

SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-FIRST MEETING

held on Wednesday, 9 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" (A/CN.9/97)

The CHAIRMAN invited the members of the Commission to comment on article 1 of the preliminary draft "International Commercial Arbitration Rules", contained in document A/CN.9/97. While it would no doubt be impossible to reach a consensus on every point, the group to be set up should be aware of the views held by the members.

Mr. CHAFIK (Egypt) asked whether the articles would be discussed on the basis of a distinction between administered and non-administered arbitration or without regard to that distinction.

The CHAIRMAN replied that that question would be considered when it came up for the first time in connexion with article 2.

Title of the Rules and article 1 (Scope of application)

Mr. KRISPIS (Greece) thought that it ought to be made clear in paragraph 1 of article 1 that the disputes in question were solely those arising from dealings connected with international trade. In paragraph 2, it should be specified that "legal persons of public law" included States, provided that the State, as a party to the contract, was acting jure gestionis. Furthermore, it was important to maintain the requirement of an agreement in writing, which would include an exchange of telegrams or telexes, in view of the value of written evidence. Lastly, he wondered whether article 1 should not include provisions ensuring that the award would be enforceable in the respondent's country. The parties were at liberty to choose the rules that would apply to them, and the fact that, under certain rules, the award might not have the effect of enforcement should therefore be drawn to their attention so as to enable them to avoid finding themselves in such a situation.

Mr. BENNETT (Australia) said that, while article 1 had some small advantage, its omission would not unduly concern his delegation. The article really did no more than provide a nexus between the model arbitration clause - the text of which was reproduced in point 6 of the introduction to the preliminary draft rules - and the rules themselves. The arbitration clause constituted a submission to arbitration by the parties of any dispute that might arise in accordance with the UNCITRAL rules, and article 1, although cast in what seemed to be mandatory terms, in reality merely indicated that the rules were to operate because of the submission in the arbitration clause. His delegation believed that, in view of the connexion between the two texts, they should be made consistent with each other. The wording "or relating to this contract" in the arbitration clause should therefore either be omitted or inserted in article 1.

He agreed with the reasons for including those words in the arbitration clause, which were explained in point 4 of the introduction to the preliminary draft rules, provided, of course, it was recognized that there would be cases which arbitrators would be unable to rule on conclusively to the exclusion of the courts.

He did not think that the application of the rules should be confined to international trade, since that might give rise to problems of interpretation. He would prefer the reference to a written agreement to be retained, particularly because of the questions of the recognition and enforcement of an arbitral award. The main vehicle in that respect was the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the application of which was confined expressly by article II to agreements in writing. A verbal agreement would therefore not be recognized under that Convention. Even if, in particular cases, there were other means of obtaining the recognition and enforcement of an award based on an unwritten agreement, there was a danger, in deleting the reference to an agreement in writing from the rules, that parties would be encouraged to resort to an unwritten agreement only to find that they were not entitled to recognition under the 1958 Convention. If, however, the Commission decided to omit such a reference, his delegation would suggest that paragraph 3 of article 1 should be redrafted so as to define the term "arbitration agreement" along the lines of paragraph 2 (a) of article I of the European Convention on International Commercial Arbitration, of 1961.

Mr. GUEIROS (Brazil) said he would prefer having one title for the preliminary draft set of rules, namely "UNCITRAL Arbitration Rules". Article 1 should keep the heading "Scope of application", because it was indispensable to define the scope of application. Paragraph 1 of article 1 was in fact tautological, and his delegation therefore proposed that it should be replaced by the following text:

"The UNCITRAL arbitration rules shall apply when the parties in an international trade contract had referred to these rules in an arbitration clause or in an arbitration agreement to settle a dispute between them arising out of or relating to the contract, subject to any modifications that may be agreed upon by the parties".

He would like paragraphs 2 and 3 to be deleted. He had no objection to their wording, but thought there was no reason to define the terms "parties" or "agreement in writing" when many other concepts such as "administered arbitration" were not defined in the rules.

