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

reached agreement. If a more specific provision was to be adopted, it would be essential to carry out a detailed study of the situations which might arise. Certain representatives wished to strengthen the power of the arbitrators in all the cases provided for in paragraph 3. The idea had also been expressed that the claimant might be required to pay all the costs of supplementing or altering his statement of claim.

Mr. ROGNLIEN (Norway) drew attention to the idea expressed in the debate that a distinction should be made between the actual substance of a claim and the statement of the claim on the basis of its substance. In the latter case, the claimant could easily be authorized to supplement or alter his assertion - e.g., in respect of amount, interest, etc. - because such changes arose directly out of the basic claim. Where, however, the change would have the effect of altering the substance of the claim, it should be submitted in the form of a separate claim, in accordance with paragraph 3.

Article 17 (Statement of defence and counter-claim)

The CHAIRMAN asked the consultant to the secretariat of the Commission whether the expression "counter-claim arising out of the same contract" in paragraph 2 of article 17 excluded the possibility of making - during the same arbitral proceedings - a counter-claim arising out of another contract containing a similar arbitration clause. It was possible to imagine a case where merchants had concluded, on different dates, several contracts providing for the delivery of cereals and containing the same arbitration clause. In the event of a dispute, the question arose whether, according to paragraph 2 of article 17, the respondent would be able, during the same arbitral proceedings and on the basis of a similar arbitration clause, to make a counter-claim of the same nature as the claim but relating to another contract. He would like to know whether that possibility had been taken into account.

Mr. SANDERS (Consultant to the secretariat of the Commission), replied that that difficult question had indeed been studied and that the solution was to submit a separate statement of claim. Usually, however, the two disputes would be submitted to the same arbitrators, who would examine the different statements of claim at the same time and would render their awards on the same date. He added that it was difficult to make provision for particular cases in a general rule.

Mr. ROGNLIEN (Norway) thought that, with regard to the counter-claim mentioned in paragraph 2 of article 17, it was essential to make a distinction between different independent contracts and several contracts concluded in the course of the same transaction. The words "the same contract" might be replaced in that paragraph by the words "the same transaction". Furthermore, the respondent should be allowed to make a counter-claim if it related to the same subject-matter as the principal claim.

Mr. SONO (Japan) said that he shared the concern expressed by the Chairman and the representative of Norway and thought that it would be preferable for UNCITRAL to propose the adoption of the formula used in the Convention on the Limitation Period in the International Sale of Goods. Since several contracts might be concluded in the course of the same transaction and the counter-claim might not necessarily come within the scope of the arbitration agreement, a further modification to the rule would also be necessary. Thus, he proposed the addition

of a provision worded: "provided that the counter-claim relates to the same contracts or to several contracts concluded in the course of the same transaction and provided further that the counter-claim has also been the subject of the same arbitration agreement". Moreover, paragraph 2 gave the impression that "set-off" and "counter-claim", which were two different concepts, had been confused. He therefore thought that the working group should make the wording of paragraph 2 more precise in that regard.

Mr. SZASZ (Hungary) supported the existing wording of paragraph 2. While endorsing the idea that a counter-claim should be based on the same contract as the claim, he thought that it was essential to make provision for a case in which several contracts contained the same arbitration clause and disputes arising from different contracts might therefore be submitted to the same arbitrators. He wondered whether the best solution might not be to institute a single procedure which would enable the arbitrators to render a single award.

Mr. GUEIROS (Brazil) endorsed the comments of the Japanese representative.

Mr. KRISPIS (Greece) thought that the question of counter-claim was similar to the problem of the alteration of the claim. Furthermore, in the case of a counter-claim, the arbitrators were obliged to give a ruling on their own competence. Paragraph 3 of article 16 and paragraph 2 of article 17 dealt with the same question. As some representatives had already observed, it would be better to use the word "dispute" or "transaction" instead of "contract" in the first sentence of paragraph 2 of article 17. On the other hand, he did not share the view expressed by the representative of Japan concerning the term "set-off", which, in his opinion, was the result of the counter-claim and should not therefore be dealt with in the draft arbitration rules. It would be sufficient to refer to it in the commentary.

Mr. SONO (Japan) said he thought that the Commission had agreed that the term "set-off" meant a defence, while the term "counter-claim" meant an affirmative claim. Where an amount of $1,000 was being claimed, the respondent, who had a claim of $1,200 against the claimant, could not collect the difference of $200 if the respondent used his claim as a set-off, because the set-off was a defensive measure. The respondent could recover the difference only if he presented the $1,200 claim as a counter-claim against the claimant.

