to make a ruling on its own jurisdiction in a final decision or in a separate preliminary decision. Alternatively, the procedure provided for in article 13 could be used.

56. Sir Michael MUSTILL (United Kingdom) said that the statement in article 16 (3), to the effect that a ruling by the

arbitral tribunal that it had jurisdiction could not be contested except in an action for setting the award aside, was not correct since a party could also apply for refusal of recognition or enforcement of the award under article 36.

57. In the view of his delegation, article 16 (3) should not be considered without the deleted article 17. There was no question of the right of the court to intervene on matters concerning the jurisdiction of the arbitral tribunal; the only doubt concerned the stage at which its intervention should be allowed. If article 17 were reinstated, the suggestion made by the secretariat in paragraph 14 of its commentary would be acceptable.

58. Mr. MARTINEZ CELAYA (Observer for Argentina) said that the arbitral tribunal's ruling on its own jurisdiction should be made at an early stage in the case in order to save the parties money, ensure due process and prevent what was called "forum shopping".

59. Mr. HOLTZMANN (United States of America) said that to his knowledge an arbitral tribunal could always leave the question of its own competence in its award on the merits, so that it could only be reviewed by a court first in an action for setting aside the award on the merits. The compromise solution suggested by the secretariat (A/CN.4/264, p. 41, para. 14) would enable the arbitral tribunal to decide the matter of its own jurisdiction either in an interlocutory award, which would allow the parties immediate recourse to the court, or in a less formal decision, which would not.

60. Mr. SCHUETZ (Austria) said that the question of an arbitral tribunal's jurisdiction should be decided at a very early stage. His delegation considered that article 16 (3) should contain a provision similar to article 13 (3); it should set a short period of time for the court's decision and stipulate that it would be final.

61. Mr. STALEV (Observer for Bulgaria) said that his delegation supported article 16 (3), even without article 17, since the claimant was not likely to raise a claim unless the arbitration agreement was valid.

62. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that an arbitral tribunal was often reluctant to declare that it did not have jurisdiction in a case, because the claimant might have no other remedy. He suggested that a fourth paragraph should be added to article 16 to the effect that, notwithstanding paragraph (3), an arbitral tribunal which had ruled that it had jurisdiction over a case might authorize the parties to ask the court mentioned in article 6 to review that ruling. In regard to the suggestion that an arbitral tribunal should be free to make either a preliminary award or a procedural decision, it did not seem right that the court's power to intervene should depend merely on the name given to the tribunal's decision. The Austrian representative had suggested that the court should be empowered to take a final decision on the arbitral tribunal's jurisdiction, but the parties would then have no further recourse.

The meeting rose at 12.35 p.m.