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. KOPAČ (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.