SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-FIFTH MEETING

held on Friday, 11 April 1975, at 10.15 a.m.

Chairman: Mr. LOEWE Austria

INTERNATIONAL COMMERCIAL ARBITRATION (agenda item 7) (continued) (A/CN.9/97 and Add.1-4)

Examination of the preliminary draft "International Commercial Arbitration Rules" (continued) (A/CN.9/97)

Article 16 (Statement of claim)(continued)

Mr. GOKHALE (India) said that, at the stage in the proceedings referred to in article 16, it was enough to state the facts without presenting the evidence supporting the facts. The parties might agree that the arbitrators should render their award solely on the basis of documents, but nothing in the rules indicated at what stage in the proceedings an agreement of that kind might be reached. Consequently, it was not necessary to communicate all the documents to the arbitrators at the stage of the statement of claim, and it would not be necessary to require in paragraph 1 that all relevant documents should be annexed to the statement of claim or, in paragraph 2 (b), that the statement of claim should include "a summary of the evidence".

His delegation considered that paragraph 3 was justified, because the respondent must have the opportunity to express his opinion before the arbitrators allowed the claimant to supplement or alter his statement of claim.

Mr. SUMULONG (Philippines) was of the opinion that the documents annexed to the statement of claim should include only a copy of the contract, which constituted the basis for the statement of claim, and a copy of the arbitration agreement, which was the basis of the application for arbitration. According to the legislation in force in his country, if a copy of the contract was annexed to the statement of claim, thus enabling the respondent to compare it with the one in his possession, it was considered that the contract had been duly executed, unless the respondent made a statement under oath to the contrary. That made it possible to speed up the proceedings. In any case, it was impossible to determine which documents were relevant until the respondent had submitted his statement of defence, giving an indication of the facts which he admitted and invoking other facts in his favour. Once facts had been admitted, it was not necessary for the claimant to provide proof of them. He therefore considered that the reference to "all relevant documents" in paragraph 1 should be deleted. For the same reasons, the only particulars required in paragraph 2 (b) should be a statement of the facts on which the statement of claim was based, and the reference to evidence should be deleted. Similarly, the "points at issue" mentioned in paragraph 2 (c) could be known only after the respondent had answered.

He was of the opinion that paragraph 3 should be retained. The claimant could supplement or alter his statement of claim, but the suggested changes must not alter the nature of the claim and the respondent must have an opportunity to express his opinion on the changes.

Mr. ROGNLIEN (Norway) said that he took a favourable view of the existing text of article 16, which should encourage the claimant to submit to the arbitrators as soon as possible all the documents he considered relevant; however, it might not be necessary to require the claimant to submit documents other than a copy of the contract and of the arbitration agreement. It was more practical to allow the arbitrators to decide, in the light of the respondent's statement of defence, which other documents were necessary and by what time they must be submitted. The text did allow for such a possibility, if the words "all relevant documents" in paragraph 1 were regarded as merely indicative.

He was of the opinion that the text of paragraph 3 should be more specific. As had been suggested by the representatives of the Federal Republic of Germany and the United States of America (164th meeting), it would be necessary to specify that the claim could be supplemented or altered only within the scope of the original arbitration agreement and on the basis of the subject matter of the dispute.

Mr. BENNETT (Australia) said that a matter of principle was at stake. Unlike the representative of the United Kingdom (164th meeting), he did not think that the rules of legal procedure which were currently applicable in common-law countries should be extended to cover arbitral proceedings, because, if they were, it would be necessary to adopt those rules of procedure as a whole, with all their assumptions and consequences; and that would be disastrous. It was essential in arbitral proceedings that the parties and arbitrators should know as soon as possible what the problems at issue were. Paragraph 1 of article 16, which did not give rise to any material difficulties with regard to the submission of documents, should be retained as it stood. All documents should be communicated to the arbitrators and to the respondent. The claimant should not be required merely to annex to the statement of claim the documents on which he based his claim, because that would enable him to keep certain documents to himself.

His delegation considered that the particulars required in paragraph 2 were justified. However, it had certain reservations concerning the summary of evidence referred to in subparagraph (b), which might in some cases be difficult to provide and should therefore be optional and not compulsory. With regard to subparagraph (c), his delegation preferred the existing text to that proposed by the representative of the United Kingdom, which was not sufficiently specific. Subparagraph (d) should provide that if the claimant was making a claim for interest, that must be indicated in the statement of claim, because the respondent must be informed of the fact.

Referring to paragraph 3, he said he agreed with the representative of Poland (164th meeting), that the claimant must have the right to supplement or alter his claim, at least until the oral proceedings had been concluded. That right must be absolute, and paragraph 3 might be amended in order to make that clear. However, one important matter which arose in that connexion was the question of costs. If a party supplemented or altered his claim, he should bear the costs thus incurred unless the arbitrators decided otherwise. However, it seemed that a provision of that kind would be more appropriate in article 31 (Costs) than in article 16.

Mr. GUEIROS (Brazil) considered that the main purpose of article 16 was to speed up the proceedings. That was why he fully supported the text of paragraph 1 and, particularly, the text of the second sentence. The procedure envisaged corresponded to the practice followed in Brazil, in accordance with which the claimant had to produce all the documents in his possession.

