

SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-FOURTH MEETING

held on Thursday, 10 April 1975, at 3 p.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)

Articles 8 - 10 (Challenge of arbitrators (continued))

Article 9

Mr. RECZEI (Hungary) thought that there was no need to specify that the challenge should be made by written notice.

Mr. CHAFIK (Egypt) said that a challenge was a very serious matter both for the parties and for the arbitrator concerned. It should not be taken lightly, and in his view paragraph 2 should be retained in its present form or should perhaps insist on even more formalities.

Mr. KRISPIS (Greece) also agreed with the text of article 9. Although an arbitrator might be asked informally whether he would be willing to withdraw from the proceedings, a formal challenge would have to be made if he refused to withdraw and the formal challenge certainly ought to be made in writing.

He wondered, however, how article 9 would work under national law, which usually regarded challenge as a question of public policy.

Mr. BENNETT (Australia) said that for the reasons he had given at the 163rd meeting in connexion with article 8, he believed that paragraph 1 of article 9 should be omitted. His delegation had no objection to paragraphs 2 and 3.

Mr. KEARNEY (United States of America) disagreed with the representative of Australia, and thought that it was perfectly reasonable for the parties to enter into contractual arrangements concerning the procedure to be followed for challenging an arbitrator. He pointed out that paragraphs 2 and 3 of article 9, as well as article 10, flowed from paragraph 1 of article 9.

The CHAIRMAN said that there appeared to be no objections to paragraph 3 of article 9. With regard to paragraph 1, some delegations were in favour of the text, but others felt that there should be no time limit to the challenge, because national legislation might allow a challenge to be made to a court at any time. It had been argued also that the provisions of national law would likewise prevail over those of paragraph 2 of article 9.

Article 10

Mr. BENNETT (Australia) disagreed with the first sentence of paragraph 3 of article 10, since it might conflict with national law.

The CHAIRMAN felt that the sentence criticized was justified in its context.

Mr. PIRRUNG (Federal Republic of Germany) expressed his surprise that the text should provide that the decision on a challenge might be made by an authority which had appointed the arbitrator. Personally, if he had appointed an arbitrator, he would find it difficult to pass judgement on a challenge of the arbitrator he had appointed. He therefore suggested that it might be better to leave the decision to a neutral person, following the procedure adopted in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Alternatively, the decision should be taken by the members of an arbitral institution or special body that had not been involved in the earlier proceedings.

Mr. KRISPIS (Greece) said that, if the parties had a right to appoint an arbitrator, then it followed that they had the right to change their minds on an appointment. In his view, therefore, article 10 was not likely to clash with national law. The difficult question was how to replace an arbitrator who refused to withdraw. If the remaining two arbitrators were responsible for the decision, there was a risk of a tie. To cover that possibility, he proposed that the matter should be settled by the president of the court of first instance in the place of arbitration, and if he had no authority, then by the president of the local chamber of commerce, who might also be asked to give a ruling.

Mr. GUEIROS (Brazil) said that the question was very much affected by national law and he had accepted the text of the article with some hesitation as a compromise solution. He found the first two paragraphs of the article easier to accept than the third.

Mr. HOLTZMANN (United States of America), referring to the remarks made by the representative of the Federal Republic of Germany concerning the possibility that an authority appointing an arbitrator might be biased when faced with a challenge of the arbitrator it had appointed, said that in his experience the situation was exactly the opposite. Arbitral institutions were so conscious of their moral obligations and public position that, if a new fact were brought to light concerning an arbitrator they had appointed, their immediate reaction would be to remove their appointee lest their own image were in any way tarnished. It would be difficult to follow the rules set out in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States because, in the present case, no institutional superstructure existed. According to that Convention, the President of the World Bank had the final decision, but in the present case there was no such figure-head readily available to rule on the question of a challenge of an arbitrator.

