# REPORT

## OF THE

# UNITED NATIONS COMMISSION

## ON

# INTERNATIONAL TRADE LAW

## on the work of its eighth session

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**1-17 April 1975**

**GENERAL ASSEMBLY**

OFFICIAL RECORDS: THIRTIETH SESSION

SUPPLEMENT No. 17 (A/10017)

**UNITED NATIONS**

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

/Original: English/

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# INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's eighth session, held at Geneva from 1 to 17 April 1975.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

# CHAPTER I

# ORGANIZATION OF THE SESSION

## A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its eighth session on 1 April 1975. The session was opened on behalf of the Secretary-General by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs.

## B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 November 1970 and 12 December 1973, are the following States: 1/ Argentina, Australia,* Austria,* Barbados, Belgium, Brazil, Bulgaria, Chile,* Cyprus, Czechoslovakia, Egypt,* France,* Gabon, Germany (Federal Republic of), Ghana,* Greece, Guyana,* Hungary, India, Japan,* Kenya, Mexico, Nepal,* Nigeria,* Norway,* Philippines, Poland,* Sierra Leone, Singapore,* Somalia,* Syrian Arab Republic, Union of Soviet Socialist Republics,* United Kingdom of Great Britain and Northern Ireland,* United Republic of Tanzania,* United States of America and Zaire.

5. With the exception of Guyana, Kenya, Somalia, the United Republic of Tanzania and Zaire, all members of the Commission were represented at the session.

6. The following United Nations organs, specialized agencies, intergovernmental organizations, and international non-governmental organizations were represented by observers:

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1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session elected 14 members to serve for a full term of six years, ending on 13 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also elected seven additional members. Of these additional members, the terms of three members, selected by the President of the Assembly, by drawing lots, will expire at the end of three years (31 December 1976) and the terms of four members will expire at the end of six years (31 December 1979). The terms of the members marked with an asterisk will expire on 31 December 1976. The terms of the other members will expire on 31 December 1979.

(a) United Nations organs

United Nations Conference on Trade and Development; Economic Commission for Europe.

(b) Specialized agencies

Inter-Governmental Maritime Consultative Organization; International Monetary Fund.

(c) Intergovernmental organizations

Commission of the European Communities; Council of Europe; Council for Mutual Economic Assistance; East African Community; European Free Trade Association; Hague Conference on Private International Law; International Institute for the Unification of Private Law.

(d) International non-governmental organizations

International Bar Association; International Chamber of Commerce; International Law Association; International Union of Marine Insurance.

## C. Election of officers

7. The Commission elected the following officers by acclamation: 2/

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|---|---|
| Chairman | Mr. R. Loewe (Austria) |
| Vice-Chairman | Mr. E. Sam (Ghana) |
| Vice-Chairman | Mr. N. Gueiros (Brazil) |
| Vice-Chairman | Mr. L. Gorbanov (Bulgaria) |
| Rapporteur | Mr. L. Sumulong (Philippines) |

## D. Agenda

8. The agenda of the session as adopted by the Commission at its 151st meeting, on 1 April 1975, was as follows:

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2/ The elections took place at the 151st meeting, on 1 April 1975, and at the 153rd meeting, on 2 April 1975. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, Volume 1: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. I, sect. A, para. 14)).

1. Opening of the session

2. Election of officers

3. Adoption of the agenda; tentative schedule of meetings

4. International sale of goods:

   (a) Uniform rules governing the international sale of goods

   (b) General conditions of sale and standard contracts

5. International payments:

   (a) Draft uniform law on international bills of exchange and international promissory notes

   (b) Bankers' commercial credits

   (c) Bank guarantees (contract and payment guarantees)

   (d) Security interests in goods

6. International legislation on shipping

7. International commercial arbitration

8. Multinational enterprises

9. Liability for damage caused by products intended for or involved in international trade

10. Training and assistance in the field of international trade law

11. Future work

12. Other business

13. Date and place of the ninth session

14. Adoption of the report of the Commission

## E. Decisions of the Commission

9. The decisions taken by the Commission in the course of its eighth session were all reached by consensus.

## F. Adoption of the report

10. The Commission adopted the present report at its 171st and 172nd meetings, on 17 April 1975.

CHAPTER II

INTERNATIONAL SALE OF GOODS

## A. Uniform rules governing the international sale of goods

### Report of the Working Group

11. The Commission had before it the report of the Working Group on the International Sale of Goods on the work of its sixth session, held at New York from 27 January to 7 February 1975 (A/CN.9/100). The report sets forth the progress made by the Working Group in implementing the mandate given to it by the Commission to ascertain which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render such text capable of wider acceptance, or to elaborate a new text for the same purpose. 3/

12. The report describes the action taken by the Working Group at its sixth session on articles 1 to 83 of ULIS. In respect of those articles, the Working Group considered only those provisions concerning which there was either a pending question at the conclusion of its fifth session 4/ or substantial support for consideration of the matter. The report also sets forth in annex I the revised text of the uniform rules, which is the result of action taken by the Working Group at its first six sessions. The report includes comments and proposals of representatives on the pending questions. The progress made by the Working Group at its sixth session is summarized below.