Mr. BENNETT (Australia) suggested that paragraph 1 of article 17 should contain a provision imposing on the respondent an obligation similar to that imposed on the claimant in paragraph 1 of article 16. If the respondent knew that the claimant had not presented all the relevant documents, he should, in communicating his written statement of defence, include a copy of the documents which had not been submitted. It was not, of course, desirable to incorporate in the draft set of rules certain detailed rules which were applicable in common-law countries, but it might be useful to ask the respondent to indicate to the fullest possible extent the facts on which his statement of defence was based. Indeed, the respondent should be encouraged to make his statements of defence as objective as possible. The revision of the text of the article should be left to the working group.

Mr. ROEHRICH (France), referring to the expression "arising out of the same contract" in paragraph 2, said that a contract could refer to an arbitration agreement which applied only to certain clauses of the contract. It would therefore be better to use a more general but safer term such as "arbitration agreement".

Mr. JAKUBOWSKI (Poland) thought that the time-limits should be less rigid, so as to permit the respondent to make a counter-claim not only in his statement of defence but also at a later stage. His delegation would have difficulty in accepting the solution proposed in the text of article 17 as it appeared in the preliminary draft set of rules.

Moreover, the relationship between the counter-claim and the contract should be "liberalized". Lastly, the question of the competence of the arbitrators had not been solved and he thought that the provisions of article 17 should not be so rigid on the matter.

Mr. GORBANOV (Bulgaria) said that he entirely shared the view of the representative of Australia and thought that it would be appropriate to repeat, in paragraph 1 of article 17, the wording of paragraph 2 (b) of article 16.

The CHAIRMAN observed that representatives had not objected to the idea expressed in paragraph 1 of article 17, but had merely suggested that the provision should be drafted in such a manner as to ensure that the prescribed procedure would be as expeditious as the procedure provided for in article 16, and that the respondent would be obliged to annex the relevant documents to his statement of defence and to furnish the particulars requested in paragraph 2 (b) of article 16.

As to paragraph 2, it seemed that the text was not entirely satisfactory with respect to the distinction to be made between the defence proper (set-off) and the counter-claim. Moreover, the expression "the same contract" had been the subject of criticism. The counter-claim should be covered by an arbitration clause similar to that governing the statement of claim. The term "contract" had been considered too restrictive by some representatives, who preferred a broader formulation and had referred in that connexion to the relevant provisions of the Convention on the Limitation Period in the International Sale of Goods.

Article 18 (Pleas as to the arbitrator's jurisdiction)

Mr. ROGNLIEN (Norway) thought that the relationship between paragraph 2 and paragraphs 1 and 4 of article 18 was not sufficiently clear in the English text and added that, in his opinion, the word "competence" referred both to the validity of the arbitration agreement and to the jurisdictional competence of the arbitrators.

Furthermore, he thought that the time-limit established in paragraph 2 for raising an objection to the competence of the arbitrators should apply in respect of paragraph 4 and he proposed in that regard that the existing paragraph 4 should be placed immediately after paragraph 1, so that the existing paragraph 2 could then refer to the two paragraphs which preceded it.

The CHAIRMAN pointed out that, for lack of time, the Commission could not deal with questions relating to the order in which the provisions would be placed. Those problems would be considered at a later stage.

Mr. SZASZ (Hungary) said that he approved of the wording of paragraph 1 within the framework of the arbitration procedure itself, but he thought that the wording might give rise to misunderstandings, since, in the last analysis, it was the courts which would rule on the competence of the arbitrators. The attention of the parties should therefore be drawn to that fact. Paragraph 3 should be drafted in such a way as to make it clear that, in general, the arbitral tribunal should rule on an objection to the competence of the arbitrators at the time when the objection was raised. It was only in exceptional cases that it ruled on an objection in its final award.

Mr. KRISPIS (Greece) observed that there were cases in which the objection to the competence of the arbitrators might be based on new facts or on facts which had just been discovered. The first sentence in paragraph 2 of article 18 should be amended to take such cases into account.

In view of the contents of paragraph 1, paragraph 1, paragraph 4 was self-explanatory; consequently, either the two provisions should be combined or paragraph 4 should be deleted. If it was deleted, the idea which it contained could be mentioned in the commentary.