Mr. JAKUBOWSKI (Poland) agreed with the representative of the United States of America that it was highly unlikely that an appointing authority would not immediately, and satisfactorily, solve any problem concerning the challenge of an arbitrator. In his delegation's view, article 10 was quite acceptable.

The CHAIRMAN said that the Commission appeared to approve of article 10 in its present form, although some misgivings had been expressed. One representative had wished to stress that the application of the article would be subject to national law. Another representative had said that it was preferable not to give any power

of decision, in the event of a challenge of an arbitrator, to the person who had appointed the arbitrator. One representative proposed that the power of decision should be given, in the last instance, to the president of the court of first instance or to the president of the chamber of commerce in the place of arbitration. Another representative felt that the first sentence of paragraph 3 should be deleted.

Article 11 (Death, incapacity or resignation)

Mr. ROGNLIEN (Norway), referring to the second sentence of paragraph 2, said that the party that had appointed an arbitrator should also have a say in the consequences of his replacement. He felt that hearings held previously should be repeated, unless the party that had appointed the replaced arbitrator consented to dispense with repetition and the arbitral tribunal so decided.

Mr. KRISPIS (Greece), referring to paragraph 1, raised the question of an informal resignation. What frequently happened in arbitration proceedings was that an arbitrator stopped attending the proceedings if he realized that they were proceeding unfavourably from the point of view of the party that had appointed him. In his view, the text should provide for presumption of resignation.

Mr. MELIS (Austria) was opposed to the repetition of previous hearings, on the ground of cost and time.

Mr. GOKHALE (India) proposed that the word "shall" in the second sentence of paragraph 2 should be replaced by the word "may".

Mr. SUMULONG (Philippines) said that, if stenographic notes existed of the hearings held before the replacement of an arbitrator, there would be no need to have repetitions, which would be very costly and time-consuming. He referred the Commission to the provision concerning stenographic records contained in article 21 (Hearings; evidence).

Mr. JAKUBOWSKI (Poland) endorsed the remarks of the representatives of Austria and the Philippines concerning the need to avoid the repetition of proceedings. Paragraph 2 should read: "If any arbitrator is replaced, any hearings held previously may be repeated at the discretion of the arbitral institution".

Mr. JENARD (Belgium) agreed with the representative of Austria that a repetition of the proceedings would involve considerable waste of time and money.

Mr. HOLTZMANN (United States of America) said that, in the event of the sole or third arbitrator being replaced, it would probably be essential to repeat the hearings, since the substitute arbitrator would in that case have a crucial part to play. If one of the other arbitrators had to be replaced, the existing text provided the desired degree of flexibility on the question of the repetition of hearings. He recognized the merit of the comment made by the representative of the Philippines on the question of the existence of a stenographic record and felt that, if such a record existed, the arbitrators could be relied upon not to insist on a repetition of hearings. In some cases, however, arbitral proceedings might involve inspections of factory sites or materials; and, since such inspections could not be recorded, the present wording of the text was necessary.

Mr. PIRRUNG (Federal Republic of Germany) wondered who should have the responsibility for deciding upon the incapacity of an arbitrator. In his view, the responsibility should lie with the other members of the arbitral tribunal. The question of what constituted a legitimate ground for the resignation of an arbitrator was another matter that might arise, and he again referred the Commission to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, article 56 of which was relevant to the point under consideration.

Mr. GUEIROS (Brazil) said that in general he agreed with the text of article 11. He endorsed the remarks made by the representative of Greece concerning presumption of resignation, and also those of the representative of the United States of America on the subject of the repetition of hearings. He also supported the Indian amendment to paragraph 2.

Mr. CHAFIK (Egypt), referring to the comments made by the representatives of Greece, Belgium and the Federal Republic of Germany concerning incapacity or resignation, pointed out that article 11 was a procedural provision and was concerned only with the effects of one of the three eventualities referred to in the first sentence of paragraph 1. If the Commission wished to qualify incapacity or resignation, it would have to draft another article to deal with the problem.

