325th Meeting

Monday, 17 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)

Article 25. Default of a party

Article 25 (a) and (b)

1. Mr. JOKO-SMART (Sierra Leone) said that the words "without showing sufficient cause" in the introductory sentence of the article gave rise to two problems. The first was whether "sufficient cause" was to be shown to the other party or to the arbitral tribunal. The second problem related to the time factor. If cause was to be shown before the time-limit set in article 23 (1), sufficient time must be allowed for the other party to comply with that time-limit. Permitting cause to be shown after the time-limit was tantamount to extending the time agreed by the parties. It might be best to delete the words "without showing sufficient cause".

2. Mr. MTANGO (United Republic of Tanzania) said that the phrase should be made clearer rather than deleted. The addition of the words "to the arbitrators" might solve the problem.

3. Mr. de HOYOS GUTIERREZ (Cuba) said that the phrase should be retained because the parties should have an opportunity to state reasons for non-compliance with article 23 (1).

4. Mr. GRIFFITH (Australia) said that the arbitral tribunal should have a clear power to order an extension in appropriate circumstances. He suggested the deletion of the phrase "without showing sufficient cause" and the insertion of the words "or otherwise ordered by the arbitral tribunal" before the word "if".

5. The CHAIRMAN said that the Australian suggestion would give the arbitral tribunal explicit discretionary power. If that was the Commission's wish, the word "shall" should be replaced by "may" in subparagraph (*b*), and the end of subparagraph (*a*) should be amended to read "the arbitrators may terminate the proceedings". The words "without showing sufficient cause" would then become superfluous and could be dropped.

6. Mr. ROEHRICH (France) said that the words "without showing sufficient cause" already gave the arbitral tribunal

sufficient discretionary power and met the point made by the representative of Australia. The word "shall" should remain in both subparagraphs (*a*) and (*b*).

7. Mr. GOH (Singapore) said that the provision should be clearer concerning the discretionary power of the arbitral tribunal to terminate the proceedings.

8. Mr. HOLTZMANN (United States of America) said that the phrase "without showing sufficient cause" should remain in the text and should be understood to imply "in the view of the arbitral tribunal". The Australian suggestion perhaps made the point clearer. The Chairman's suggestion to replace "shall" with "may" in subparagraphs (*a*) and (*b*) would amount to a substantive change in the thrust of the Model Law.

9. Mr. AYLING (United Kingdom) agreed that the phrase "without showing sufficient cause" implied "to the arbitrators". It was odd that the phrase governed subparagraph (*a*) but also subparagraph (*b*). The aim of subparagraph (*b*) was that the arbitrators should not have discretion but must continue the proceedings without the statement of defence being communicated.

10. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said he understood the provision to mean that the arbitrators always had the discretion, for example, to grant the respondent a period of grace if his failure to serve his papers on time was not a wilful act and caused no undue delay in the proceedings.

11. The CHAIRMAN suggested that the Commission's report should make it clear that the words "without showing sufficient cause" implied "to the arbitrators" and that the intention was to give the arbitrators a degree of discretion and flexibility.

12. *It was so agreed.*

13. The CHAIRMAN said that it would cause great difficulties if the Commission attempted to draft wording to cover the point made by the representative of Sierra Leone.

14. Mr. HOLTZMANN (United States of America) pointed out that a party might fail to meet the time-limit set in article 23 (1) and then promptly thereafter give a valid reason for that failure.

15. Mr. JOKO-SMART (Sierra Leone) pointed out that sufficient cause might be shown after the time-limit, when the arbitral tribunal had already terminated the proceedings pursuant to subparagraph (*a*). In that case the party concerned should have the opportunity to re-open the proceedings.

16. The CHAIRMAN said that in such a case the party could begin new proceedings. He suggested that the Commission should not try to deal with the point in the Model Law.

