SUMMARY RECORD OF THE ONE HUNDRED AND SIXTY-SIXTH MEETING

held on Friday, 11 April 1975 at 3.15 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)

Article 19 (Further written statements; further documentary evidence)

Mr. GORBANOV (Bulgaria) observed that paragraph 2 of article 19 enabled the claimant to present a rejoinder to a counter-claim. His delegation would like the respondent to be given the opportunity to reply to the rejoinder.

Mr. KHOO (Singapore) said he thought that paragraph 2 should more appropriately be placed in article 17, which dealt with the statement of defence and counter-claim.

The CHAIRMAN said that it had been agreed that, in the current discussion, the question of the order of the various provisions would be ignored. That question would be considered subsequently by the working group.

It appeared, therefore, that there were no comments concerning article 19 apart from the suggestion by one representative that the respondent should be able to reply to the rejoinder to the counter-claim.

Article 20 (Time-limits)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he wondered whether a period of 30 days for the inclusion of written statements was adequate. The working group should consider the matter and decide whether or not that time-limit should be extended.

Article 21 (Hearings; evidence)

Mr. MATTEUCCI (International Institute for the Unification of Private Law), speaking at the invitation of the Chairman, said that, since arbitrators were not in a position to compel witnesses to attend, the word "call" in paragraph 2 should, perhaps, be replaced by the word "invite".

The CHAIRMAN said that there were two systems with respect to arbitration witnesses. Under the first system, if a witness did not appear, the arbitration continued without him. Under the other system, the arbitrators could obtain a court order to compel the witness to attend.

Since the matter would be subject to the applicable national law, the observer for UNIDROIT was probably right in suggesting a more cautious wording.

Mr. CHAFIK (Egypt) observed that the first sentence of paragraph 4 established the perfectly normal procedure that hearings should be held in camera. In the second sentence, however, the arbitrators were given the right to invite other persons to be present, without the permission of the parties. That provision completely destroyed the privacy of the proceedings established in the first sentence.

The CHAIRMAN said that the second sentence was, perhaps, rather badly drafted. There was certainly no intention of permitting the arbitrators to open the hearings to the public.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that the purpose of the second sentence was to allow the arbitrators to invite specific persons to attend, if their presence was useful for the arbitration proceedings. It might, however, be possible to delete the provision. The working group would consider the matter.

Mr. KRISPIS (Greece) said that the last sentence of paragraph 5 - "Conformity to legal rules of evidence shall not be necessary" - could create considerable difficulties in many countries, particularly in those where there were jus cogens rules concerning evidence.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that the object had been to leave the arbitrators free to use any kind of evidence they deemed fit. Obviously, however, if the applicable national law did not permit them to do so, it would be the national law which would prevail. The sentence might require reconsideration.

Mr. CHAFIK (Egypt) said that the last sentence of paragraph 4 also created some difficulties. He wondered, for instance, whether English courts would accept an award by an arbitral tribunal if there had been no cross-examination of witnesses.

Mr. RÉCZEI (Hungary) said that the second sentence of paragraph 5 should be deleted, since, in fact, it was rather offensive to any man of law. The first sentence of the paragraph gave the arbitrators adequate freedom.

With respect to the question of cross-examination of witnesses, it was very difficult for a party not accustomed to that system to engage in a cross-examination. Although the question of interrogating witnesses was an extremely difficult and complex one, it would have to be solved by the working group, since the rules should obviously not give any advantage to one of the parties.

Mr. JAKUBOWSKI (Poland) said that, at the Fifth International Arbitration Congress, the problem of the interrogation of witnesses had been discussed at some length. The Congress had decided that the matter could not be settled immediately, but that guidelines should be prepared. It had been generally agreed that the system adopted should not be a copy of any judicial system used in any specific country but should be a pragmatic and flexible one. Hence the suggestion for inserting, after the existing paragraph 4, a new paragraph reading: "Evidence of witnesses may also be presented in the form of written statements" (A/CN.9/97/Add.2, para. 19).

With respect to paragraph 5, he agreed with the Hungarian representative that the second sentence was superfluous and might be misleading. At the Congress, all the lawyers present, including lawyers from the common-law countries, had agreed that it should be deleted.