Mr. SANDERS (Consultant to the secretariat of the Commission), replying to a question by the representative of Egypt, said that it was standard practice in international arbitration proceedings for oral hearings to be held - usually after a formal exchange of written documents.

Mr. NESTOR (Consultant to the secretariat of the Commission) agreed with Mr. Sanders that in practice oral hearings were always held.

Mr. GUEST (United Kingdom), referring to paragraph 1, said that the problem most commonly encountered was not the death, incapacity or resignation of an arbitrator, but rather his failure to take any action.

In the event of a new arbitrator being appointed, the panel of arbitrators should decide whether or not hearings should be repeated.

The CHAIRMAN noted that in general, the members of the Commission approved of paragraph 1. However, one representative had thought that an arbitrator who resigned should be requested to give the grounds for his resignation. The view had been expressed that the question whether or not an arbitrator was really incapacitated, or whether the grounds given for resignation were valid, would have to be dealt with by the inclusion of an additional provision.

There had been some differences of view concerning paragraph 2. Some representatives thought that if the sole or presiding arbitrator was replaced, any hearings held previously should be repeated, while others were of the opinion that that it was not necessary to repeat previous hearings and that the decision in the matter should be left to the substitute arbitrator. Among those favouring the retention of the first sentence of paragraph 2, some thought that where written records existed of the hearings, the hearings need not be repeated in every case.

As far as the second sentence was concerned, members were more or less agreed that the decision concerning previous hearings should be left to the discretion of the arbitral tribunal. In that regard, two representatives had requested that the word "shall" in the second sentence of paragraph 2 should be replaced by the word "may".

Article 12 (Extension of terms of appointment; particulars regarding proposed arbitrators)

Mr. PIRRUNG (Federal Republic of Germany) thought that it would be useful to indicate the nationality of the proposed arbitrators.

The CHAIRMAN observed that, in principle, article 12 could be regarded as having been approved. With regard to paragraph 2, consideration should be given to the possibility of indicating the nationality of the proposed arbitrators.

Article 13 (General provisions)

Mr. KRISPIS (Greece) said that, if the parties agreed to arbitration, they had the right to decide how the proceedings should be conducted, leaving it to the arbitral tribunal to make good any omissions in the arrangements they had decided upon. His delegation thought that article 13 should be redrafted accordingly, and that paragraphs 2, 3 and 4 should be deleted. The article should state that if the parties had neglected to take a decision on the matters referred to in the existing paragraphs 2, 3 and 4, the arbitral tribunal would deal with those questions itself.

With regard to the provision in paragraph 1 concerning the equality of the parties, he thought that the word "absolute" should be deleted, since there was no concept of relative equality.

Mr. MELIS (Austria) said that in cases in respect of which the rules made no provision, the arbitrator or the arbitral tribunal should decide which national procedural laws would be applicable. In that regard, he referred to paragraph 2 of article 27 (Applicable law).

Referring to paragraph 2 of article 13, he thought that the wording was perhaps too restrictive and that it might be more appropriate to say that an oral hearing must be held if at least one party requested it.

Mr. BURGUCHEV (Union of Soviet Socialist Republics), referring to paragraph 2, also thought that the proceedings should not be conducted solely on the basis of documents and other written materials and that it would be more appropriate to provide for a procedure under which oral arguments could be presented if requested by at least one party to the proceedings.

Mr. JAKUBOWSKI (Poland) said that his delegation shared the view expressed at the Fifth International Arbitration Congress, held at New Delhi in January 1975, that paragraph 2 of article 13 contained a principle which was unacceptable. He thought that the problem might be solved on the basis of paragraph 16 of the suggested modifications submitted by the Secretary-General (A/CN.9/97/Add.2), which contained the text of a single paragraph that could usefully replace paragraphs 2 and 3 of article 13.

