SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-THIRD MEETING

held on Thursday, 10 April 1975 at 10.20 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 6 (Appointment of sole arbitrator) (continued)

Mr. SANDERS (Consultant to the UNCITRAL secretariat), introducing paragraph 2, said that sub-paragraphs (a), (b) and (c) were designed solely to place certain suggestions before the Commission; the latter could, of course, adopt any other formulation that it considered to be better.

The solution proposed in sub-paragraph (a) would not suffice in itself: there would always be a number of Governments which would not designate an appointing authority even if the General Assembly adopted a resolution inviting States to do so. As regards sub-paragraph (c), the Secretary-General of the Permanent Court of Arbitration at the Hague had been approached, and had said that he would be prepared to designate an appointing authority from among the arbitral institutions of States members of the Court.

With regard to paragraph 3, he said that the list-procedure was used in the Netherlands, and gave good results. Experience showed in fact that when the appointing authority proposed to the two parties an identical list of three names, the parties very frequently indicated a preference for the same name, with the result that indirectly they themselves selected the sole arbitrator.

In connexion with time-limits, he drew the Commission's attention to article 12 (Extension of terms for appointment; particulars of proposed arbitrators), which stated that the time-limits set for the appointment of arbitrators might at any time be extended by agreement of the parties. It was essential also to bear in mind article 25 (Waiver of rules). Under the terms of that article, if a party considered that paragraph 1 of article 6 (nationality of the arbitrator) was not being complied with, it had to object in writing, failing which it was deemed to have waived its right to object.

Mr. PIRRUNG (Federal Republic of Germany) said he approved of paragraph 3 of article 6. With regard to paragraph 2, he drew attention to the fact that in certain cases it was in the respondent's interest to refer the matter to the appointing authority. It was also unnecessarily complicated to fix two successive time-limits of 15 days. The third sub-paragraph of paragraph 2 might therefore be amended to say that on the expiry of a time-limit of 30 days, either party might apply to the appointing authority.

Lastly, he did not consider that it would be a good solution to refer the matter to an arbitral institution in the country of the respondent, as provided for in sub-paragraphs (a) and (b). He greatly preferred the solution under which application could be made to a neutral institution - for example, the Permanent

Court of Arbitration at the Hague (sub-paragraph (c)). Personally, he thought that the UNCITRAL secretariat might also act as appointing authority.

Mr. JENARD (Belgium) said he thought that the procedure described in paragraph 2 was excessively complicated and that it opened the way to delaying tactics. In his view, when the parties did not agree on the choice of the sole arbitrator, the claimant should be able to apply directly to the appointing authority. With regard to the problem of the selection of an appointing authority, the best course would perhaps be to designate the appointing authority in the country where the arbitration took place. If the parties did not agree on the place of arbitration, or if the country of the place of arbitration had not designated an appointing authority, the UNCITRAL secretariat might act as the appointing authority. If the UNCITRAL secretariat considered that it should not perform that function, a special committee - similar to that provided for in the ECE Arbitration Rules - might be set up for the purpose.

Mr. GORBANOV (Bulgaria) said he thought that additional provisions should be included in paragraph 3 to indicate how the appointing authority was to draw up the list of arbitrators. It might perhaps be stated that, once the appointing authority had been designated, the parties or the States should submit a list of arbitrators.

Mr. SUMULONG (Philippines) said that in cases where the parties had not been able to agree on the choice of a sole arbitrator it was quite pointless to ask them to agree on an arbitrator suggested by the appointing authority. As the representative of Singapore had already suggested (160th meeting), the United Nations should adopt a resolution authorizing UNCITRAL to create a panel of arbitrators. When the parties were unable to agree on the choice of an arbitrator, the claimant could apply to UNCITRAL and request it to designate an arbitrator from its panel.

Mr. RÉCZEI (Hungary) proposed that the second sub-paragraph of paragraph 2 should be deleted.