Mr. ROGNLIEN (Norway) was of the opinion that the wording of article 1 should be as broad as possible. It was preferable not to refer in the text to the disputes as being of an international nature, for that would seemingly limit the parties' possibility of submitting disputes to arbitration in accordance with the UNCITRAL rules. Parties could not be denied the right to submit disputes for settlement under those rules, even if they were not of an international nature. Further, the scope of application of the rules should not be limited to disputes arising out of a contract but should be extended to all disputes which might arise out of any transaction or other specific (defined) commercial relationship between the parties. With regard to mentioning an agreement in writing, two considerations should be borne in mind: that it was desirable on the one hand, here also, to make the wording as broad as possible, and on the other hand, to

indicate for the benefit of the parties that foreign awards based on oral agreement might not have enforcement effect in many jurisdictions. If an agreement in writing was mentioned in paragraph 1, it should be defined in paragraph 3, and, in that case, the wording of the definition should be closer to that in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958, as his country had suggested in its written observations (A/CN.9/97/Add.3, annex I).

Mr. KOPAC^V (Czechoslovakia) pointed out that it must be borne in mind that the rules were optional and those of a mandatory character should therefore be excluded. Paragraphs 2 and 3 of article 1 should be deleted, because the definition of parties and of a written agreement was not the concern of the rules but of the applicable law. He had at first been doubtful as to the need for requiring an agreement in writing between the parties, but had come to recognize that it was justified. That condition for the validity of an arbitration agreement differed from other conditions in that the parties could not, of their own will, bring about those conditions, whereas they could decide to put their agreement in writing even if that was not required by the applicable law. He thought it advisable to keep paragraph 1 as it stood, except that it might be specified that any modifications which the parties might agree upon should be in writing.

Mr. JENARD (Belgium) agreed with the Norwegian representative that the scope of application of the rules should be as broad as possible and that it should not be confined to disputes arising out of international trade. Thought should also be given to the possibility of broadening the scope of paragraph 1, so that the rules would apply to disputes arising not only out of a contract but also, for instance, as the result of an illicit act. That would be all the more useful in view of the decision taken by the Commission at its present session on the products liability of manufacturers.

He did not think that paragraph 1 should require an agreement in writing, since that was a matter governed by the applicable law or by an international agreement, notably the European Convention on International Commercial Arbitration, of 1961, which did not define an agreement in writing in the same way as paragraph 3. Paragraph 2 should be deleted for similar reasons, since it too dealt with a question governed by the applicable law, and the rules could not change the domestic law. Paragraph 3 would automatically come out if the reference to an agreement in writing was deleted from paragraph 1. If it was decided to retain such a reference, the definition should be broadened and be more or less in line with the definition in the 1961 European Convention or other instruments of wider scope concerned with arbitration.

Mr. KEARNEY (United States of America) thought that it was preferable not to refer to commercial law or to international trade in article 1, since that might create difficulties. He agreed with the Australian representative that it was a good idea to require an agreement in writing, so as to avoid any confusion due to the fact that the 1958 Convention called for an agreement in writing. Those actively engaged in trade were often ill informed about the law of international agreements, and it was preferable to have the same provision in the Convention and in the UNCITRAL rules. He was doubtful about the advisability of deleting paragraphs 2 and 3. He himself would like to retain them, since they would be useful as guidance for the arbitrators, even if it was true to say that the definitions they contained derived from the applicable law. National legislation, which was apt to vary considerably from one country to another,

might make no provision in that respect and therefore leave the arbitrators considerable discretion in following the guidance thus given.

At the invitation of the Chairman, Mr. Sanders and Mr. Nestor took seats at the Commission table as arbitration experts.

Mr. PIRRUNG (Federal Republic of Germany) agreed that it was better not to specify that the rules applied to disputes relating to international trade. If the parties decided to submit a dispute to arbitration and chose a set of rules, they should not confront difficulties in applying it. There was no need to include such a provision in the article, but it could appear in the commentary as guidance for application of the rules.