Mr. GUEIROS (Brazil) said that he entirely supported the idea in paragraph 1 that the arbitrators might conduct the arbitration in such a manner as they considered appropriate, provided that the parties were treated with equality. However, he considered that it would be necessary to delete the words, "Subject to these rules", which contradicted the rest of the sentence. He also thought that paragraphs 2, 3 and 4 should be deleted.

Mr. SAM (Ghana) said that his delegation did not think that paragraph 4 should be deleted.

With regard to paragraphs 2 and 3, his delegation felt that if they were to be retained as separate provisions, paragraph 2 should be broadened along the lines indicated by the Austrian and other representatives, and the words in brackets in paragraph 3 should be deleted.

Mr. RANA (Nepal), referring to paragraph 1, observed that all parties would have equal rights under the rules and that the words "absolute equality" were therefore unnecessary.

Mr. GORBANOV (Bulgaria) thought that it would be necessary to include a provision concerning time-limits in respect of such matters as the completion of preparatory work by the arbitrators and the duration of hearings, in order to expedite the proceedings.

With regard to paragraph 2, he agreed that oral arguments should be admitted if requested by one of the parties. He favoured the retention of the words "absolute equality" in paragraph 1.

In reply to a question by Mr. GOKHALE (India), Mr. SANDERS (Consultant to the secretariat of the Commission) said it was possible that the arbitrators might rely solely on written documents, but oral hearings would have to be held if one of the parties so requested.

Mr. ROGNLIEN (Norway) said that in general his delegation approved of article 13 in the original version. However, he thought that paragraph 1 should be redrafted in order to make clear what was meant by the statement that the parties should be treated with equality. His delegation would also welcome clarification concerning paragraphs 2 and 3. If oral hearings were held in order to enable the parties to produce evidence by witnesses, did that mean that the hearings would be limited to the presentation of evidence or that oral arguments could also be presented? The arbitrators should have competence to refuse to hear irrelevant evidence offered by one party.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that paragraphs 2 and 3 had originally been separate. The intention had been to limit paragraph 2 to oral hearings for the presentation of arguments and paragraph 3 to oral hearings for the production of evidence by witnesses. In the new text, however, the word "hearings" referred to both the presentation of evidence by witnesses and to oral arguments.

With regard to the concept of equality, he said that a classical example was that if one party was heard, the other party must also be heard. In practice, it often happened that one party sent a document to the arbitrator and subsequently the arbitrator neglected to determine whether that document had been communicated to the other party. It was not possible to sum up the various practical examples of equality in a single article. It was essential, however, for the article to remind the arbitrators that the parties must be treated with equality.

Mr. RECZEI (Hungary) said that his delegation approved of the idea, expressed in paragraph 1, that the arbitrators were entitled to conduct the arbitration in such a manner as they considered appropriate.

His delegation thought that oral hearings should constitute the basis of the proceedings. If the Commission accepted that principle, paragraph 3 would have to be redrafted. If both parties offered to produce evidence by witnesses, his delegation could not accept the view that the arbitrators should be permitted to refuse to hold an oral hearing if they considered that the evidence to be presented would be irrelevant.

Mr. SUMULONG (Philippines) said that it would be a mistake to prevent parties from presenting oral arguments or producing evidence by witnesses, provided that such arguments and evidence were relevant to the issue. Oral arguments after the presentation of evidence to the tribunal would also be extremely useful to the arbitrators. He was therefore pleased to note that following the Fifth International Arbitration Congress modifications had been suggested to paragraphs 2 and 3 of article 13 which would permit either party to produce evidence by witnesses or to present oral arguments.

Mr. KRISPIS (Greece) considered that the concepts of equality and also of fairness should be included in paragraph 1. What would be equal to the parties would not necessarily be fair to them. It was possible to have equality in unfairness. He therefore proposed that the words "and fairness" should be added at the end of the paragraph.