Mr. ALLEN (Australia) said that, in Australian law, the legal rules of evidence had to be applied, unless the parties had specifically agreed otherwise. In practice, the rules of evidence were usually relaxed in arbitration cases. In the circumstances, his delegation would like the last sentence of paragraph 5 to be retained, but it would not insist on its retention if that would cause difficulties in other legal systems.

Mr. GORBANOV (Bulgaria) said that the second sentence of paragraph 5 was quite unacceptable. Even the first sentence of that paragraph was so worded as to give the impression of stating a general rule. If that sentence were retained, it should be rewritten to make it clear that the arbitrators were obliged to observe the general principles of evidence. It should also state whether the rule applied solely to oral evidence or to all the evidence submitted.

Mr. GUEIROS (Brazil) said that he wished to propose to the working group that the words "and the language in which such witnesses will give their testimony" at the end of paragraph 2 should be deleted, that the second and third sentences of paragraph 4 should be deleted, and that paragraph 5 should be deleted. He would explain to the working group itself the reasons for those proposals.

Mr. KEARNEY (United States of America) said that, if the second sentence of paragraph 5 was to be deleted, then some amendments would have to be made to the first sentence. The words "relevancy and materiality of the evidence offered" did not cover all the problems that might arise, such as the question of hearsay evidence in common-law countries. He suggested that they should be replaced by the words "admissibility of the evidence".

The CHAIRMAN said that there appeared to be general agreement on the principle underlying article 21. Paragraphs 1 and 3 seemed to be acceptable. Paragraph 2 was acceptable apart, perhaps, from the use of the word "call". In the case of paragraph 4, it was agreed that the second sentence should be redrafted to show that the arbitrators had to respect the will of the parties. The last sentence of paragraph 4 created some difficulties, which would have to be solved by the working group. There was also a proposal that the possibility of submitting written statements should be included in a new paragraph, to be inserted after paragraph 4. The Commission was virtually unanimous in deciding that the second sentence of paragraph 5 should be deleted. One representative had some very far-reaching amendments for submission to the working group.

Article 22 (Interim measures of protection)

Mr. SANDERS (Consultant to the secretariat of the Commission) said that a modification had been suggested (A/CN.9/97/Add.2, para. 20) to the effect that the following sentence should be added at the end of the text of the article: "Such interim measures may be established in the form of an interim award".

Mr. CHAFIK (Egypt) said that the suggested modification certainly improved the sense of the article. Nevertheless, he thought it would be better to specify that direct application should be made to the court concerned.

The CHAIRMAN commented that, in some countries, a court might refuse to give an order where an arbitral tribunal was sitting on the case.

Mr. KRISPIS (Greece) said that he would prefer article 22 to be drafted in the contrary sense, so as to give the arbitrators the right to order interim measures only if that possibility was expressly provided for by the parties. In that context, interim measures were final decisions, unlike interlocutory orders, which as a rule did not prejudice the final outcome of the proceedings.

Mr. BENNETT (Australia) said that the view expressed during a seminar on the subject in his country had been that it would be desirable to provide arbitrators with an indemnity to cover the costs of the conservation of the goods forming the subject-matter of the dispute, since those costs could be quite considerable and there was no other provision in the rules under which the arbitrators could obtain such an indemnity. His delegation had considered the possibility that the matter might be covered by some provisions of article 31 (Costs), but had come to the conclusion that article 31 was not as explicit as it should be in that regard.

Mr. PIRRUNG (Federal Republic of Germany) drew attention to article VI, paragraph 4, of the 1961 European Convention on International Commercial Arbitration which provided that "a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court". Accordingly, in countries which subscribed to that Convention, there was no problem about going to the courts even if an arbitration agreement existed; in many countries, however, only the courts were competent before the arbitration procedure had been begun and only the arbitrators were competent after the start of that procedure. Accordingly, the possibilities open to the parties might be stated expressly in the commentary, with a reference to the 1961 Convention and perhaps some indication of the variety of legislation on the subject.

Mr. ROGNLIEN (Norway) said that a distinction should be made between measures which required enforcement or execution, which had to be referred to the courts, and interim measures requested by parties for which recourse to the courts was unnecessary. Perhaps the addition suggested by the representative of the Federal Republic of Germany could appear as a separate paragraph of article 22. The existing wording of the article contained no reference to the role of the parties; it might be stated that interim measures could be ordered at the request of one party, and that the other party should as far as possible be given an opportunity to express its opinion before the measures were taken.