On the other hand, it would be a good idea, as suggested by the representative of Norway, to define more clearly the disputes covered and to indicate that they were those which might arise from any commercial relationship between the parties. Such disputes were, perhaps, embraced by the words "a dispute existing between them" but the matter might be made more precise. More emphasis should also be placed, in paragraph 1, on the fact that it was the parties which could modify the rules. The commentary should make it clear that modifications might be necessary to overcome difficulties resulting from the applicable law.

The matters dealt with in paragraphs 2 and 3 normally were governed by the national law or by international conventions. Rules such as those being prepared by UNCITRAL could not decide that legal persons could or could not be parties to a dispute. The definitions given in those paragraphs should appear in the commentary and not in the text of the rules.

Mr. RÉCZEI (Hungary) felt that article 1 would be more appropriate in a legislative instrument than an agreement or contract. Deletion of the article would not create any difficult as concerned arbitration, where parties had decided to have recourse to that solution. If the Commission decided to keep article 1, the second and third paragraphs should certainly be deleted, since they defined concepts which depended not on an agreement but on the applicable law.

Mr. GOKHALE (India) thought it necessary to specify that there must be an agreement "in writing" between the parties; after all, the national law of many countries required that contracts be in writing. The definition of "parties" given in paragraph 2 was, however, out of place in the rules, since it related to the way in which the contract was drawn. Like the representative of Greece, he thought it useful to specify that the rules applied to international trade. Paragraph 3 was unnecessary, but was not objected to by his delegation; the word "means" might, however, be replaced by the word "includes".

Mr. GORBANOV (Bulgaria) expressed support for and willingness to adopt the text of article 1 in its present form. In his view, there was no need to limit the scope of paragraph 1 by a reference to foreign trade. The argument that the subject-matter of paragraph 2 depended on the applicable law was not really an obstacle to its inclusion in article 1 of the rules; if parties were free to choose the applicable law, they were also free to choose a rule which reflected their wishes.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that it should be clearly stated, both in the title of the rules and in the provisions of article 1, paragraph 1, that all the rules were applicable to disputes arising from a contract involving "international" trade. The idea that the parties must conclude an agreement "in writing" if they envisaged possible recourse to arbitration should be retained. Paragraph 2 of the article should be deleted as pointless: the question was governed by the provisions of the domestic law relating to the conclusion of arbitration agreements.

Mr. SAM (Ghana) said that article 1 should be kept and that application should not be limited to international trade.

Ghana had ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958, which required the arbitration agreement to be in writing, and he felt that the same provision should appear in article 1 of the rules.

He supported the Norwegian proposal that the scope of paragraph 1 should be extended to cover all disputes arising not only out of contracts but also out of "commercial transactions" of any kind between the parties.

He had no definite opinion on whether or not paragraphs 2 and 3 should be deleted. The Commission should, however, reflect carefully on the remarks by the representative of the United States of America who favoured the retention of those paragraphs. Some speakers had recommended that their content be included in the commentary, but experience showed that substantive rules were rarely published with their commentaries and that some courts even refused to consider them. If the paragraphs were kept, their wording should follow that of the relevant definitions in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Mr. EYZAGUIRRE (Chile) said that, so far as the title was concerned, a choice must be made between "International Commercial Arbitration Rules" and "UNCITRAL Arbitration Rules".

In article 1, it was important to keep the idea that an arbitration agreement must be in writing. In many countries, including his own, an arbitration clause was invalid unless it was in written form. It should also be stated in paragraph 1 that any modifications on which the parties might agree must also be in writing.

On the whole, article 1 was divorced from the main body of the rules, since it provided only an indirect definition of the arbitration clause. While it might be inadvisable to limit the scope of application of the rules to disputes arising from "international" contracts, it was certainly necessary to limit it to "commercial" contracts, since national legislation frequently distinguished between civil-law and commercial-law disputes.