Mr. GUEST (United Kingdom) noted that the use of the term "equality" would be incorrect in English; what was important was that the parties should be treated fairly, as the representative of Greece had pointed out. He agreed with the representative of Poland that paragraphs 2 and 3 should be replaced by the single paragraph spelt out in paragraph 16 of document A/CN.9/97/Add.2. In paragraph 4 of article 13, the point was that the arbitrators should not take into account documents or information which had been supplied to the arbitrators by one party and had not been communicated to the other.

Mr. MANTILLA-MOLINA (Mexico) said that he had misgivings about paragraph 2, since it appeared to confuse two situations which should be kept separate. If the parties agreed that oral arguments should be presented, the procedure to be followed should be spelt out more clearly.

The witnesses referred to in paragraph 3 might presumably be experts. In many countries, a distinction was drawn between evidence by witnesses and evidence by experts, whose participation had generally proved to be of greatest benefit if they were given an oral hearing. Consequently, paragraph 3 should explicitly provide for the possibility of cross-examining experts. Provision should also be made in that paragraph for the possibility of examining particular goods, which constituted another form of evidence in addition to documents and written materials.

In paragraph 4, it should be specified that copies, and not the originals, of the documents and information supplied to the arbitrators by one party should be communicated at the same time to the other party.

Mr. BENNETT (Australia) supported the observations made by the United Kingdom representative.

Mr. HOLTZMANN (United States of America) said he fully supported the replacement of paragraphs 2 and 3 by the text suggested in paragraph 16 of document A/CN.9/97/Add.2. On the question of fairness, it might be useful to take into consideration on that point the ECE Arbitration Rules, which provided that the parties should be given a fair hearing on a basis of equality.

Mr. JAKUBOWSKI (Poland) agreed that the two concepts of fairness and equality should be included in the text.

The CHAIRMAN, summarizing the Commission's discussion of article 13, said that most members appeared to be in agreement on the first part of the first sentence of paragraph 1, although two representatives felt that the autonomy of the parties should be emphasized. As regards the final clause in the first sentence, one representative considered that it should be deleted; other representatives felt that relative equality was meaningless and reference should be made to equality without qualification; others again considered that "equality" was not the right word because treatment might be unequal but still fair, while yet others were of the opinion that the concepts of equality and fairness should both be introduced.

The Commission seemed to be in agreement on the content of paragraphs 2 and 3. A number of representatives had pointed out that oral proceedings were essential; they should not be dispensed with if at least one of the parties requested such proceedings. Some representatives considered that the amendment proposed in paragraph 16 of document A/CN.9/97/Add.2 should replace the existing paragraphs 2 and 3. One representative thought that neither the present text nor the amendment proposed at New Delhi was sufficiently complete. It was also suggested that reference should be made to the hearing of experts. One representative was of the opinion that, where both parties offered to produce evidence by witnesses, the arbitrators should not be permitted to refuse to hold an oral hearing if they considered that the evidence to be produced would be irrelevant.

Some representatives felt that paragraph 4 should provide that documents which were communicated to one party but were not communicated to the other party should not be considered by the arbitrators.

Article 14 (Place of arbitration)

Mr. PIRRUNG (Federal Republic of Germany) said that he had misgivings about paragraph 3. Once the parties had agreed upon a place of arbitration, any further travel by the arbitrators would give rise to complications. It should be specified, at least in the commentary, that travel of the kind provided for in paragraph 3 should be regarded only as an exceptional procedure.

Mr. HOLTZMANN (United States of America), noting the observations that had been made at the Fifth International Arbitration Congress, said that whereas article 14 referred to the "place" of arbitration, the model clause referred to the "seat" (A/CN.9/97/Add.2, para. 6). The two terms should be brought into line.

Attention had been drawn to the need to indicate where the award should be rendered - an important point. The rules should stipulate that the award should be rendered in the place indicated by the parties. Such a provision might be included in article 14 or in article 26 (Form and effect of the award) - a question that might be left to the working group.

Like the representative of the Federal Republic of Germany, he had misgivings about floating arbitration, but the arbitrators must be permitted to travel from place to place for such purposes as conducting interviews and inspecting plant sites.