Mr. CHAFIK (Egypt) congratulated the authors of article 18 on having drafted a rule which was clear and easy to apply, and on having thereby resolved the dual question of the competence of the arbitral tribunal to rule on its own competence and of the necessarily separate nature of the arbitration clause with respect to the contract of which it formed a part - one of the most controversial questions in cases of that nature which had come before the courts of many countries throughout the world.

It was stated in the commentary, with regard to paragraph 2, that it had not seemed necessary for the rules to deal with objections that the arbitrators had exceeded their terms of reference, possibly because the authors had taken the view that the provisions of paragraph 1 covered cases in which it was alleged that the terms of reference of the arbitrators had been exceeded. However, the wording of paragraph 1 should perhaps be made more explicit in that respect.

Mr. GREENWELL (Australia) said that his delegation had reservations concerning the substance of article 18, and particularly paragraphs 1 and 4. Once again, the problem lay in the fact that the rules were by definition optional and that the applicable law prevailed over them. In Australia, arbitrators could not be the judges of their own competence - neither their competence to hear a dispute which was referred to them nor their competence to rule on the validity of the contract of which the arbitration agreement formed a part. Those matters were decided by the Australian courts. The provisions of article 18 would therefore create conflicts of laws and conflicts with rules of public policy. They would be misleading if parties were to infer from them that in Australia, or in any common-law country, arbitrators could rule on those questions, and if they were to discover only later that the national courts could intervene. The parties would also feel they had been misled if they found that, in certain countries, under the national legislation, the award was unenforceable if the arbitration agreement was not valid under the applicable law. In Australia, for example, if Australian law was applicable to the arbitration agreement, and if the courts had to rule on the enforceability of the award, the parties could not decide on the validity of the agreement; the agreement had to be valid according to domestic law.

For all those reasons, his delegation hoped that the provisions of article 18 would be deleted. Generally speaking, it was difficult to endorse a provision which empowered an arbitrator to rule on the validity of a contract under which he himself had been appointed an arbitrator.

The CHAIRMAN noted that discussions had already taken place on other occasions concerning the question raised by the representative of Australia; it had emerged therefrom that, in most countries and not only in the common-law countries, if the parties gave the arbitrators a degree of competence of the order envisaged in article 18, that competence did not constitute an authorization to override rules of national procedure, either at the stage of the enforcement of the award or of its annulment, or even at the stage of the arbitral proceedings. The question was regulated by national laws, and no arbitration agreement could change the situation in any way. Consequently, as the representative of the Federal Republic of Germany had observed during the discussion on the arbitration rules, the rules could mislead businessmen to the extent that they disregarded a law of which the businessmen had no knowledge.

However, some representatives would find it difficult to agree that the provisions of article 18 should be deleted entirely, since, if a dispute arose on the competence of the arbitral tribunal, the parties would in that case have to wait until a State court ruled on the validity of the arbitration agreement, in order to be able to continue the arbitral proceedings if the tribunal was competent. Article 18 represented a middle course, in that it offered the possibility of a solution. The 1961 European Convention on International Commercial Arbitration contained the same provisions, subject to the ultimate authority of the courts. Perhaps it would be possible to draw the attention of users of the UNCITRAL arbitration rules to that State supervision, which could lead to a different result from that determined by the arbitral tribunal. The parties must know that they could not prevent the State courts from considering the case.

Mr. GUEIROS (Brazil) said that, on article 18, he had the same criticisms to make as the representative of Australia. Provisions of that kind could indeed mislead both arbitrators and parties who were not acquainted with the competence of the courts of their country.

It would also be advisable to harmonize the terminology used in the English text of the UNCITRAL arbitration rules, the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and the arbitration rules, in which the words "competence" and "jurisdiction" were used indiscriminately; only the word "competence" should be used.

Mr. SANDERS (Consultant to the secretariat of the Commission) observed that, in the English text of article 41, paragraph 2, of the Washington Convention of 1965, as quoted in paragraph 1 of the commentary on article 18 of the preliminary draft arbitration rules of UNCITRAL, the word "jurisdiction" at the beginning of the third line should be replaced by the word "competence". However, the drafters of the Washington Convention seemed to have attributed exactly the same meaning to both words.

The Chairman had accurately interpreted the intention of the drafters of article 18. The only points that remained to be determined were how to warn the parties that the final decision rested with the national courts, and whether such a warning should be incorporated in the body of the rules or in the commentary.