17. *It was so agreed.*

18. Mr. SCHUMACHER (Federal Republic of Germany) drew attention to his Government's written comment on subparagraph (*b*) (A/CN.9/263, p. 37, para. 1). The subparagraph could not be interpreted to mean that silence on the part of the respondent would not result in any disadvantage to him. That was the common view in the Commission, and the text should make it clear.

19. Mr. ROEHRICH (France) endorsed the comments made by the representative of the Federal Republic of Germany.

20. The CHAIRMAN suggested that, if the Commission was agreed on the meaning of the subparagraph, it should be submitted to the drafting committee for rewording.

21. *It was so agreed.*

Article 25 (c)

22. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his delegation's written proposal concerning subparagraph (*c*) (A/CN.9/263, p. 38, para. 3). The proposal should in fact read "may, or at the request of the other party must, continue the proceedings" and not "may, and at the request . . .". The point was that it would be unjustified to give the arbitral tribunal full discretion in such cases.

23. Mr. MOELLER (Observer for Finland) supported the Soviet Union proposal.

24. Mr. MTANGO (United Republic of Tanzania) said that he was not opposed to the Soviet Union proposal but it might be helpful to insert the words "within reasonable time" after "documentary evidence".

25. The CHAIRMAN noted that the words "within reasonable time" could apply only to the production of documents and not to an appearance at a hearing.

26. Mr. SZASZ (Hungary) said that the text implied that the time-limit for the production of documents would be set by the arbitral tribunal; it could be assumed that it would be a reasonable one.

27. The CHAIRMAN suggested that the report should make it clear that documentary evidence was to be produced within the period set by the arbitral tribunal or, if no period had been set, within reasonable time.

28. Mr. HOLTZMANN (United States of America) said that the point made by the representative of the Federal Republic of Germany concerning subparagraph (*b*) applied equally to subparagraph (*c*), which should also be sent to the drafting committee.

29. The CHAIRMAN said that in his opinion the point made by the Federal Republic of Germany applied only to subparagraph (*b*). The Soviet Union proposal for subparagraph (*c*) gave the arbitral tribunal wide discretion.

30. Mr. SAMI (Iraq) said that his delegation could not accept the Soviet Union proposal because the party requesting the continuation of the proceedings might take unfair advantage of the failure of the other party to submit documentary evidence. There might be good reasons for such failure, and decisions concerning continuation of the proceedings should rest only with the arbitral tribunal. Furthermore, the Soviet Union proposal was in contradiction with the proviso "without showing sufficient cause" at the end of the introductory sentence. That proviso gave the tribunal some discretion, whereas under the Soviet Union proposal it would have to continue the proceedings if so requested by one of the parties.

31. Mrs. RATIB (Egypt) endorsed the second point made by the representative of Iraq.

32. The CHAIRMAN said that in his view there was no contradiction, since the introductory sentence governed all three subparagraphs. Under the Soviet Union proposal, the tribunal would be bound to comply with a request for continuation of the proceedings made by one of the parties under subparagraph (*c*) only if the defaulting party had not shown sufficient cause.

33. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed with the Chairman that there was no contradiction but said that, if a number of delegations were opposed to his proposal, he would not press it.

34. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that he could not accept any amendment to the present text.

35. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that his delegation preferred the existing text, since the Soviet Union proposal would limit the discretionary powers of the arbitral tribunal.

36. Mr. LAVINA (Philippines) said that his delegation supported the Iraqi position.

37. The CHAIRMAN suggested that, since the representative of the Soviet Union did not press his amendment, the Commission should retain the existing text of subparagraph (*c*).

38. *It was so agreed.*

Article 26. Expert appointed by arbitral tribunal

39. Mr. LEBEDEV (Union of Soviet Socialist Republics), speaking on article 26 (1), said that the parties should decide before the setting up of the arbitral tribunal whether they wished to allow the appointment of experts or not. An arbitrator might of course not consider himself competent in a particular area and might wish to rely upon the advice of an expert. If the parties did not wish an expert to be appointed, the arbitrator could resign, but the resultant delay would not be in the parties' best interests. He proposed that the opening sentence of the paragraph should be amended to read "Unless otherwise agreed by the parties before the arbitrators are appointed, . . .".