Mr. GOKHALE (India) said he agreed with the representative of Norway that interim measures should be ordered only at the request of a party. In its existing form, article 22 seemed to impose a kind of obligation on the arbitrators to take interim measures, whereas the clause should merely give them the possibility of taking interim measures at the request of the parties.

Mr. GUEST (United Kingdom) said that one solution of the problem might be to authorize the arbitrators to take interim measures so as to require one party to deposit the goods subject to dispute with a third person or to require that

party to effect the sale of the goods. In that way, the taking of interim measures by the arbitrators would become part of the arbitration procedure; on the other hand, if the party in question refused to obey, enforcement might be difficult.

The CHAIRMAN, summing up the debate, said that most representatives approved of the underlying principle of article 22, although approaches to the text differed rather widely. One representative thought that the emphasis of the article should be reversed, so that interim measures would be permitted only if they were expressly provided for by the parties in the arbitration agreement. Others had raised the question of the relationship between the measures taken by the arbitrators and the interim measures which, under many national legislations, were taken by ordinary courts before the arbitral proceedings had begun or even while the proceedings were in progress; those representatives had suggested that a paragraph on the subject should be included in the article or that the problem should be reflected adequately in the commentary, with a reference to the relevant provision of the 1961 European Convention. It had also been proposed to differentiate between measures which had to be executed and those which did not, and two representatives considered that arbitrators should be able to take interim measures only when requested to do so by one party, provided that the other party's views on the matter were also heard.

Article 23 (Experts)

Mr. SZASZ (Hungary) said that experts could participate in proceedings on the invitation either of the arbitrators or of the parties, and suggested that that should be reflected in paragraph 1. Otherwise, if a party called an expert to testify, it might be assumed that the arbitrators had the right to decide whether or not the expert should be heard.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that it had been decided only to refer to the neutral experts appointed by the arbitrators, because the experts invited by the parties were in fact very similar to the witnesses covered by article 21.

Mr. SZASZ (Hungary) suggested that, in that case, a specific reference to experts should be made in article 21.

Mr. GUEIROS (Brazil) said he thought that it was important to specify that the parties as well as the arbitrators could appoint experts.

The CHAIRMAN observed that the only problem seemed to be the relationship between the experts called by the parties and those appointed by the arbitrators.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that the working group would include in article 21 an express reference to the right of the parties to call experts. The parties would be likely to call legal experts, who could certainly not be appointed by the arbitrators.

Article 24 (absence of a party)

Mr. KRISPIS (Greece) said that the article did not cover the possibility that both parties, after being duly notified, might fail to appear at a hearing.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that it had not been considered necessary to provide for such an unlikely event. If both parties failed to appear, the arbitrators would presumably convene another hearing and if the parties again failed to appear, the case would probably be dismissed.

Mr. MANTILLA-MOLINA (Mexico) said that, in his opinion, an express provision dealing with the hypothetical case where the claimant did not present his statement of claim should be included, despite the statement made in the first sentence of the second subparagraph of paragraph 2 of the commentary.

The CHAIRMAN said that article 24, together with the comments on it, would be referred to the working group.

Article 25 (Waiver of rules)

Mr. CHAFIK (Egypt) said that article 25 seemed to be generally acceptable, except for the requirement that the parties should state their objection in writing.

The CHAIRMAN observed that no such requirement appeared in the English text. The words "par écrit" in the French version should be deleted.

Article 26 (Form and effect of the award)

Mr. JAKUBOWSKI (Poland), referring to the last sentence of paragraph 3 of article 26, said that it would be wise to allow for the possibility of including dissenting opinions in the award.

The CHAIRMAN observed that the question of the absence of an arbitrator's signature and the question of a dissenting opinion were not always connected. The reason for an arbitrator not signing the award might be that he was obliged to be absent from the place where the award was made, or that he was ill or had died.

Mr. JAKUBOWSKI (Poland) said he agreed with the Chairman's remarks concerning the reasons for the absence of an arbitrator's signature, but he still believed that the possibility of including dissenting opinions in the award should be allowed for. In accordance with the last sentence of paragraph 3 as it was worded at present, an arbitrator had no way of expressing his dissenting opinion except by refraining from signing the award.

