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.