

332nd Meeting

Thursday, 20 June 1985, at 3 p.m.

Chairman: Mr. LOEWE (Austria)

The meeting was called to order at 3.15 p.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*

Articles 1 to 18 (A/CN.9/XVIII/CRP.14)

Article 1

1. *Article 1 was adopted without change.*

Article 2

2. Mr. HOLTZMANN (United States of America) said that, pursuant to the Commission's decision at the previous

meeting to include in the Model Law an express reference to counter-claims and defences to counter-claims (A/CN.9/SR.331, para. 14), his delegation and the delegation of Czechoslovakia had prepared a written proposal for the incorporation of a provision on the matter in article 2. The proposal would be submitted to the Commission for consideration.

3. The CHAIRMAN suggested that the Commission should adopt the article as worded by the drafting group, subject to consideration of that proposal.

4. *It was so decided.*

Articles 3 to 5

5. *Articles 3 to 5 were adopted without change.*

Article 6

6. Mr. GRIFFITH (Australia) said that article 16 (3) as proposed by the drafting group included a reference to the court or other authority specified in article 6 and should therefore be added to the list of provisions given.

7. Mr. HERRMANN (International Trade Law Branch) observed that the court functions referred to in articles 16 (3) and 34 (2) could, in fact, only be performed by a court and not by another authority.

8. The CHAIRMAN asked the Commission whether it considered that to be the case.

9. Mr. ROEHRICH (France) said that those delegations which had wished to include in the article a reference to an authority other than a court had had in mind articles 11 (3), 11 (4), 13 (3) and 14 only.

10. Mr. LEBEDEV (Union of Soviet Socialist Republics) proposed that the words "the court, courts or other authority" should be amended to read "the court, courts or, where so indicated herein, another authority".

11. Mr. HOLTZMANN (United States of America) said that his delegation could accept the Soviet Union's proposal but would suggest rewording it to read ". . . or, where referred to therein, . . .".

12. Mr. GRIFFITH (Australia) proposed that the first comma in article 6 should be replaced by the word "and".

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to replace the first comma in article 6 by the word "and" and to amend the words "the court, courts or other authority" to read "the court, courts or, where referred to therein, another authority".

14. *It was so decided.*

15. *Article 6, as amended, was adopted.*

Article 7

16. Mr. BOGGIANO (Observer for Argentina) said that in the second sentence of the Spanish version of paragraph (2), the word "*combatida*" should be replaced by the word "*negada*".

17. Mr. GRIFFITH (Australia) said that the word "another" at the end of the second sentence of the English version of paragraph (2) suggested that the text provided for the existence of more than two parties; that was not so with the French version, however, which used the words "*l'autre*".

18. Mr. HOLTZMANN (United States of America) said that the drafting group had intended to allow for the involvement of a third party. For the sake of clarity, the English version should be amended to read "another party".

19. The CHAIRMAN said that the Model Law had been conceived on the basis of the involvement of two parties.

20. Mr. RICKFORD (United Kingdom) suggested that the text should be amended to read "the other or others" in order to provide for the possibility that more than two parties would be involved.

21. Mr. ROEHRICH (France) said that the French version correctly reflected what the Chairman had said. He noted that other articles spoke of "a party" or "the other party". It would be unwise for the Commission to enter into the complex area of multiparty arbitration. In any case, the present text did not exclude the possibility of there being several parties on one side and several on the other.

22. The CHAIRMAN said that there did not seem to be any difference of opinion as to the substance of the provision, and he therefore suggested that the text should remain unchanged.

23. *Article 7 was adopted without change, subject to the correction in the Spanish version requested by the Observer for Argentina.*

Article 8

24. Mr. SAMI (Iraq) said that the Arabic version of paragraph (2) was incorrect and should be brought into line with the English version.

25. Mr. SEKHON (India) said that the words "and an award may be made" in paragraph (2) were superfluous, since they were implied by the phrase "arbitral proceedings may nevertheless be commenced or continued".

26. The CHAIRMAN said that the words had been included in order to make it clear that the arbitrators need not stop short of making an award.

27. *Article 8 was adopted without change, subject to the correction in the Arabic version requested by the representative of Iraq.*

Articles 9 and 10

28. *Articles 9 and 10 were adopted without change.*

Article 11

29. In reply to a question put by Mr. GRIFFITH (Australia), Mr. HERRMANN (International Trade Law Branch) said that the wording of paragraph (4) (c) correctly reflected the decision taken by the Commission at its 319th meeting (A/CN.9/SR.319, para. 67).

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Russian version of the draft text of the Model Law had been issued before the drafting group had completed its work and it did not reflect some of the provisions agreed by the group. That applied to paragraph (5) and to other parts of the draft text. He would be agreeable to the definitive Russian version of the text being prepared by the secretariat at a later stage. That being so, he would not raise points which affected the Russian version only.