40. The CHAIRMAN pointed out that parties could withdraw from the arbitral proceedings at any stage if they were not satisfied with the expert appointed by the arbitral tribunal.

41. Mr. MTANGO (United Republic of Tanzania) said that article 26 should be maintained in its present form since it gave the parties freedom to decide at any stage of the proceedings whether an expert should be appointed.

42. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) agreed with the Soviet Union representative that arbitrators should know in advance whether they would have the right to obtain the assistance of an expert. That was no danger to the parties since under the Model Law they would have an opportunity to interrogate the expert appointed by the tribunal.

43. Mr. AYLING (United Kingdom) said he preferred the present text of article 26. With regard to the point raised by the Soviet Union representative, he himself felt that in most cases the parties would avoid a decision which might force the resignation of an arbitrator, because of the delay and expense which that would cause.

44. Mr. ROEHRICH (France) also favoured retaining article 26 as it stood.

45. Mr. PAULSSON (Observer for the Chartered Institute of Arbitrators) expressed support for the present text of article 26, which his organization had followed in drawing up the rules of the London Court for International Arbitration (1985). It was also consistent with the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (1983). In practice, parties rarely agreed that experts should not be appointed.

46. Mr. OLUKOLU (Nigeria) said that the present text of article 26 gave the parties the required degree of freedom and should be retained.

47. Mr. LAVINA (Philippines) proposed that the words "Unless otherwise agreed by the parties" should be deleted; the parties should rely upon the arbitral tribunal to appoint experts if it were necessary.

48. Mr. JOKO-SMART (Sierra Leone) pointed out that the confidence which parties had in the arbitral tribunal did not necessarily extend to the experts appointed by that tribunal. The existing text of article 26 should be retained.

49. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) and Mr. KADI (Algeria) expressed a preference for the original text of article 26.

50. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed to withdraw his amendment but asked for the support it had received to be reflected in the report.

51. Mr. MATHANJUKI (Kenya) noted that the text of article 26 (1) (*b*) stated that a party might be required to provide information for the expert. It should be made clear that either or both parties might be required to provide such information.

52. The CHAIRMAN said that "a party" should be interpreted to mean "each party".

53. Mr. SEKHON (India), speaking on article 26 (2), proposed that the word "interrogate" should be replaced by "examine", to read ". . . the parties have the opportunity to examine [the expert]".

54. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that article 26 (2), which stated that "the parties have the opportunity to interrogate [the expert]", should make clear that such examination could not be done directly by the parties but only through the arbitral tribunal.

55. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to retain article 26 in its present form.

56. *It was so agreed.*

Article 27. Court assistance in taking evidence

Article 27 (1)

57. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said that the phrase "in this State or under this Law" in the English version of article 27 (1)

was ambiguous; it should be brought into line with the French version, which read "in this State and under this Law". As stated in his organization's written comments (A/CN.9/263/Add.1, pp. 15-16, para. 1, under art. 27), a special commission of The Hague Conference had met to decide whether the scope of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 1970) might be extended by the addition of a protocol to cover arbitral proceedings. The special commission had confirmed the technical feasibility of the scheme but had expressed doubts about its usefulness. He would welcome any comments on the matter.

58. The CHAIRMAN pointed out that the French version of article 27 had been corrected and brought into line with the English text (A/CN.9/246/Corr.1, French only).

59. Mr. SEKHON (India) pointed out that an arbitral tribunal could not usually make a direct request to a court for assistance. He proposed that the text of article 27 (1) should be amended so as to state that the arbitral tribunal ". . . may request, through a competent authority, . . .".

60. In its present form, article 27 (1) could be understood to mean that a court would provide assistance only in the taking of evidence. He proposed that the introductory sentence of the paragraph should be amended to read ". . . the arbitral tribunal may request . . . assistance in taking or securing evidence".