Mr. SANDERS (Consultant to the secretariat of the Commission) drew attention to two other suggestions that had been made at the Fifth International Arbitration Congress. First, the words "at the beginning of the proceedings" should be added at the end of the first paragraph. Secondly, in paragraph 3, the word "convenient" should be replaced by "appropriate".

Mr. KRISPIS (Greece) suggested that it might be advisable to include a provision to the effect that the expenditure entailed by the proceedings should be kept as low as possible; that point should be borne in mind when the costs of arbitration were determined.

Mr. JENARD (Belgium) suggested that paragraph 2 might be deleted, since it appeared to be superfluous.

Mr. GUEIROS (Brazil) said that the point made by the representative of the United States of America concerning the place of the award might be met by the replacement of the word "may" by the word "shall" in paragraph 2.

The amount of travel involved in arbitration proceedings depended on the interests of the parties. It would, therefore, be advisable to provide for a certain amount of flexibility on the point. Any extra expenditure incurred would be borne by the parties.

Mr. MELIS (Austria) said that, in principle, the wording of the article was acceptable to his delegation, although paragraph 2 would appear to be superfluous.

In paragraph 4, it might be advisable to impose limitations on travel for inspection purposes, since that could prove very expensive. The point might be met by the addition of the words "if the parties agree or at the request of at least one of the parties" at the end of the first sentence of paragraph 4.

Mr. GOKHALE (India) wished to know whether the place of arbitration was the place where witnesses were to be heard.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that, when the article had been drafted, it had been felt that the arbitrators should be free to decide the best place for hearing witnesses.

Mr. GOKHALE (India) agreed that the place of arbitration should, if necessary, be determined at the arbitrators' discretion. Criteria should nevertheless be laid down for determining the place.

Mr. KHOO (Singapore) supported the observation made by the representative of India.

Mr. MELIS (Austria) noted that, under the arbitration rules in force in some countries, it was regarded as sufficient if only one member of an arbitration tribunal heard a witness in a place other than the place of arbitration. In order to reduce costs, a provision on those lines might be incorporated in paragraph 3.

The CHAIRMAN, summarizing the discussion on article 14, said that the Commission appeared to be in general agreement on paragraph 1, although two representatives had requested that more explicit criteria be established for cases in which the arbitrators were to determine the place of arbitration.

Some representatives had suggested that paragraph 2 was superfluous and should be deleted.

It was an open question whether paragraph 3 might give rise to inordinate expenditure. Some representatives considered that, if arbitrators were to travel to any place they deemed convenient, it should be specified in the commentary that such action should be taken only in exceptional circumstances, with due regard to costs. That consideration also applied to paragraph 4. It was also suggested that, if it proved necessary to hear a witness in a place other than the place of arbitration, the arbitration tribunal could be explicitly empowered to send only one arbitrator for that purpose.

Lastly, it was felt that, in determining the place of arbitration, account should be taken of the place where the award was to be rendered, given the variations in practice with regard to awards in different countries.

#### Article 15 (Language)

Mr. SANDERS (Consultant to the secretariat of the Commission) noted that at the Fifth International Arbitration Congress it had been suggested that after the word "language(s)" in paragraph 2 of article 15 the words "determined by the parties or the arbitrators" should be replaced by the words "agreed on by the parties or determined by the arbitrators".

Mr. GOKHALE (India) asked whether it was necessary for the translation referred to in paragraph 2 to be certified.

The CHAIRMAN said that the matter could be left to the discretion of the arbitrators.

Mr. RECZEI (Hungary) considered that the language to be used in the notice of arbitration should be the language of the contract or the language used in the correspondence between the parties.

Mr. CHAFIK (Egypt) said that, instead of giving the arbitrators freedom of choice in the matter, it would be preferable to stipulate that the language of the contract should be taken into consideration, unless otherwise agreed.