(a) Before proceeding to a discussion of the articles of the revised text of ULIS, the Working Group decided that the revised text should be drafted in the form of an "integrated" convention entitled "Convention on the International Sale of Goods" rather than as a uniform law annexed to a convention (A/CN.9/100, para. 13), and requested the Secretariat to structure the draft provisions accordingly. 5/

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3/ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38, para. 3 (a) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. II, para. 38, subpara. 3 (a) of the resolution contained therein); ibid., Twenty-sixth Session, Supplement No. 17 (A/8417), para. 92, subpara. 1 (c) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, chap. II, para. 92, para. 1 (c) of the resolution contained therein). The 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the annexed Uniform Law (ULIS) appear in the Register of Texts of Conventions and Other Instruments Concerning International Trade Law, vol. I (United Nations publication, Sales No.: E.71.V.3), chap. I, sect. 1.

4/ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 15.

5/ The text (A/CN.9/100, annex I) is presented in the form of a convention and has been renumbered.

(b) The Working Group also decided that the formulations in the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15) should be followed to the largest extent possible whenever there was a similar text in the Convention on the International Sale of Goods (A/CN.9/100, para. 16). However, the Working Group pointed out that, since the issues arising in limitation and the sale of goods were not always similar, it would not be desirable to adopt the text of the Limitation Convention in the Sales Convention where that would lead to an inappropriate result.

(c) Because the sixth session of the Working Group was devoted primarily to questions not settled at the fifth session, no major changes in concept or structure were proposed.

(d) The provisions on usages were redrafted by the Working Group to make it clear that usages become binding on a party only as a part of the contract of sale. The parties are considered, unless they have otherwise agreed, to have impliedly made applicable to their contract a usage of which they knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned (A/CN.9/100, paras. 34-42; annex I, art. 8).

(e) In regard to the period of time during which the buyer could give notice of lack of conformity of the goods, the Working Group decided that the buyer shall lose that right if he had not given notice thereof to the seller at the latest within a period of two years from the time the goods were actually handed over, except that the parties might derogate from such a limitation by providing for a period of guarantee (A/CN.9/100, paras. 60-65; annex I, art. 23).

(f) In regard to the right of the parties to declare the contract avoided, the Working Group decided that they should not lose that right by delay in giving notice (A/CN.9/100, paras. 75-79, 96-98; annex I, arts. 30 and 45). In this connexion, the view was expressed in the Working Group that losing the right to declare the contract avoided would be excessively hard on the party not in breach, because in certain circumstances the proposed text would require two notices; a first notice of his intention to avoid, and a second of his actual avoidance.

(g) In regard to excused non-performance of obligations under a contract, the Working Group adopted a text, which provides that, where a party has not performed one of his obligations, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part. The Working Group decided that for this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment (A/CN.9/100, paras. 102-107; annex I, art. 50).

(h) The Working Group requested the Secretariat to draw up a commentary on the Convention on the International Sale of Goods based on the reports of the sessions of the Working Group and the various studies made and to transmit a draft of the commentary to representatives for unofficial comment. It was agreed that the commentary should have an unofficial character (A/CN.9/100, para. 119).

13. With respect to its future work, the Commission noted that the Working Group expects to be able to hold at its next session a preliminary discussion on the formation and validity of contracts of sale 6/ so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field. 7/

Consideration of the report by the Commission 8/

14. In considering the report of the Working Group, the Commission followed its general policy of only considering the progress made and not the substance of the work carried out by a Working Group until it had completed that work.

15. The Commission considered whether, once the Working Group had completed the final text of the draft Convention on the International Sale of Goods, it should follow the same procedure as that followed in respect of the draft Convention on the Carriage of Goods by Sea, prepared by the Working Group on International Shipping Legislation, and request the Secretary-General to transmit the draft Convention to Governments and interested international organizations for comment, prior to its consideration by the Commission in plenary session. Some representatives were in favour of a restricted consultation, limited only to the members of UNCITRAL. Other representatives were of the view that as wide a consultation as possible should be effected before the consideration of the draft Convention by the Commission at its tenth session. The Commission decided to follow the procedure adopted in respect of the draft Convention on the Carriage of Goods by Sea and that, therefore, once the text of the Convention on the International Sale of Goods was completed by the Working Group, it should be circulated to Governments and interested international organizations for comment. It was agreed that they should be invited to focus their observations, as far as possible, on fundamental issues.