As the parties remained entirely free to decide on the application of the rules, the arbitration clause should have universal implications. It was hard to see how a trader who was party to an international contract could invoke the rules if the law of the country of which he was a national did not recognize them as internationally valid. It should not be forgotten that many countries had not

ratified the existing arbitration rules or conventions. The national law of countries must also recognize the role assigned to arbitrators and the enforceability of awards.

He had no firm opinion concerning paragraphs 2 and 3. It would seem that the definition of "parties" covered all types of physical or legal persons, since the words "of public law" could refer to cases in which a State was a party to an arbitration clause relying on the UNCITRAL rules and to cases in which a trading company was a State enterprise or an enterprise in which the State had a share. It might, however, be preferable to look to the applicable law for the definition of the "parties". If it was intended that the arbitration clause should be "in writing", that should be explicitly stated, and all the cases referred to in paragraph 3 (exchange of letters, telegrams or telexes) could be used.

Mr. ADESALU (Nigeria) said that he would prefer the retention in paragraph 1 of the words "agreement in writing", since Nigerian law required that any arbitration agreement should be in written form. It would be advisable to limit the scope of application of the rules to "international" commercial transactions; if the Commission wished to extend the scope, the title would have to be changed.

He had no preference either way with regard to paragraphs 2 or 3.

Mr. GUEST (United Kingdom) noted a tendency in the Commission to study article 1 as if the Commission, instead of establishing purely indicative rules concerning the appointment and role of arbitrators, etc., was in the process of drawing up a convention. The obligation to conclude an arbitration agreement in writing was, however, solely a matter for the national law. If the law said that an exchange of telegrams or telexes was not valid, it was not and could not become so.

Similarly, was it really important to determine whether or not the application of the rules should be limited to "international" trade? If the parties agreed that the UNCITRAL rules should apply to the arbitration of a dispute arising between them, it did not matter whether that dispute was of a national or an international character. The parties had complete freedom of choice.

Under the circumstances, article 1 was superfluous and should be deleted.

Mr. CHAFIK (Egypt) was of the view that the rules should be called "UNCITRAL Arbitration Rules", since the title would then correspond to the wording used in article 1, paragraph 1, and the Commission would not have to include definitions concerning the international or commercial nature of the transaction giving rise to the dispute.

The idea that the arbitration agreement must be "in writing" should be retained. There would be no conflict if the applicable law also required that the agreement be in writing; if it did not do so, it would not prohibit such an arrangement, so that there again there would be no conflict.

The agreement in writing, whereby parties to a contract agreed that a dispute arising out of the contract should be referred to arbitration, could be

either a separate arbitration agreement or an arbitration clause, a point which would have to be specified. A dispute could, after all, arise from a contractual or from a delictual relationship but, whereas an arbitration agreement could cover both types of relationship, an arbitration clause could cover only the contractual relationship. The English version of paragraph 1 was better in that respect that the French version, since it contained commas.

Paragraph 2 should be deleted, since it might be incompatible with the applicable law. Furthermore, it related to a matter of substance and the rules were supposed to concern only questions of procedure.

Paragraph 3 was essential and should be retained as it stood.

The CHAIRMAN pointed out that the term "arbitration agreement", which was equivalent to the term compromis, was required precisely to cover both contractual and delictual relationships. Inland-waterway shipping companies wishing to provide, for example, that cases of collision should be settled by way of compromis, normally specified an arbitration "agreement" in the contracts they concluded with one another.

Mr. RANA (Nepal) did not think article 1 was needed in the draft rules. If the parties wished to provide that a dispute between them arising from a contract they were concluding would be submitted to arbitration, they normally so stipulated in their contract. Besides, the provisions of paragraph 3 in particular might well be incompatible with the applicable law.

If, however, article 1 was to be retained, it was unnecessary to specify that the arbitration agreement must be "in writing".

Mr. PAREJA (Argentina) considered it essential to state in article 1, paragraph 1 that the arbitration rules related to transactions in "international" trade.