Mr. SANDERS (Consultant to the secretariat of the Commission) pointed out that the arbitrators might have no knowledge of the language of the contract. The freedom of choice of the arbitrators should not be limited: the language used should be the most practical one. It was impossible to lay down a hard and fast rule on the question; in some cases, two languages were used in arbitration proceedings.

Mr. KRISPIS (Greece) said that, since article 15 was very closely connected with article 13, he suggested either that article 15 should become paragraph 5 of article 13 or that the four paragraphs of article 13 should become separate articles and be followed immediately by article 15.

Mr. MANTILLA-MOLINA (Mexico) said that, if the wording of the article were construed literally, the arbitrators could choose any language they liked for use in the proceedings, whether or not the parties, witnesses etc., had any knowledge of that language. The representative of Egypt had suggested that the language of the contract should be used; another possibility was the language of the place of arbitration.

Mr. GUEIROS (Brazil) said the problem, though difficult, was inherent in any international arbitration. The three arbitrators might all speak different languages and it was essential that each of them should be able to work in a language with which he was familiar. There was another possible difficulty regarding the award made. If the award had to be enforced in a particular country, it would presumably have to be available in the language of that country. He thought that the working group should take all those points into consideration, and that the solution might lie in the rules established with respect to translation.

Mr. JENARD (Belgium) suggested that the provision should be based on article 26 of the ECE Arbitration Rules, which specified that the arbitrators were to arrange for the translation of the documents and proceedings.

Mr. CHAFIK (Egypt) said that his proposal had been based on the principle of respecting the will of the parties. If the parties were able to agree on a language for the arbitration proceedings, there was no difficulty. If they were unable to reach such an agreement, however, the language to be used in the proceedings should be the language of the contract.

The CHAIRMAN said that the members of the Commission appeared to agree that the proceedings should take place in the language chosen by the parties, if they had made such a choice. The difficulty arose if they had not reached agreement on that point. The use of the language of the contract and the language of the place of arbitration had been suggested as solutions in such a case, and one representative had suggested that the solution adopted in the ECE Arbitration Rules might prove useful. The working group would take account of the various ideas put forward.

Article 16 (Statement of claim)

The CHAIRMAN said that, during the Commission's consideration of article 3 (162nd meeting), many representatives had suggested that that article could be combined with article 16.

Mr. JAKUBOWSKI (Poland) said that his delegation was opposed to the combination of the articles on the notice of arbitration and the statement of claim.

Since it was against current legal practice throughout the world to limit the freedom of the claimant to alter, supplement or withdraw his claim, paragraph 3 of the article should be amended by deleting the clause following the word "altered".

Mr. GUEST (United Kingdom) said that the contents of the statement of claim, as defined by paragraph 2, seemed rather excessive. Sub-paragraph (b) of paragraph 2 required a full statement of the facts and a summary of the supporting evidence. That was unnecessary at the initial stage. If the arbitrators required such material at a later stage, they would order it to be presented. He suggested that the sub-paragraph should read "(b) a statement of the relevant facts;".

With regard to sub-paragraph (c) of paragraph 2, it might be difficult for the claimant to include "the points at issue", since they might not be known to him at that stage. He thought that what the drafters had had in mind was the claimant's submission on the subject. Sub-paragraph (d) was, of course, highly relevant and necessary.

With respect to paragraph 1, he was not clear what was meant by the expression "all relevant documents". If it signified the documents on which the claimant relied to prove his case, that too was a matter for a later stage of the arbitration. It was for the arbitrators to order the production of the documents they required; it should not be necessary to annex them to the statement of claim.

Mr. KRISPIS (Greece) said that, with respect to paragraph 1, he would have agreed with the representative of the United Kingdom but for the fact that, in international arbitration, it was essential to save time and reduce costs. In the circumstances, it was useful to include the requirement that all relevant documents should be submitted at the very outset of the arbitration proceedings. The same answer could be given to the comments of the United Kingdom representative concerning paragraph 2.