Mr. GUEST (United Kingdom) said that he too thought that the procedure described in paragraphs 2 and 3 was too complex. In cases where the parties agreed on the choice of the appointing authority, the latter should be able to designate an arbitrator directly, without resorting to the list-procedure. In cases where they were unable to agree, the best solution was probably that contained in sub-paragraph (c). The solutions contained in sub-paragraphs (a) and (b) both had the same disadvantage, in that the appointing authority was designated in the country where the respondent had his principal place of business.

Mr. HOLTZMANN (United States of America) said that he too preferred the solution contained in sub-paragraph (c). The solution in sub-paragraph (a) presupposed the adoption of a resolution by the General Assembly, which presented some difficulties. Moreover, even if the Assembly adopted such a resolution, some Governments might not apply it. With regard to the solution contained in sub-paragraph (b), even although several countries had chambers of commerce with experience in appointing arbitrators, many others did not.

The representatives of the United Kingdom and the Federal Republic of Germany had drawn attention to the disadvantages of the solution in which the appointing authority was designated in the country of the respondent; and he shared their

views. Such a system could, of course, function quite satisfactorily when a homogeneous group of countries was involved - as in the case, for example, of the CMEA countries. But it was likely to give rise to difficulties if applied on a world-wide scale. The solution contained in sub-paragraph (c) - applying to the appointing authority designated by the Permanent Court of Arbitration at the Hague - was certainly preferable. He was sorry that the UNCITRAL secretariat did not consider that it could itself designate appointing authorities, but he acknowledged the wisdom of such a decision. It was better for UNCITRAL to remain above the disputes of private litigants.

A list-procedure along the lines of that provided for in paragraph 3 was used in the United States of America and gave good results: it should be used even if the parties agreed on the choice of the appointing authority.

Lastly, the next version of the rules should state expressly that the Secretary-General of the Permanent Court of Arbitration at the Hague should designate a neutral appointing authority.

Mr. JAKUBOWSKI (Poland) said he did not think that sub-paragraph (c) provided an ideal solution, since the Permanent Court of Arbitration at the Hague was not sufficiently universal. It would be better for a United Nations organ (either the UNCITRAL secretariat or a regional organ like the special committee provided for by the ECE Arbitration Rules) to designate the appointing authority.

Mr. GUEIROS (Brazil) said he approved of the suggestion of the representative of Hungary that the second sub-paragraph of paragraph 2 should be deleted. As to the procedure for designating the appointing authority, he too considered that the best solution was the one provided for in sub-paragraph (c). Designation of appointing authorities would place too great a burden on the Commission's Secretariat. The Permanent Court of Arbitration at the Hague was sufficiently universal to perform that function.

Mr. ROGNLIEN (Norway) warned the Commission against the bureaucratic dilatoriness which might arise from over-centralization. In his view, there should be more than one organ empowered to designate the appointing authority.

Mr. RECZEI (Hungary) said he agreed with the United Kingdom representative's comments regarding the disadvantages of the solutions provided for in sub-paragraphs (a) and (b), and wished to make the following proposal: if the parties were agreed on the place of arbitration (and if the place were a country other than a country of the parties), the appointing authority would be designated by an arbitral institution of the country where the arbitration took place, or by a chamber of commerce in that country with experience in appointing arbitrators. Otherwise it would be designated by the Permanent Court of Arbitration at the Hague, or by a United Nations organ according to the procedure provided for in sub-paragraph (c).

Mr. BENNETT (Australia) said that he too considered that the procedure provided for in paragraph 2 was over-complicated.

Of the three solutions proposed, he preferred the solution contained in sub-paragraph (c), which simply provided that the Secretary-General of the Permanent Court of Arbitration should designate an appointing authority: he would not himself

appoint the arbitrators. The risks of delay, to which the representative of Norway had drawn attention, were therefore more apparent than real.