He also supported the wording of paragraph 2 (b), in which the word "relevant" might be inserted between the words "a full statement of the" and the word "facts", in accordance with the suggestions which had been made. Subparagraph (c) should also be retained.

Referring to paragraph 3, he stressed that the word "altered" used in the English text was stronger than the words "modifiée" and "modificarse" used in the French and Spanish texts respectively and raised some difficult problems because it implied a change in the nature of the claim. Such an operation was radically different from an operation which consisted simply of supplementing the claim, and the two operations should be dealt with differently. He therefore proposed that the existing text of paragraph 3 should be replaced by the following text:

> "During the course of the arbitral proceedings, the claim may be supplemented or altered and relevant documents or a summary of the evidence should be exhibited by the claimant. The alteration depends always on the respondent's permission".

The existing wording of the last part of paragraph 3 was not acceptable. It was not for the arbitrators to give their permission; any change must be accepted by the respondent and it would serve no purpose for him to express his opinion if the final decision was going to be taken by the arbitrators.

Mr. GORBANOV (Bulgaria) considered that article 16 was, on the whole, satisfactory. He supported, in particular, the wording of paragraph 2 (b), although he considered that the words "a full statement of the facts" should be taken to mean "a full statement of the relevant facts" on which the rights claimed were based, and not a full statement of facts which were unrelated to the dispute; a clarification to that effect might be included in the text. The inclusion of a summary of the evidence in the statement of claim would help to speed up the settlement of the dispute and would encourage the claimant to show that he was acting in good faith and to submit, from the outset, all the facts in his possession, so that the respondent would not be caught by surprise during the proceedings. It was, however, obvious that the lack of such an indication was not of major importance and that the provision was only of an indicative nature for the parties. It might be preferable to specify that the summary of the evidence would be submitted without prejudice to the right of the parties to submit at a later stage any evidence which might be necessary in order to establish the truth.

Paragraph 3 was, in principle, acceptable, but it might also be amended so as to specify that the statement of claim could be supplemented or altered only on the basis of the original claim. The claimant might be allowed to make a change concerning the facts or the basis of the claim, but he could not be allowed at the same time to alter the basis of the claim or the nature of the claim itself. Any alteration of the nature of the claim would be tantamount to the institution of new proceedings, and that would require the consent of the respondent.

Mr. MELIS (Austria) said that, since in most international arbitrations the greater part, if not all, of the proceedings were in writing, it was in the practical interest of the parties and the arbitrators to have a detailed statement of the facts as soon as possible. His delegation therefore considered that articles 3 and 16 should be merged; if that was impossible, article 16 should in any case oblige the claimant to set out his statement of claim as fully as possible.

He was therefore in favour of the wording of paragraphs 1 and 2, with the slight reservation that in paragraph 2 (b), the adjective "full" before the word "statement" should be deleted, since it might subsequently become necessary for the claimant to mention further facts.

Paragraph 3 was based on the assumption that it was always in the interests of the claimant for the arbitration procedure to be as rapid as possible; in some cases, however, it might be advantageous to cause the proceedings to drag on for some time. Accordingly, and in view of the distinction drawn by the Brazilian representative between "supplementing" and "altering" the claim, it was essential to specify that the statement of claim could be altered only if the circumstances justifying the change had not previously been known to the claimant; similarly, to avoid any abuse, the claimant should be obliged to make those circumstances known as soon as he himself became aware of them. He should be allowed to supplement his claim before the expiry of a certain time-limit.

Mr. SAM (Ghana) suggested that the difficulties mentioned by the Brazilian representative in connexion with the text of paragraph 3 might be met by replacing the words "supplemented and altered" by a single word, such as "modified".

Mr. KRISPIS (Greece) said that two situations might arise when the arbitrators came to take a decision on an alteration that the claimant proposed to make to his claim. The arbitrators might either consider that the proposed alteration came within the framework of the original claim and they might therefore decide, under article 18 (Pleas as to the arbitrator's jurisdiction), that they were competent to consider it; or, on the contrary, they might consider that the proposed alteration radically changed the nature of the claim and would in fact constitute a new claim. In the latter case, they would not be competent to consider it unless the parties agreed otherwise and unless the arbitrators consented to examine the new claim. Those questions should perhaps be considered by the working group.

Mr. KHOO (Singapore) said that he could support the principles underlying paragraphs 1 and 2 of article 16, but he wished to suggest two slight amendments. In paragraph 2 (b), it should be specified that the claimant must provide a statement of facts "supporting his case", and the wording of paragraph 2 (c) should be more flexible, since, until the respondent had submitted his statement of defence, the claimant did not always know what the points at issue were.

With regard to paragraph 3, he considered that the claimant should be free to alter or supplement his claim, but that he should enjoy a controlled kind of freedom to do so. In the first place, as the Australian representative had suggested, the claimant should bear any costs entailed by the alteration he requested. Secondly, the arbitrators should be free to refuse to accept the proposed alterations if they were frivolous or vexatious.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the provision to the effect that all relevant documents should be annexed to the statement of claim - a provision which also appeared in the Rules of the Foreign Trade Arbitration Commission in Moscow and in the ECE Arbitration Rules - helped to speed up the arbitration procedure. His delegation was therefore in favour of paragraph 1 of article 16.