Mr. CHAFIK (Egypt) considered that the existing text of article 18 was clear; it was intended to accelerate the arbitration procedure, but it did not in any way conflict with the applicable law. The warning to the parties should therefore be contained in the commentary, and not in the text of the article,

Mr. JENARD (Belgium) said that he whole-heartedly endorsed article 18, the contents of which corresponded exactly with those of the provisions which Belgium had recently introduced into its national legislation.

In paragraph 1, it was not perhaps essential to maintain the distinction between the arbitration clause and the arbitration agreement. In his country's view, the arbitration clause was equivalent to an arbitration agreement.

The idea contained in paragraph 4 was sound, but it should perhaps be made more precise by the addition of the following sentence: "A decision that a contract is null and void shall not automatically mean that the arbitration agreement is null and void".

Mr. MANTILLA-MOLINA (Mexico) considered that paragraph 2 should be amended to provide that an objection to the competence of the arbitrators might, if necessary, be raised after the statement of defence or, with respect to a counter-claim, after the reply to the counter-claim.

Unlike the representative of Hungary, he thought that the provision contained in paragraph 3 was satisfactory and that the arbitrators must be left to decide for themselves how they would rule on an objection to their competence.

Mr. JAKUBOWSKI (Poland) unreservedly supported the principles underlying article 18, namely that the arbitrators should be the judges of their own competence and that the arbitration agreement must be considered as independent of the contract of which it formed a part. Those principles were in keeping with the trends that were observable in modern international law, both in writings and in legal opinions.

He agreed with the Egyptian representative that the commentary and not the text of the article was the right place to warn the parties that the final decision rested with the national courts.

Mr. BREBECK (Federal Republic of Germany) supported the Chairman's observations on the value of article 18. He endorsed the Belgian representative's suggestion that paragraph 4 should specify that the arbitration agreement must be regarded as absolutely separate from the contract of which it formed a part. The UNCITRAL arbitration rules should also be independent of the national law. Obviously, however, a decision taken by an arbitral tribunal would in no way prevent the national courts from ruling on the matter.

Mr. GOKHALE (India) acknowledged that there were indeed grounds for believing - as people now generally tended to believe - that the arbitrators should be the judges of their own competence. However, he seriously doubted whether in practice they could be judges of their own competence, because, in principle, arbitrators who derived their competence from the arbitration agreement could not rule on the validity of that agreement.

With regard to paragraph 3, he considered that an objection to the competence of the arbitrators should be treated as a preliminary question.

The provisions of article 18 should logically follow, and not precede, those of article 19 relating to "further written statements" and particularly to the counter-claim mentioned in paragraph 2 of article 19.

Mr. MELIS (Austria) said that the content of article 18 was acceptable to his delegation. It should be left to the working or drafting group to make any minor drafting amendments that might be necessary.

Mr. GUEST (United Kingdom) considered that article 18 was satisfactory as regards its substance, since it was intolerable that the arbitrators, in the event of an objection to their competence, should be obliged to suspend the arbitral proceedings and wait for a ruling by a national court.

It would undoubtedly be advisable to warn the parties that the rules might conflict with the national law. If possible, the warning should be inserted in some form in the text rather than in the commentary. Otherwise, the wording of article 18 seemed to be satisfactory.

Mr. GORBANOV (Bulgaria) said he endorsed the principles on which article 18 was based.

The CHAIRMAN, summarizing the discussion on article 18, observed that, in the light of the comments he had made concerning the intentions of the drafters, the great majority of the representatives who had spoken had supported the principle underlying the article. Two representatives had some misgivings, since they felt that the article might prejudge the right of State courts to deal with those questions.

Some representatives considered that users of the UNCITRAL arbitration rules should be reminded of the possibility of intervention by the State courts. On the question whether that point should be mentioned in the text itself or in the commentary, opinion was divided.

In addition, some representatives had requested that the terminology used should be revised or standardized, particularly as far as the terms "competence" and "jurisdiction" in the English text, were concerned. Other representatives doubted whether the second sentence of paragraph 2 was sufficient to cover all cases in which new developments might constitute raising grounds for delay in a plea of incompetence. One representative considered that paragraph 4 should be made more specific.

Mr. CHAFIK (Egypt) noted that some representatives had taken the view that the parties should be warned in the actual text of the article that the UNCITRAL arbitration rules might enter into conflict with the applicable law, while others had suggested that the warning should be incorporated in the commentary. Since the same warning would have to be given to the parties in connexion with other articles as well, care should be taken to ensure that the same solution, whatever it might be, was adopted throughout the draft rules.

The meeting rose at 1 p.m.