31. *Article 11 was adopted without change.*

Article 12

32. Mr. SAMI (Iraq) pointed out that the reference to impartiality or independence had not been rendered correctly in the Arabic text.

33. *Article 12 was adopted without change, subject to the correction in the Arabic version requested by the representative of Iraq.*

Article 13

34. Mr. GRIFFITH (Australia) said that, in the light of the discussion of article 16 (3) at the 320th meeting, paragraph (2) should refer to a period of 30 days, as did paragraph (3).

35. The CHAIRMAN said that since paragraphs (2) and (3) dealt with different topics there was no need for them to specify the same period. He suggested that, since the Commission had not taken a clear decision to amend the period in paragraph (2), the text should remain unchanged.

36. Mr. SEKHON (India), referring to the words "and make an award" at the end of paragraph (3), drew the Commission's attention to the commentary on the point in its draft report (A/CN.9/XVIII/CRP.2/Add.5, para. 12). If the expression "the system" used in the draft report was meant to include the further steps, he would have no particular objection, but the present paragraph (3) had been drafted in a slightly different fashion.

37. Mr. HERRMANN (International Trade Law Branch) said that the point referred to by the representative of India concerned primarily the question of which of the four or five possible solutions was preferred with respect to determination of the time at which court control could be exercised. The question whether the continuation of the proceedings implied the making of an award had been referred to the drafting committee, which had decided that it would be better to state the provision clearly. That was why the express reference to the making of an award appeared in several places in the draft text.

38. *Article 13 was adopted without change.*

Articles 14 and 15

39. *Articles 14 and 15 were adopted without change.*

Article 16

40. Mr. SAMI (Iraq) said that paragraph (3) of the Arabic version still referred in brackets to alternative periods of 15 or 30 days. The reference to 15 days and the brackets should be deleted.

41. Mr. VOLKEN (Observer for Switzerland) noted that in the French version the word "*pouvoir*" in the heading of the article had been changed to "*compétence*". He thought that the word "*pouvoir*" should be retained; the drafting group had not altered it in the heading of article 18.

42. After a discussion in which the CHAIRMAN, Mr. ROEHRICH (France) and Mr. VOLKEN (Observer for Switzerland) took part, the CHAIRMAN asked if the French-speaking delegations would accept the present wording of the French version of the heading.

43. *It was so agreed.*

44. Mr. HERRMANN (International Trade Law Branch) suggested that the Commission, bearing in mind the discussion earlier in the meeting on article 6, might wish to delete the words "or other authority".

45. Mr. VOLKEN (Observer for Switzerland) said that if a State wished to appoint an authority other than a court to perform the function referred to in article 16 (3), it should not be prevented from doing so.

46. Mr. GRIFFITH (Australia) said that the words "or other authority" should be retained in order to ensure consistency with article 13 (3).

47. Mr. SEKHON (India) pointed out that, as indicated in the draft report (A/CN.9/XVIII/CRP.2/Add.9, para. 13), the Commission had decided to provide for instant court control in article 16 (3) along the lines of the solution adopted in article 13 (3).

48. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that the words "court or other authority specified in article 6" should be amended to read "competent court".

49. Mr. SAMI (Iraq) said that the functions referred to in article 16 (3) could only be performed by a court. An explanatory note to article 16 (3) might be provided to that effect.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to delete the words "or other authority".

51. *It was so decided.*

52. *Article 16, as amended, was adopted, subject to the correction in the Arabic version requested by the representative of Iraq.*

Article 18

53. Mr. VOLKEN (Observer for Switzerland) proposed that the words "order any party to take such interim measure" should be amended to read "order such interim measure".

54. The CHAIRMAN said that the change did not seem essential. He invited the Commission to adopt article 18.

55. *Article 18 was adopted without change and renumbered as article 17.*

*Articles 18 bis to 36 (A/CN.9/XVIII/CRP.14/Add.1)**Article 18 bis*

56. *Article 18 bis was adopted without change and renumbered as article 18.*

Articles 19 to 23

57. *Articles 19 to 23 were adopted without change.*

Article 24

58. Mr. ROEHRICH (France) said that a problem had arisen in the drafting group in regard to the second sentence of paragraph (1). The question was whether the words "at an appropriate stage of the proceedings", which had been between commas in the original version of the paragraph, applied to a party's request for oral hearings or to the arbitral tribunal's decision to hold such hearings: in other words, whether they imposed a restriction on the parties or whether they gave discretion to the arbitral tribunal. If they were interpreted in the former sense, it would modify the Commission's decision that the parties had a fundamental right to request an oral hearing.