The CHAIRMAN pointed out that an arbitrator signed the award more or less as a notary. His dissent from the terms of the award did not oblige him to refuse to sign it.

Mr. SANDERS (Consultant to the secretariat of the Commission) said that the possibility of annexing dissenting opinions to the award had been ruled out, because it had been felt that, if dissenting opinions were to be included, arbitrators might be encouraged to express such opinions. Nevertheless, the working group would be glad to know the opinions of members of the Commission on the subject.

Mr. KEARNEY (United States of America) said that he was in favour of giving the arbitrators an opportunity of expressing dissenting opinions.

Mr. PIRRUNG (Federal Republic of Germany) endorsed that view, since the inclusion of dissenting opinions would facilitate the interpretation of arbitral awards. On the other hand, it should be stated in the commentary that the laws of some countries did not permit the publication of dissenting opinions, and did not recognize awards which were not signed by all the arbitrators. Such was the case in the Federal Republic of Germany.

Mr. MANTILLA-MOLINA (Mexico) said that, although arbitral awards in his country were often not unanimous, it would be better to leave the sentence as it stood. It would also be desirable to make the wording of paragraph 4 rather more flexible, since third parties should be fully informed of the grounds for an award.

Mr. CHAFIK (Egypt) said that he was against the publication of dissenting opinions and considered that the only signature which was absolutely essential was that of the president of the arbitral tribunal.

Mr. KRISPIS (Greece), Mr. GUEIROS (Brazil), Mr. GORBANOV (Bulgaria) and Mr. SUMULONG (Philippines) expressed the view that arbitrators should be given an opportunity of expressing dissenting opinions.

Mr. GUEST (United Kingdom) and Mr. JENARD (Belgium) said that they were against including any dissenting opinions in the award.

The CHAIRMAN observed that a majority of the members of the Commission were in favour of allowing arbitrators to express dissenting opinions. With regard to the signature of the award by the arbitrators, one representative had expressed doubts concerning the validity of an award which was not signed by the president of the tribunal, although the other two signatures were not regarded as strictly necessary.

Mr. SZASZ (Hungary), referring to paragraph 6, said it was also important to specify that the award should be filed or registered where filing or registration was required by the law of the country where the award was enforced. It might be awkward to insert such a provision in the body of article 26, but some reference to the matter might be included in the commentary.

Mr. SONO (Japan) expressed his agreement with the text of paragraph 5. However, a similar approach should also be followed in regard to the need to comply with the requirements of the arbitration law of the country where the award was rendered in respect of the transmission of copies of the award, in view of the fact that the rules were only intended to supplement an arbitration agreement and consequently the agreement should not be in conflict with the procedural rules of a forum. The arbitration law of the forum might require other methods to be used in the transmission of copies of the award.

Mr. KEARNEY (United States of America), referring to paragraph 4 of the commentary, observed that it would be useful to insert in the rules a definition of the term "award", in order to incorporate the idea that interim measures were treated as final awards in certain cases.

Mr. GUEST (United Kingdom), referring to paragraph 6 of the article, asked whether it was generally the duty of the arbitrators to comply with the requirements to file or register an award in States which had such a requirement. In his delegation's opinion, that duty should fall not on the arbitrators but on the successful party. The duty of the arbitrators should be to present the award in a form which was recognized in the State where it was rendered and which, if necessary, would secure its enforcement in that State.

Mr. SANDERS (Consultant to the secretariat of the Commission), replying to the United Kingdom representative, said that, on the basis of the national arbitration laws studied to date, it appeared to be the duty of the arbitrators to file or register awards. The intention in paragraph 6 was to show that, if the arbitration law of the country where the award was rendered required the award to be filed or registered, it was the duty of the arbitrators to do so within the time-limit prescribed.

Mr. GUEST (United Kingdom) said that the paragraph should therefore be worded more precisely to show that, in cases where the arbitrators were required to file or register the award, they should observe the time-limit for so doing.

Mr. JENARD (Belgium), referring to the second sentence of paragraph 3, wondered whether it would not be possible to find a more neutral formulation in order to take account of a situation where the award was not enforceable of itself but was made enforceable by a court order.