The reference to the "contract" was in accordance with the wording of paragraph 1 of article 1, but if the wording of that paragraph were changed, there would have to be a consequential change in article 16. He thought that the words "inter alia" should be inserted in the introduction to paragraph 2, after the word "include".

With respect to paragraph 3, he assumed that the provision meant that an alteration could be made within the framework of the original claim and not that the claimant was entitled to submit another completely different claim.

Mr. PIRRUNG (Federal Republic of Germany) said that, in a sense, article 16 was a crucial one, since it had provoked the first clash of procedural styles. The article as drafted was an attempt to reconcile the Anglo-American and European continental styles.

The representative of the United Kingdom had been perfectly correct, in terms of his own legal tradition, in objecting to the scope of the statement of claim, since in Anglo-American law a statement of claim was little more than a notification that a dispute was being sent for arbitration. The continental tradition was quite different. Unlike the common-law practice where most of the facts were elicited during oral hearings, the continental system required full documentation to be submitted at the outset and the oral hearings were intended simply to clarify points in the documentation. It might be necessary for the Commission to decide which system should be followed.

With respect to paragraph 3, any alteration in the claim would, of course, have to come within the scope of the arbitral agreement.

Mr. RECZEI (Hungary) said that he shared the Polish representative's misgivings concerning paragraph 3. The active rather than the passive voice should be used, and the paragraph should read, "The claimant may supplement or alter the claim". In fact, the claimant was perfectly free to do so, and he did not need an opinion from the respondent or the permission of the arbitrators. If the respondent objected to a change in the claim, the arbitrators would have to give an interim ruling.

Mr. HOLTZMANN (United States of America) said that his delegation was opposed to a merger of articles 3 and 16, for the reasons put forward earlier by some representatives.

Although the representative of the Federal Republic of Germany had, quite correctly, referred to the differences in procedure between the common-law system and the continental system, it was a fact that, at the current stage, the procedure in article 16 did not differ greatly from that practised in the United States of America. Although the statement of claim itself was a mere summary of the case being submitted for arbitration - as was also the practice in the United Kingdom - the United States system required "discovery" of the case to be carried out as soon as possible after the statement had been lodged. Consequently, the combination of the "statement of claim" and "discovery" in article 16 was perfectly acceptable to his delegation.

The expression "all relevant documents" in paragraph 1, was far too broad, and he suggested that it should be replaced by the words "all documents relied upon".

Paragraph 3 dealt with the possibility of altering a claim (and, in his view, that included alteration of a counter-claim by the respondent). There were two principles involved - the autonomy of the parties and the need to expedite the procedure. Where a clash of principles occurred, it was always useful to leave the decision to the wisdom of the minds on the spot. Consequently, his delegation supported the existing text of paragraph 3, including the expression "with the permission of the arbitrators".

Mr. JAKUBOWSKI (Poland) said he agreed with the representative of the United States of America that the rules should not choose between the two systems regarding the contents of a "statement of claim". A pragmatic solution was obviously required and, on the whole, the drafters of article 16 had found such a solution. Nevertheless, some of the detailed changes suggested by the United Kingdom representative could usefully be made.

In the case of paragraph 3, he disagreed with the representatives of the United States of America and Hungary. There was indeed a conflict of interests, but the claimant's interests should prevail. There could be no question of the respondent having any rights in the matter. A respondent might well wish to delay the proceedings, but it was not in a claimant's interest to prolong them unnecessarily. In actual practice, claimants frequently altered and supplemented their claims.

The distinction between supplementing a claim and altering it did not appear to be a very significant one. Any alteration that came within the terms of the arbitral agreement was surely legitimate and did not require the permission of the arbitrators. It might be useful, however, to include a provision that the claim could be supplemented or altered prior to the end of the last oral hearing. The only question that might cause difficulties with respect to supplementing a claim was the extra cost involved.

The meeting rose at 6 p.m.