He agreed with the representative of Poland that the organ responsible for designating the appointing authority should be as universal as possible. However, he did not consider that any United Nations organ - not even UNCITRAL - had the necessary experience and knowledge to carry out that task. Moreover, UNCITRAL comprised only a limited number of member States and was not universal either.

Mr. KHOO (Singapore) said he thought that the difficulties which had been mentioned in connexion with the possible role of a United Nations organ as the appointing authority were more apparent than real and would be resolved if the Commission were to offer some guidelines on the matter. The United Nations would be the author of the arbitration rules; it should therefore play a role in their application. It was difficult at the present stage to specify exactly which organ should act as appointing authority. Indeed, it might not necessarily be the UNCITRAL secretariat; any body designated in pursuance of a General Assembly resolution could act with assurance on behalf of the Secretary-General and could benefit, where necessary, from the advice of experts.

Mr. CHAFIK (Egypt) said that the two 15-day periods specified in paragraph 2 should rather be combined into a single period of 30 days, since that would simplify the procedure. The list-procedure mentioned in paragraph 3 might be dropped, since the appointing authority, once it had been designated, would have to appoint an arbitrator immediately. He wished to reserve his delegation's position with regard to the choice of the appointing authority; the Secretariat might consult the regional economic commissions to find out whether they would be prepared to act as appointing authorities and, if so, on what conditions.

Mr. GOKHALE (India) thought that the two-stage procedure described in paragraph 2 was unnecessary; it would be better to have a single provision. If the parties could not agree on the choice of a sole arbitrator, they should apply to the appointing authority. The choice of the appointing authority should be left to the discretion of the parties. His delegation preferred the procedures provided for in sub-paragraphs (a) and (c) to that suggested in sub-paragraph (b). It would also prefer the deletion of the words "by telegram or telex" in paragraph 2.

Mr. EYZAGUIRRE (Chile) agreed that the system suggested in paragraph 2 was unnecessarily complicated. The time-limits should be the same in all cases and should be 30 days rather than 15. With regard to the appointing authority, the procedure suggested in sub-paragraph (a) would be difficult to apply; he was not in favour of the procedure suggested in sub-paragraph (b); the solution proposed in sub-paragraph (c) was more to his liking, but he would prefer the appointing authority to have a more universal character. The ideal solution would be to find a competent organ within the United Nations which could designate an arbitrator; but no such organ existed and the Secretariat should not be given too many tasks. Nevertheless, a solution along those lines would be the most suitable.

Mr. JENARD (Belgium) said he hoped that recourse to a competent institution of the place of the arbitration would be retained as one of the possible solutions. Recourse to an authority such as the Secretary-General of the Permanent Court of Arbitration at the Hague or the secretariat of UNCITRAL would result in over-centralization. If the parties agreed on a place of arbitration

and if an institution existed, recourse to that institution should be possible; if not, the parties might apply to a central authority.

Mr. KEARNEY (United States of America) observed that the Commission had not considered the problems arising where the parties had agreed in advance on the choice of an appointing authority. In that case, the appointing authority would have to have some specific rules or instructions to comply with; he wondered whether it was supposed to follow the procedure set out in paragraph 3.