His delegation fully endorsed paragraph 4. With regard to paragraph 6, it wondered whether it was not the duty of the presiding arbitrator alone to comply with the filing or registration requirement.

The CHAIRMAN noted that, leaving aside the question of including dissenting opinions in the award, no serious objections had been raised to article 26. The question of signature had been discussed and, in that connexion, he thought that it might be useful to amend the wording of paragraph 3, because in many cases an award was made enforceable through an act by the appropriate authority.

Referring to paragraph 4, he said that one representative had expressed the view that the secrecy of the award would be maintained if it was published without any mention of the names of the parties concerned. Another representative had said that, since the parties might be recognized even if their names were not indicated, it would prefer paragraph 4 to be maintained in its present form.

The wording of paragraphs 5 and 6 would have to be revised in several respects. In particular, one representative had suggested that paragraph 6 should be re-drafted so as to state that the obligation to comply with the requirement to file or register an award rested with the presiding arbitrator alone. Lastly, one representative had said that it might be useful to include in the rules a definition of the term "award".

Article 27 (Applicable law)

Mr. KOPAČ (Czechoslovakia), referring to paragraph 1 of article 27, said that his delegation took exception to the term "expressly designated". The law designated by the parties should be applied whether it was designated expressly or

by implication only. His delegation had strong objections to paragraph 2, and thought that the conflict-of-laws rules of the country where the award was rendered should be used to determine the applicable law.

It could not accept paragraph 3 for two reasons. First, many legal systems did not permit arbitrators to act ex aequo et bono. Secondly, his delegation thought that the paragraph was superfluous, particularly in view of the provisions of paragraph 1 of the article. It might be possible, therefore, to delete paragraph 3 and leave it to the parties to take the decision on the matter - a solution which would not be contrary to the law applicable in many countries.

His delegation thought that paragraph 4 should be deleted. It was not possible to say that the terms of the contract should be taken into account in all cases, because they might be contrary to the provisions of the applicable law.

To sum up, the word "expressly" in paragraph 1 should be deleted. Secondly, paragraph 2 should be so amended as to indicate that the conflict-of-laws rules of the country where the award was rendered should be used to determine the applicable law. Lastly, paragraphs 3 and 4 should be deleted.

Mr. KRISPIS (Greece) supported the Czechoslovak representative's proposal to delete paragraphs 3 and 4.

In his delegation's view, article 27 was one of the most important provisions in the text before the Commission. There were two aspects to the question of the applicable law - the procedural and substantive aspects, and the problem of distinguishing between the substantive and procedural aspects was especially difficult in arbitration matters. Article 27 referred to "the applicable law" without specifying whether the reference was to the procedural or the substantive law or to both. It might be assumed that the article dealt solely with the law to be applied with respect to the substance of the dispute submitted to arbitration, and, provided that the substance of the dispute was commercial in nature, it was indeed possible to speak of the autonomy of the parties to choose the law they wished to be applied in their case (lex voluntatis). Such a law might be designated either in the original contract or in the arbitration agreement.

In both cases, however, the question arose whether the autonomy of the parties was absolute or relative. If it was absolute, they might choose the law of any State or States. If it was relative, they would have to select the law of a State with which the case or any of the parties had some connexion. To the best of his knowledge, the private international law of no State permitted the parties to a contract freely to choose the law applicable to their contract. On the contrary, written or unwritten rules of private international law placed limits on the autonomy of the parties, and if they went beyond those limits, their selection of the applicable law was not valid.

However, when a contract was finalized, it was already governed by a law - whether or not selected by the parties - and it was questionable whether the parties might later change that law or entrust a body, for example the arbitral tribunal, with the task of doing so. Such a question would be decided under the private international law of a specific country. But which country? Paragraph 2 did not make it clear whether the arbitrators should first fix a country and then apply the private international law rules of that country, or apply a rule of private international law of their own invention.

It was to be assumed that the parties would incorporate in their original contract or in the arbitration agreement the rules of article 27, which would then become contractual clauses. In such a case, the question whether those clauses were valid or not would depend on the rules of private international law of a specific State. Would the State concerned be the State selected to be the seat of the arbitral tribunal if it had no other connexion with the case and/or the parties?

In short, article 27 raised many difficulties and in his delegation's opinion it might well be deleted in its entirety.