Referring to paragraph 2, he said that his delegation could not accept the notion that "parties" included legal persons of public law, since the Argentine State could not enforce an award rendered by foreign arbitrators. If the provision was retained, some reference would have to be made in it to the rights of third parties.

If the rules were to require the arbitration agreement to be "in writing", it would be necessary to bring out more clearly the distinction between a "contract" in writing, which might contain an arbitration clause, and an "agreement" in writing signed by the parties after a dispute between them had arisen.

The CHAIRMAN summed up the discussion on the title of the draft rules and article 1.

Additional delegations had expressed themselves in favour either of the long or of the short title, depending on their position with regard to article 1, paragraph 1.

Some representatives advocated the deletion of article 1, but they were in the minority.

Most of them were in favour of the retention of some components of the article, especially of paragraph 1: some wished to restrict the scope of application of the rules to transactions in international trade, whereas others wished to give parties the option to use the rules in all commercial transactions, if the applicable law so allowed. Several representatives stated that the provisions of paragraph 1 were too narrow if they covered only cases of "contract" and would like them extended to all "relationships in law"; but such an extension did not have general support.

Opinion was divided on the question whether the arbitration agreement must be concluded in writing, and several representatives would prefer deletion of the relevant provision on the ground that it was the applicable law that determined whether an agreement which was not in writing was or was not valid. Several other representatives wanted to mention the requirement, either because it was part of their own national law or because, in the absence of such a provision, traders might conclude an oral agreement which might later turn out not to be valid. One representative had stated that if it was expressly stipulated that the arbitration agreement must be "in writing", it must also be specified that any change in that agreement must also be agreed in writing.

A slight majority of the Commission appeared to favour the deletion of paragraph 2, some because they disliked the possibility that the provision might be relied upon to validate arbitration agreements which were not permissible where the State was a party to the contract, and others because the only recourse in such a case was to the applicable law.

With regard to paragraph 3, the number of representatives that wished its deletion was slightly smaller than that of the representatives that favoured its retention in order to explain what an "agreement in writing" was, the provision being amended, if need be, to bring it into line with the corresponding provision of the ECE Arbitration Rules or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Article 2 (Administered and non-administered arbitration)

Mr. HOLTZMANN (United States of America) said that he had refrained during the general debate on the arbitration rules from taking a position on the question whether there were grounds for giving parties a choice between "administered" and "non-administered" arbitration because he preferred to speak on the subject during the consideration of the rules article by article. In the general debate many delegations had already expressed opposition to the two options, basically, it seemed, for reasons of terminology, because the term "administered arbitration" could easily lend itself to confusion and give the impression that the rules were intended for "institutional" rather than ad hoc arbitration. The English adjective "administered" was too broad, as indeed was the French "libre".

Nevertheless, it must certainly be recognized that, whatever the label, it covered some excellent procedures. Such procedures, which concerned the functions of the arbitral institution, were, unlike institutional procedures of arbitration, very narrow and limited: they related, first, to the appointment of one or more arbitrators where the parties had not concluded an agreement on the matter - initial appointment, challenge, and substitution in the event of death,

incapacity or resignation of an arbitrator - and, secondly, the amount of the arbitrators' fees and administrative costs. The second question was, by the way, closely linked to the first. In any ad hoc arbitration, negotiations about the amount of fees and the administrative costs might give rise to many difficulties, and the provisions in draft articles 31 and 32 were thus very sound, especially as the assistance of the arbitral institution might help to keep the costs of arbitration down to a reasonable level and thereby allay a concern which several delegations had already expressed and he himself shared.

A comparison of the provisions under the heading "administered arbitration" with those under the heading "non-administered arbitration" showed that they were in fact very similar, since all the functions to be exercised by the arbitral institution under the administered arbitration procedure would be exercised, under non-administered arbitration, by other types of institutions (the Secretary-General of the Permanent Court of Arbitration at The Hague, for example). The only difference was that in administered arbitration the arbitral institution was designated in the contract, whereas in non-administered arbitration it was only designated once a dispute had arisen.