61. Mr. ROEHRICH (France) endorsed the proposal of the Observer for The Hague Conference that the first sentence of article 27 (1) should be amended to read ". . . held in this State and under this Law". The Model Law was designed to be adopted as national legislation and could not deal with the question of co-operation between courts of different countries. That question was still open and could perhaps be dealt with in the future. In view of the differing provisions of various legal systems, it seemed unwise to specify explicitly that only an arbitral tribunal or a party could request assistance in taking evidence. He therefore proposed that article 27 (1) should be worded more neutrally and should state that, with the authorization of the arbitral tribunal, a request for assistance could be submitted to a competent court. His delegation endorsed the written proposal of Austria (A/CN.9/263, p. 39, para. 4) that subparagraphs (*a*), (*b*) and (*c*) should be deleted as unnecessary.

62. Mr. STROHBACH (German Democratic Republic) expressed support for the territorial approach advocated by Japan, Austria and the Soviet Union in their written comments (A/CN.9/263, p. 38, paras. 2, 4 and 5). He agreed that subparagraphs (*a*), (*b*) and (*c*) of article 27 (1) should be deleted as unnecessary.

63. Mr. SAWADA (Japan) confirmed his Government's comments (A/CN.9/263, p. 38, para. 1) concerning the scope of article 27 and the need to delete the words "under this Law" in paragraph (1), as well as its support for the Working Group's decision that the article should deal only with court assistance to an arbitration taking place in the State of the court giving that assistance (A/CN.9/263, p. 39, para. 2). His Government was not against assistance in obtaining evidence, but considered that the taking of evidence beyond national borders would be better regulated by international conventions than by a provision in the Model Law, which was intended to become a domestic statute.

64. Mrs. RATIB (Egypt) said that her Government believed that the application of article 27 should be limited to arbitral proceedings held in the State concerned. It would be excessive to oblige a State to lend assistance to arbitral proceedings held outside its own territory.

65. Mr. AYLING (United Kingdom) agreed with the French representative's remarks both on points of substance and on points of form, on the understanding that the proposals by that representative would not confer on the State in which the Model Law was to apply, discretion as to whether there should be court assistance or not; that discretion belonged to the tribunal or to the parties.

66. Mr. HOLTZMANN (United States of America) withdrew his Government's written amendment (A/CN.9/263, p. 39, para. 3), which would have empowered courts in the State in which the arbitration was held to transmit requests for assistance in obtaining evidence to courts in other States. It now felt that there was little practical need for such provisions in the Model Law or in a convention; besides, arbitration could be delayed for as much as six months or a year by requests for evidence to courts outside the country. He saw no need for a reference to the territorial scope in article 27 (1), since that would be covered elsewhere. He supported the Austrian written suggestion that subparagraphs (*a*), (*b*) and (*c*) should be deleted (A/CN.9/263, p. 39, para. 4).

67. He also supported Sweden's written suggestion (A/CN.9/263, p. 39, para. 6) for the inclusion of a provision that would empower the arbitral tribunal to order the party in possession of evidence to produce it and would specify that refusal to comply would be interpreted to that party's disadvantage. He suggested that the idea should be noted in the report as the Commission's view.

68. He supported the French amendment to the first part of article 27 (1), on the understanding that a request could be made only by the arbitral tribunal or by one of the parties.

69. Mr. SAMI (Iraq) supported the French amendment to replace the word "or" by "and" in the first line of article 27 (1). Regarding the authority receiving the request, he proposed that words on the following lines should be added to the paragraph: "The authority receiving the request shall be the court or the authority mentioned in article 6." He also supported the Austrian suggestion to delete subparagraphs (*a*), (*b*) and (*c*).