The CHAIRMAN, summing up the discussion on article 6, said that the members of the Commission were unanimous in believing that paragraph 2 was over-complicated. The two stages and two time-limits suggested were definitely unsatisfactory; agreement would probably be reached on a single time-limit of 30 days running from the date of the claimant's notice of arbitration to the date when the appointing authority received a request for the appointment of an arbitrator. Two or three representatives considered that there was no need to say that the claimant could propose the names of persons by telegram or telex, since he would have to act as quickly as possible. Another representative considered that in some cases it might be in the respondent's interest, in the event of disagreement, to apply to the appointing authority and request it to designate an arbitrator. Some doubts had been expressed with regard to the institutions responsible for appointing a sole arbitrator. Most representatives had expressed the view that the rule should be as simple as possible and that only one institution should be envisaged; but one or two delegations thought it would be better to leave it to the claimant to choose the appointing authority. Most delegations considered that the procedure suggested in sub-paragraph (a) would be difficult and complicated, first, because a General Assembly resolution would be required, and secondly, because the appointing authority would be designated by the Government of the country where the recipient had his principal place of business or habitual residence; and that would be incompatible with the principle of neutrality. Those delegations were not in favour, either, of the procedure suggested in sub-paragraph (b), both for the reasons referred to in connexion with sub-paragraph (a) and because the institutions mentioned might not exist in some countries. The procedure which found most favour was that described in sub-paragraph (c), even though it was not ideal because not all countries were represented on the Permanent Court of Arbitration at the Hague and an indirect procedure might give rise to delays. The possibility of recourse to an appointing authority of the place of the arbitration had also been mentioned. A large number of representatives had expressed a preference for the establishment of an institution within the United Nations, either an organ under the direction of the Commission's secretariat or, more generally, an organ of the United Nations system - possibly the regional economic commissions. Pending further discussion, the Commission should ask the Secretariat to make inquiries so that the working group to be set up would know whether any possibilities existed in that regard. There had been no particular comments on paragraph 2 bis. Opinions had been divided on paragraph 3, some delegations considering that the procedure it described was satisfactory, while others thought it was too complicated. It was also necessary to define the procedure to be followed by the appointing authority where the parties had agreed in advance on the choice of the authority.

Article 7 (Appointment of three arbitrators)

Mr. RECZEI (Hungary) said that the will of the parties and the decision of the arbitrators must be respected. The dividing line between trust and mistrust was

not a matter of nationality; the parties and the arbitrators must be able to trust the presiding arbitrator regardless of his nationality. The two parties must therefore approve of the choice of the presiding arbitrator by the other arbitrators; accordingly, the existing text of paragraph 2 should be replaced by the following:

> "If the presiding arbitrator has the same nationality as any of the parties, the choice is valid only with the written approval of the claimant and the respondent".

The CHAIRMAN said that the secretariat of the Commission had noted the suggestion for the benefit of the working group.

Mr. GORBANOV (Bulgaria) observed that if the two arbitrators did not agree on the choice of a presiding arbitrator, the procedure to follow was that laid down in paragraph 5; the main consideration was, of course, the will of the parties. It was essential above all to recognize the right of the parties to reach agreement on the choice of the presiding arbitrator; if they were unable to do so, then the two arbitrators would make the choice.

Mr. GUEIROS (Brazil) said he was in favour of the deletion of paragraph 2. The second sentence of paragraph 4 was a repetition of the final sentence of paragraph 3. The first sentence of paragraph 7 should also be deleted, since its contents were self-evident from the preceding paragraphs.

Mr. SANDERS (Consultant to the UNCITRAL secretariat) said that he could see that paragraph 2 of article 7 gave rise to the same problems as paragraph 1 of article 6. The confusion was due to the fact that the text did not specify that the presiding arbitrator must be of a nationality different from that of the parties "unless the parties otherwise agree".

The CHAIRMAN observed that the comments on article 6 applied *mutatis mutandis* to article 7 and, with regard to the nationality of the arbitrator in particular, reference should be made to the comments on paragraph 1 of article 6. A wording slightly different from the present wording had been suggested for paragraph 2; other representatives were in favour of its deletion. According to the present wording, the parties and the arbitrators appointed by them might agree on the choice of the third arbitrator, and only an authority would be bound where an incompatibility relating to nationality arose.

Articles 8-10 (Challenge of arbitrators)

Article 8

Mr. SANDERS (Consultant to the UNCITRAL secretariat) said that there was an error in paragraph 1. The words "a party" should be replaced by the words "the other party".

Mr. GUEIROS (Brazil) said that he approved of paragraph 1 subject to that correction.