The choice offered to the parties between the two procedures was very useful. Some would regard administered arbitration as simpler and faster: others would prefer non-administered arbitration if they did not wish to designate an arbitral institution at the time when the contract was concluded or if they could not reach agreement on the appointment of the arbitrator. That alone - the existence of that dual machinery in the UNCITRAL draft rules - made those rules far better than all the other existing sets of rules. Such flexibility should be kept in rules designed for world-wide use in a broad variety of commercial situations.

If, therefore, it was desirable to keep the option between the two alternatives in the rules but mitigate the danger of confusion caused by the labels "administered arbitration" and "non-administered arbitration", the best course would be to consider changing those labels. Since the relevant provisions dealt with the basic function of the arbitral institution, that of appointment of the arbitrators, the term "administered arbitration" might be replaced by "appointing institution" or "appointing authority". As to the provisions dealing with the case where the authority or institution was designated in the contract, they might be grouped under the heading "Designated appointing authority", while the provisions dealing with the case where the arbitral institution was not designated in the contract might be grouped under the heading, "No designated appointing authority". Alternative wording would also have to be found wherever the terms "administered arbitration" and "non-administered arbitration" appeared in the body of the rules. That, however, was a matter of drafting and should be referred to a drafting group if the basic idea was retained, namely that the two procedures should be kept, but under different names.

Mr. ROGNLIEN (Norway) said that he had appreciated the arguments put forward at the 159th and 160th meetings by representatives who wished the Commission to refrain from trying to the time being to devise rules for "administered arbitration". He endorsed their view, because the inclusion of such provisions in the present rules was liable to confuse the parties. But that did not mean that the Commission would not revert to them later.

Article 2 was not superfluous, however. There must be at least some statement of what the effects would be of an arbitration agreement in which the parties had cited the UNCITRAL rules and had also agreed to select an arbitral institution. The provision might perhaps be worded: "Where the parties have agreed to select an arbitral institution to administer the arbitration, they shall be deemed to have opted for the arbitration rules which such institution may have established for such purpose, unless they have expressly specified otherwise."

Where the arbitral institution was unable or unwilling to administer the arbitration, as provided for in paragraph 3 of article 2, it should also be specified that the UNCITRAL rules would be deemed applicable in accordance with article 1, notwithstanding the provisions he would suggest for article 2, paragraph 1.

He endorsed one of the ideas put forward by the representative of the United States of America, namely that somewhere the rules should mention the "appointing authority".

Mr. KRISPIS (Greece) recalled that during the general debate he had opposed the idea of drafting rules for "administered arbitration". He had changed his mind after hearing the arguments of the representative of the United States of America and remembering that novelty was essential to progress. It should not be forgotten that the UNCITRAL arbitration rules would be optional in any case. The parties might apply them as a whole or not. If they chose to apply them as a whole and if they had not expressly selected the procedure of administered arbitration, it would not apply.

Mr. DERAINS (International Chamber of Commerce), speaking at the invitation of the Chairman, observed that the main difference between administered and non-administered arbitration was that, in the former case, it was an institution that would be administering the arbitration and, possibly, negotiating the arbitrators' fees. As to the sureness of the appointment of the arbitrators, the draft made no distinction between the two systems. On that point, it was expressly provided in the model clause that an appointing authority should be designated by the parties in advance.

In his opinion, the risk of creating confusion in the mind of the parties was due not to terminology but to the fact that the draft seemed to be offering a choice between two procedures when, in reality, those procedures differed very little from each other; the parties might get the impression that administered arbitration involved an institution that would administer the arbitration, whereas it would only be fulfilling the function of an authority designated in advance to appoint the arbitrators.

The point could be dealt with in a later article; it would seem risky to offer the parties a choice between two systems as early as article 2.