59. The CHAIRMAN said that, as he saw it, the paragraph could mean only that the party must make the request at an appropriate stage of the proceedings, otherwise it would make

no sense. The meaning was perhaps clear in the English version.

60. Mr. SZASZ (Hungary) said that his understanding of the discussion was that the words "if so requested by a party at an appropriate stage of the proceedings" meant that a party could at any time ask for oral proceedings and the tribunal could note the request and could act accordingly but would not be compelled to hold an oral hearing forthwith.

61. Mr. HOLTZMANN (United States of America) said that the discussion had arisen out of his Government's written proposal (A/CN.9/263, p. 35, para. 1) for a new paragraph (1) to replace the former paragraphs (1) and (2) of the Working Group's draft, and stating: "if either party so requests at an appropriate stage of the proceedings . . .". It had been his understanding that the Commission had approved his proposal.

62. Mr. HERRMANN (International Trade Law Branch) said that it had been the secretariat's understanding that the United States proposal had been accepted as a drafting suggestion and that no decision had been taken on the question whether "appropriate" should qualify the parties' request or the holding of a hearing.

63. Mr. SZASZ (Hungary), speaking as Vice-Chairman, said he had been in the Chair at the time of the discussion. He agreed with what the representative of the Secretariat had just said. It was his understanding that the article had been sent to the drafting group without any substantive change from what had been expressed in the original draft.

64. Mr. de HOYOS GUTIERREZ (Cuba) said that it was clear from the paragraph as at present drafted that the arbitral tribunal should hold hearings if the parties so requested at an appropriate stage in the proceedings.

65. The CHAIRMAN suggested that the matter might be resolved by wording the sentence to read ". . . the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if so requested by a party".

66. Mr. RICKFORD (United Kingdom) and Mr. ROEHRICH (France) supported the Chairman's suggestion.

67. Mr. HOLTZMANN (United States of America) said that he would accept the Chairman's suggestion on the understanding that it was made clear in the record that an arbitral tribunal could refuse a last-minute request for a hearing, on the ground that there was no longer any appropriate stage of the proceedings for a hearing. He gave as an example a last-minute request that had been submitted solely for the purpose of delaying the issue of the award where no acceptable reasons had been given to justify holding a hearing.

68. Mr. LAVINA (Philippines) supported the Chairman's proposal.

69. Mr. SAMI (Iraq) said that the tribunal should not have the right to oppose a request: the parties' right to request oral hearings must be safeguarded.

70. Mr. MTANGO (United Republic of Tanzania) agreed.

71. In reply to a question put by the Chairman, Mr. SZASZ (Hungary), speaking as Vice-Chairman, said that his notes and the summary record of the 324th meeting (A/CN.9/SR.324) both confirmed the following: that, after a lengthy discussion touching on points both of substance and of drafting, it had been agreed to consider the substantive points

referred to in para. 1 of that summary record. No other point had been considered as a point of substance in the discussion, and no speaker had asked for a ruling on any question other than those submitted to the drafting group.

72. After a discussion in which Mr. HOLTZMANN (United States of America), Mr. RICKFORD (United Kingdom) and Mr. ROEHRICH (France) took part, the CHAIRMAN said that the issue seemed to be one on which there had been a misunderstanding about what the Commission had decided. Since the evidence suggested that the Commission had intended that the paragraph should provide that a party could make a request at any time and that the tribunal must hold hearings, and also that the reference to the appropriate stage should be retained, he asked the Commission if it would accept his earlier suggestion.

73. *It was so agreed.*

74. Mr. GRIFFITH (Australia) proposed that the commas in the third and fourth lines of paragraph (3) should be deleted.

75. *It was so agreed.*

76. *Article 24, as amended, was adopted.*

Article 25

77. Mr. GRIFFITH (Australia) said that the phrase "without showing sufficient cause" in the opening portion only applied to subparagraph (a) and should therefore be included in that subparagraph. It had no application to subparagraphs (b) and (c).

78. The CHAIRMAN said that the matter had not been discussed by the Commission. He could not reopen discussion of the article unless the Commission wished it.

79. *Article 25 was adopted without change.*

Article 26

80. *Article 26 was adopted without change.*

Article 27

81. Mr. GRIFFITH (Australia) asked for clarification as to whether, as a result of the redrafting of the article, the "competent court" which it mentioned was the court specified in article 6.

82. The CHAIRMAN said that the "competent court" to which article 27 referred was not the court specified in article 6. It was a court which might be requested to take evidence from a witness who, for example, was unable to appear before the tribunal because he lived at too great a distance.

83. Mr. MATHANJUKI (Kenya) asked the Chairman to confirm that article 27 did not cover the question of the procedure for implementing the request.

84. The CHAIRMAN confirmed that.

85. *Article 27 was adopted without change.*

The meeting rose at 6.05 p.m.