On the other hand with regard to paragraph 3, he did not think it was fair that the claimant's entitlement to alter or supplement his claim should be subject to the approval of the arbitrators. The principle that the claimant could alter or supplement his claim at any time - provided, of course, that the alterations did not go beyond the limits set in the arbitration agreement - was recognized in the legislation of many countries, including that of the USSR. He thought that paragraph 3 should be amended to take that principle into account.

Mr. ROGNLIEN (Norway) said that it was not clear whether the authors of the draft had intended to draw a distinction between the basic claim and particulars of the claim, such as the amount of damages and so forth. Was one to understand that the claim was "supplemented" when the alteration related to particulars and that it was "altered" when the change related to the basic claim? In his opinion, the provisions of paragraph 3 should apply only to the latter case, but he would like to have some clarification on the matter.

Mr. SANDERS (Consultant to the secretariat of the Commission) explained that the meanings attached to the terms in question by the authors of the draft were as follows: the statement of claim was "supplemented" when the claimant requested changes of detail, and it was "altered" when the claimant, after submitting a claim to secure, for example, the performance of a contract, altered it during the proceedings and claimed damages. It was in the latter case in particular that the authors had taken the view that the permission of the arbitrators was necessary.

The wording of the end of paragraph 3 was not altogether in line with the intentions of the authors, who were already contemplating an amendment to the effect that the respondent should have the right of defence, and not only the right to express his opinion.

Mr. JAKUBOWSKI (Poland) said he thought that the provisions of paragraph 3 were unduly restrictive, since there might be cases where the claimant, at the time when he submitted his claim, did not have at his disposal all the facts necessary to make the claim definitive. For example, he might be obliged to await the results of expert surveys before knowing the amount of damages that he could claim. He should therefore be left free to alter his claim when necessary.

Mr. BREBECK (Federal Republic of Germany) proposed that paragraph 3 should be replaced by the following text:

> "The tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute, provided that they are within the scope of the consent of the parties".

Mr. KEARNEY (United States of America) thought that it was very difficult to distinguish between changes which "supplemented" the claim and changes which "altered" it. A distinction between those two terms would not therefore solve the problems raised by paragraph 3. He could support the Australian delegation's amendment to that paragraph.

It might be wise to adhere to the system proposed in the text of paragraph 3 in the preliminary draft rules, under which the claimant's option to alter his claim was subject to the permission of the arbitrators.

Mr. GUEST (United Kingdom) said that the distinction between the pleadings stage and the evidenciary stage, which he had proposed at the 164th meeting, did not correspond only to the legal procedure of Anglo-Saxon countries; it was also in conformity with articles 30 and 32 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The working group to be set up might perhaps consider the advisability of making that distinction in the case of arbitration relating to international trade.

Mr. MANTILLA-MOLINA (Mexico) said he was in favour of the amendment proposed by the Brazilian representative, to the effect that any alteration of the claim should be subject to the consent of the respondent. Also, the existing text did not seem to respect the principle of equality between the parties, since it gave a claimant the right to supplement his statement of claim, with all the necessary time to prepare the additions, but it did not give the respondent an opportunity to supplement his statement of defence, which had to be prepared more quickly because of the time-limit fixed for its submission.

The CHAIRMAN, summing up the discussion on article 16, pointed out that one representative had suggested combining the first sentence of paragraph 1 of the article with the text of article 3, but that two representatives had opposed that suggestion. Some representatives wished the scope of the second sentence of paragraph 1 to be restricted by a provision to the effect that only copies of the contract and of the arbitration agreement should be annexed to the statement of claim, and they had cited Anglo-Saxon law and the 1965 Washington Convention in support of their thesis. Nevertheless, the majority of representatives preferred to retain the proposed text.

Certain representatives considered that the list in paragraph 2 was too long and that it prejudged the procedure to be adopted at a later stage. Others had thought it advisable to specify in the introductory sentence of the paragraph that the list was not exhaustive, and had suggested the insertion of the words "inter alia". Subparagraphs (b) and (c) of paragraph 2 had been criticized, and some representatives had proposed that the adjective "full" should be deleted from subparagraph (b), since it was not indispensable and since the claimant might not be in a position to fulfil that condition. It had also been proposed that subparagraph (c) should be deleted, since the points at issue were not always evident at the time when the claim was introduced, and that subparagraph (d) should contain a reference to the claim for interest, if the claimant was making such a claim against the respondent.

Paragraph 3 had given rise to considerable differences of opinion. One group of representatives considered the paragraph to be acceptable with some slight amendments. A second group considered that the claimant should be allowed to alter or supplement his claim at any time, since otherwise he might find himself in a difficult situation. A third group accepted the idea that the claimant should be authorized to alter his statement of claim, but advocated a stricter rule and thought, in particular, that a distinction should be drawn between the terms "supplemented" and "altered", on the meaning of which representatives had not yet