Mr. GUEIROS (Brazil) said that as a lawyer he was opposed to the use of the terms "administered arbitration" and "non-administered arbitration" and would be in favour of deleting the whole of article 2. He associated himself with the remarks of the observer for ICC.

As the representative of Brazil, however, he would suggest that, in order not to discourage the arbitration centres - and he noted that the Brazilian Arbitration Centre was linked to the Inter-American Commercial Arbitration Commission - the heading and wording of article 2 should be amended to read:

"Arbitral institutions"

Article 2

"The parties may at any time select an arbitral institution to facilitate the arbitration procedure."

Paragraphs 2 and 3 of article 2 would thus be deleted.

Mr. PIRRUNG (Federal Republic of Germany) did not think it wise to include provisions concerning administered arbitration in the arbitration rules.

If the parties thought that their dispute could be submitted to the arbitration of an arbitral institution, they would choose that institution, whose rules would then be applicable. If the institution in question did not accept the task which the parties to the dispute asked it to perform, it was doubtful whether the parties would accept another type of arbitration. In order to deal with administered arbitration, it would be necessary to ascertain which institutions would be prepared to apply the UNCITRAL rules. The main argument in favour of excluding all rules on administered arbitration was that the parties would find it difficult to understand what was involved in such arbitration. The rules should be as simple as possible, and he therefore suggested that the Commission should, for the time being, leave the question of administered arbitration aside and concern itself exclusively with non-administered arbitration.

Mr. LEMONTEY (France) said he could not, for the same reasons as those stated by the observer for ICC, support mentioning administered arbitration in article 2. The rules under discussion were intended for businessmen who were not familiar with legal niceties and might imagine that the arbitral institution referred to in article 2 would actually control the arbitration proceedings, which was not the case at all. The French delegation was therefore in favour of deleting the whole of article 2.

Mr. MELIS (Austria) said he was against the distinction made between administered and non-administered arbitration; the parties should have a very clear understanding of which type of arbitration they were choosing.

Like the French delegation, the Austrian delegation favoured the deletion of article 2.

Mr. RÉCZEI (Hungary) agreed with the observer for ICC and the representatives of the Federal Republic of Germany and France that it would be better not to include in the draft rules a legal concept that might give rise to confusion; and, he too, would suggest the deletion of article 2. On the other hand, he thought that there might be some advantage in drafting a provision concerning an "appointing authority".

Mr. JENARD (Belgium) said he shared the views of the observer for ICC and the representatives of the Federal Republic of Germany and France.

Mr. SAM (Ghana) was of an entirely different opinion: the parties should have a choice between the two types of arbitration. The advantage of administered arbitration was that it could inform the parties about the national law of countries and give them the benefit of the experience of an institution which could advise them on the procedure to follow. The parties to a dispute might be at a loss to find a competent lawyer by themselves, in which case an appropriate institution could prove very useful. If the institution proved unable to fulfil its task, the draft rules offered the parties recourse to non-administered arbitration. The most important question was how to solve the problem of the appointing authority. Again, while it was difficult at the present stage to say exactly which procedure was more costly, his delegation was inclined to believe that, so far as general overhead costs were concerned, administered arbitration would be less expensive.

A proposition should not be turned down simply on account of its novelty. Even judges in courts of law, for example, very often showed a spirit of innovation. As for the term "administered", it was clear enough to be understood by the parties.

He found it difficult to understand why some delegations were against applying the rules to administered arbitration while suggesting that provisions on that point could be adopted at a later stage.

Lastly, he observed that since the parties usually consulted legal counsel before taking disputes to arbitrators, such counsel could explain to them the difference between administered and non-administered arbitration.

His delegation was therefore in favour of keeping article 2.

Mr. GOKHALE (India) said he shared the views expressed by the representative of the United States of America, except on the subject of arbitration costs.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) thought that article 2 should not be in the rules, since they ought not to apply to administered arbitration. To include such a provision in the rules would be premature.