70. The CHAIRMAN said he had the impression that there was wide agreement that the article should apply only to arbitrations taking place in the territory of the State. He suggested that, pending discussion of a secretariat proposal on the subject, the reference to arbitral proceedings "held in this State" should be retained. There was also support for the deletion of subparagraphs (*a*), (*b*) and (*c*) in article 27 (1). Regarding the French amendment to that paragraph, he suggested that it might be unwise to amend a text which had been agreed upon as a compromise after prolonged discussion. He wished to know whether the members of the Commission were prepared to reach preliminary agreement on those lines.

71. Mr. SAMI (Iraq) suggested that article 27 should be added to those listed in article 6.

72. Mr. HERRMANN (International Trade Law Branch) explained that article 6 was concerned with centralizing the functions of a specially designated court. It would have been inappropriate for the list in it to include article 27, which was concerned with matters such as hearing witnesses, obtaining access to premises, and so forth; in these matters, local court

jurisdiction was determined by other factors, such as residence of witness or location of premises.

73. Mr. MATHANJUKI (Kenya) agreed with the Chairman's conclusions but thought that the Indian amendment to article 27 (1) should be borne in mind.

74. Mr. LAVINA (Philippines) also agreed with the Chairman's conclusions but considered that it might, on rare occasions, be necessary to request assistance from a court in a foreign State, as indicated in the United States proposal, now withdrawn. He supported the proposal to delete sub-paragraphs (*a*), (*b*) and (*c*) in article 27 (1).

75. Mr. TANG Houzhi (China) said that he entirely agreed with the Chairman's summing up. He also supported the French amendment to article 27 (1).

76. Mr. VOLKEN (Switzerland) said that he too supported the Chairman's conclusions.

77. In his opinion, the French amendment was not strong enough. The matter to be regulated was the contact between the arbitral tribunal and the State court. He suggested wording on the following lines: "When a court of this State receives a request for obtaining evidence from an arbitral tribunal, this State court shall act on such a request."

78. Mr. SEKHON (India) said that he agreed with the Chairman's summing up and supported the territorial approach in article 27 (1). He pointed out that the definition of "court" in article 2 would not be appropriate to article 27 as far as routing of requests was concerned, since more often than not requests were made by bodies which were not bodies or organs of the judicial system of a country.

79. The CHAIRMAN suggested that it should be noted in the report that the rules in question did not apply to routing of requests but only to originating and complying with requests.

80. *It was so agreed.*

81. Mr. KADI (Algeria) also endorsed the Chairman's summing up. Regarding the question raised by the representative of Iraq, he saw a link between articles 25 and 27, because both dealt with assistance. If the Iraqi proposal were supported, he would suggest a draft on the following lines: "In arbitral proceedings held in this State and in accordance with article 6, the arbitral tribunal may request assistance from a competent court in taking evidence or obtaining documents."

82. The CHAIRMAN said that if there were no objections the amendment could be sent to the drafting committee.

83. *It was so agreed.*

84. Mr. LOEFMARCK (Sweden) drew attention to his Government's suggestion (A/CN.9/263, p. 39, para. 6) that an explicit provision should be included to the effect that refusal of a party possessing evidence to comply with an order to produce it should be interpreted to that party's disadvantage. If that notion were generally accepted, he would be satisfied if it was simply mentioned in the report.

85. The CHAIRMAN said that the report would mention the proposal and also that it had not been opposed.

86. *It was so agreed.*

87. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed with the Chairman's summing up but asked whether the scope of territorial application would be included in article 27 or in a separate article, as proposed by the secretariat (A/CN.9/XVIII/CRP.12).

88. The CHAIRMAN said that for the time being, territorial scope would be included in article 27 but might prove superfluous when the secretariat proposal came to be discussed.

Article 27 (2)

89. Mr. LAVINA (Philippines) proposed the deletion of the concluding portion of the paragraph "either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal". The provision would thus end at the word "request".

90. The CHAIRMAN said that in the absence of any opposition he would take it that the Commission agreed to adopt article 27 (2) with that amendment.

91. *It was so decided.*

The meeting rose at 12.25 p.m.