Mr. HOLTZMANN (United States of America) said that his delegation was particularly concerned by the last two sentences of paragraph 4 of the commentary on article 27. In its opinion, many lawyers would be hesitant to recommend the use of the UNCITRAL rules if they thought that to do so would result in "divorcing" arbitration from the applicable law and would give primacy to trade usage - which might often be ill-defined, different in various parts of the world and hard to prove. For those reasons, it urged that paragraph 4 of the commentary should be deleted.

His delegation considered that article 27 should be re-drafted to make it clear that the relative order of priority was: first, the mandatory provisions of the applicable law; second, the express terms of the contract; third, the usages of the trade. The provisions of the applicable law should be given the primary position in determining the rights of the parties. The terms of the contract and trade usage should both yield to the mandatory provisions of the governing law. Where the contract gave no indication or was unclear, it should be interpreted by reference to trade usage. In conclusion, he said that it would be useful if that order of importance - and that relationship between the applicable law, the terms of the contract and trade usage - were made clear in the article or at least in the commentary.

Mr. ROGNLIEN (Norway) said he did not think that in preparing rules which were to form part of the contract between parties, the Commission should be unduly concerned with the mandatory rules of law. He agreed that it was necessary to distinguish between the substantive and procedural aspects and that article 27 was concerned with the substantive rules of law. With regard to paragraph 2, he disagreed with the Czechoslovak representative that the conflict-of-laws rules of the place of arbitration should be used as the basis for determining the applicable law. In his opinion, it was not possible for the Commission to make clear and specific rules concerning conflict of laws and that should be left to the arbitrators, as provided for in paragraph 2.

With regard to the question raised by the United States representative concerning paragraph 4 of the commentary, he felt that that was more a matter of concern for lawyers than for merchants.

He was somewhat hesitant to endorse the proposal to delete the word "expressly" in paragraph 1, which would accept the applicability of the law implied in the contract between the parties, since in many countries many kinds of presumptions prevailed concerning the choice of the law implied in contracts, such as the law of the place of litigation, arbitration or delivery. Perhaps one might replace the words "expressly designated by the parties" by the words "determined or clearly indicated by the parties". He therefore thought that it would be preferable in paragraph 1 either to delete the words "as applicable to their contract" or to replace

them by the words "as applicable to the substance of the dispute". In that connexion, he recalled the point made by many delegations that the rules should not be limited to international commercial relations or to contracts.

Mr. SZASZ (Hungary) agreed with representatives who had suggested that paragraphs 3 and 4 should be deleted.

Paragraph 2 was not clear, did not contain objective criteria and was inconsistent with the municipal law of many countries. Under private international law, objective factors should be taken into consideration in the situation provided for in the paragraph. Consequently, unless the paragraph could be revised so that it provided clear guidance, there would be no choice but to delete it.

Mr. JAKUBOWSKI (Poland) said that his delegation was satisfied with the present text. He nevertheless wished to make some observations on it.

Paragraph 1 raised the question whether or not the parties should have limited autonomy in the field of conflict of laws. Recent doctrine was that the parties should have unlimited autonomy; the predominant trend at present was towards the abandonment of the requirement that there should be a relationship between the law chosen by the parties and the contract. From that standpoint, therefore, the existing text was perfectly satisfactory. The paragraph also raised the question whether the applicable law must be chosen expressly. In his opinion, a hypothetical choice should never be recognized and an implied choice also gave rise to uncertainty. In that respect, too, the existing text was acceptable. A third problem, which had been mentioned by the Norwegian representative, was that the wording relating to the applicable law was too narrow. That view deserved consideration and should be taken into account by the working group.

Paragraph 2, which was based on article VII of the European Convention on International Commercial Arbitration of 1961, was ambiguous; arbitrators had rarely availed themselves of the possibility provided for in that article, since it gave rise to difficulties. To stipulate that the conflict-of-laws rules of the lex fori should be applied was not a satisfactory solution. Most authors on the subject were of the opinion that such a provision might be suitable for State courts, but not for international arbitration. The solution contained in the paragraph was, however, the best that had been found so far.