Mr. BENNETT (Australia) said that his delegation had reservations concerning article 2. It was inclined to support deletion of the provisions relating to administered arbitration, because it saw a need for further consultations with the organizations concerned, whereas there was nothing urgent about having such provisions in the rules. The views of the organizations should be canvassed before the question was considered any further. Some delegations had tried to clear up possible confusion by suggesting changes in terminology, but the danger still remained, as businessmen were very unlikely to be as familiar with the situation as the members of UNCITRAL.

One representative had suggested that parties which opted for the appointment of arbitrators by an institution should automatically be bound by the rules of that

institution. He wondered which of the institution's rules would become applicable in such a case and which of the UNCITRAL rules would cease to be applicable. For those reasons, his delegation, like the Soviet delegation, believed that article 2 should be deleted.

Mr. EYZAGUIRRE (Chile) saw no problem in replacing the term "administered", which was indeed liable to create a certain amount of confusion in the minds of businessmen, but he could on no account support the idea of deleting article 2; on that point, he shared the views of the representative of Ghana. It was worth noting that, at the regional level, there existed in Latin America an Inter-American Commercial Arbitration Commission, which to a certain extent promoted use of the system of arbitration. That institution was developing in the countries of Latin America, and those interested in arbitration could obtain assistance from the Commission through the national sections in the Commission's member countries. Each country drew up a list of experts from which the Commission selected persons to serve as arbitrators. The Commission dealt not only with appointments but also with financial matters and provided assistance in arbitration proceedings.

His delegation was therefore in favour of maintaining the basic provisions of article 2.

Mr. SUMULONG (Philippines) said that he too thought that parties to a commercial transaction should be free to choose between administered and non-administered arbitration and that it would be preferable if the draft rules were not limited to non-administered arbitration. However, the use of the term "administered" was not, perhaps, a happy one, because it could imply that the institution played a part in the actual proceedings, whereas, in fact, its functions were limited to assisting the parties in the appointment of the arbitrators and to relieving them of some problems connected with costs. Furthermore, if the draft rules were to encourage parties to a dispute to have recourse to arbitration, they should be left free to choose between administered and non-administered arbitration; in that connexion, he emphasized that administered arbitration would help the parties to save time so far as appointing the arbitrators and fixing their fees was concerned.

The representative of the United States of America had suggested that the term "administered arbitration" should be replaced by "appointing institution" or "appointing authority", but that might tend to make the definition too narrow, since the institution would also be dealing with the determination of fees and of the costs of the proceedings. He therefore suggested use of the terms "assisting authority or institution".

Mr. JAKUBOWSKI (Poland) was against using the term "administered arbitration" in the draft rules; a first instrument, of a universal nature, relating to arbitration should not pursue too many aims. It was preferable to try to universalize already known solutions, such as ad hoc arbitration. He recognized, however, that the distinction might, if need be, be made in the future. For the time being, it seemed premature to consider the question of administered arbitration.

The CHAIRMAN, summing up the discussion on article 2, thought that the divergencies which had emerged should be reduced to their proper proportions. A group of delegations had spoken in favour of introducing the idea of administered arbitration to deal with a situation where an arbitration agreement provided for the application of the draft rules with the stipulation that certain functions would be assumed by an arbitral institution. In that connexion, he recalled that those delegations did not insist on the term "administered arbitration" and would be willing to accept a different designation. However, a fairly clear majority of members of UNCITRAL rejected the idea of the new approach, at least for the time being, and, with the exception of one representative, had suggested the deletion of article 2.

Mr. CHAFIK (Egypt) pointed out that, during the general debate, his delegation had clearly expressed itself in favour of the rules being applied solely to so-called "non-administered" arbitration.

Mr. ROGNLIEN (Norway) wished to make it clear that the fact of opposing the inclusion of provisions relating to administered arbitration in no way implied opposition to that system. Representatives that had taken that position did not reject the possibility of making an arbitral institution an appointing authority; the members of UNCITRAL could examine the question of organized arbitration at a later stage.

The meeting rose at 1.05 p.m.