Paragraphs 3 and 4 were perfectly acceptable to his delegation. The substance of paragraph 4 was very modern and provided a sound solution. In Poland, the Supreme Court had made a significant ruling on that point, namely, in cases where there was a universally accepted trade usage, that usage had priority over any law, whether national or foreign. That approach was advocated by many specialists on the subject and met the needs of international trade. A reference might be made in the commentary to mandatory rules, but that was not necessary in the text.

Mr. CHAFIK (Egypt) considered that the article constituted the best solution of the problem of the applicable law in the present circumstances.

Paragraph 1 was satisfactory, since it respected the principle that the parties must be completely free in their choice of the applicable law. He agreed with the Norwegian representative that the word "contract" should be replaced by the word "dispute".

Paragraph 2 provided the best possible solution in the circumstances. The procedure stipulated was that embodied in various conventions and comprised two stages. The arbitrators chose the conflict-of-laws rules that they deemed applicable, and those conflict-of-laws rules would lead them to the applicable law. The paragraph also raised the questions whether the freedom of the arbitrators should be as great as that of the parties. In his opinion, it should not. The law chosen should be that which was most appropriate in the circumstances.

Paragraph 3 was perfectly satisfactory and embodied a principle that was frequently encountered in international trade.

The trend of modern doctrine towards the impartiality of international trade law, which had been mentioned by the representative of Poland, was an excellent one. Paragraph 4 provided an opportunity for affirming the existence of international trade law, which courts should consider as part of their national law; it was, therefore, acceptable to his delegation.

Mr. GUEIROS (Brazil) considered that, in paragraph 1, the word "expressly" should be deleted and the word "contract" should be replaced by the word "dispute". The article did not cover a situation in which one party designated one law and the other party designated another law. That difficulty might be overcome by the insertion, after the word "parties" in paragraph 2, of the words "and if the parties disagree on the applicable law". In addition, the words "rules that the arbitrators deem applicable" should be replaced by the words "rules of the place where the award has to be enforced".

The wording of paragraph 3 was acceptable to his delegation, because it protected national law and helped to expedite a decision.

The existing text of paragraph 4 was satisfactory and should be maintained.

Mr. TAKAKUWA (Japan) supported the views expressed by the representatives of Czechoslovakia, Greece and the United States of America. There were certain respects in which the article could be improved. There might be a case for deleting the reference to conflict-of-laws rules from paragraph 2 on the grounds that the question should be left to the discretion of the arbitrators. It was not necessary to follow the precedents mentioned in the commentary.

Mr. PIRRUNG (Federal Republic of Germany) said that his delegation was in principle satisfied with the wording of the article, although some improvements might be made.

In paragraph 1, the word "designated" should be replaced by the words "determined or indicated". In that respect, the text of the 1961 European Convention should be followed more closely.

The present text of paragraph 2 could be maintained, but a possible improvement would be to combine it with paragraph 4 by adding the words "taking account of the terms of the contract and the usages of the trade" after the word "applicable".

He was not satisfied with the wording of paragraph 3. The important point was not the law of the country where the award was rendered but the law of the country which was applicable. An observation to that effect could be made in the commentary. In addition, it would be preferable to omit the words "ex aequo et bono" since that procedure always raised difficulties.

Mr. ROEHRICH (France) said that the wording of article 27 was on the whole acceptable to his delegation, essentially for the reasons expressed by the representatives of Egypt and Poland.

In connexion with paragraph 1, he agreed that the word "contract" was too narrow; reference must be made to the law applicable to the substance of the dispute.

He agreed with the Polish representative's observations on paragraph 2; the solution provided for in the paragraph was not an ideal one, but no other solution existed at the present time. As the Norwegian representative had pointed out, traders did not in practice deal with the applicable law, although a reasonable loi de rattachement would have to be found. It would have been desirable to place greater emphasis on the relationship between paragraphs 2 and 4, in order to avoid the slight danger of contradiction which existed at present between paragraphs 1 and 4. He agreed that the arbitrator should not have unlimited freedom but must be guided by a number of factors. In that connexion, the order of precedence referred to by the United States representative was acceptable.

There was no real lex fori in arbitration matters. It would be dangerous to keep to the law of the country where the award was to be rendered, because no one knew where that would be. Consequently, paragraph 2 was indispensable, although it should be borne in mind that the arbitrators did not enjoy complete freedom and that the content of paragraph 4 must be taken into account.

The meeting rose at 6 p.m.