16. The Commission also considered the following:

(a) Whether the proposed Sales Convention and the rules on the formation and validity of contracts of sale should be incorporated in a single convention; or

(b) Whether the rules on the formation and validity of contracts of sale should be the subject-matter of a separate convention.

If the latter course were adopted, the Commission considered:

(a) Whether this separate convention should be considered at the conference of plenipotentiaries at which the Sales Convention will be considered; or

(b) Whether this separate convention should be considered at a different conference.

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6/ For the mandate of the Working Group, see Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 93.

7/ Ibid., para. 118.

8/ The Commission considered the subject at its 151st and 152nd meetings on 1 April 1975, its 159th meeting on 8 April 1975, and its 168th meeting on 14 April 1975.

There was general agreement that it would be desirable for the Sales Convention and the rules on formation and validity to be considered at the same conference. However, the view was also expressed that consideration of the Sales Convention should not be postponed if it appeared that the rules on formation and validity would not be ready for some time. It was agreed to defer any decision on this question until the tenth session of the Commission.

Decision of the Commission

17. The Commission, at its 159th meeting, on 7 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Takes note with appreciation of the report of the Working Group on the International Sale of Goods on the work of its sixth session;

2. Requests the Working Group to continue its work under the terms of reference set forth by the Commission at its second session and to complete the work expeditiously;

3. Requests the Secretary-General:

(a) To transmit the draft Convention on the International Sale of Goods, when completed by the Working Group, to Governments and interested international organizations for their comments, and when doing so, to recommend that they should, as far as possible, focus their observations on fundamental issues in view of the fact that they would again be invited to submit comments on and amendments to, the draft Convention in connexion with a conference of plenipotentiaries to which the draft Convention, as approved by the Commission, would be submitted for adoption;

(b) To prepare an analysis of such comments for consideration by the Commission at its tenth session.

## B. General conditions of sale and standard contracts

18. The Commission, at its third session, requested the Secretary-General "to commence a study on the feasibility of developing general conditions embracing a wider scope of commodities". 9/ Pursuant to this request, the Secretary-General submitted progress reports to the Commission at its fourth (A/CN.9/54) 10/ and

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9/ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 102, para. (b) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. III, sect. A, para. 102, para. (b) of the resolution contained therein).

10/ For the printed text, see Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part two, chap. I, sect. B, 1.

fifth (A/CN.9/89) sessions. The final report on the feasibility study, submitted to the Commission at its sixth session, concluded that "it appears feasible to draw up a set of 'general' general conditions that would be applicable ... to a wide range of commodities" (A/CN.9/78, para. 198). 11/ On the basis of that report, the Commission requested the Secretary-General "to continue work on the preparation of a set of uniform general conditions". 12/

19. At the present session, the Commission had before it a report of the Secretary-General to which was annexed a draft set of "general" general conditions (A/CN.9/98).

20. The report indicates that the draft set of general conditions proceeds from the idea that "general" general conditions applicable to a wide range of commodities and a law of sales, also applicable to a wide range of commodities, are closely interconnected. 13/ In both cases a general framework of rights and obligations is established and the parties may adapt those rights and obligations to their own needs by agreeing on the elements unique to their contract, that is, description of the goods, quantity, price etc., and by varying the general rights and obligations by specific contract clauses if that would seem necessary or appropriate.

21. It was also suggested in the report that the general conditions should be in harmony with the Convention on the International Sale of Goods in the form in which it is being revised by the Commission's Working Group on the International Sale of Goods. The report suggests that the best means of assuring this harmony is to use the language of the Convention for the basic provisions of the general conditions. In some specific trades, it would be necessary or desirable to vary or add to these general provisions. It was suggested in the report that, if the Commission were to accept this approach, it might wish to request the Secretariat to consult with representatives of these trades when drafting the substitutive or additional clauses of the "general" general conditions for the use of their trade. 14/

Consideration of the report by the Commission 15/

22. Many representatives expressed themselves in favour of the continuation of work on general conditions. There was a wide measure of agreement that the general conditions should not conflict with the provisions in the Convention on the

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11/ For the printed text, see Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part two, chap. I, sect. B.

12/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 24 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, chap. II, sect. A, para. 24).

13/ The relationship between the proposed general conditions of sale and the law of sales was discussed in the report (A/CN.9/98, paras. 8-25).

14/ Ibid., para. 21.

15/ This subject was considered by the Commission at its 152nd meeting, held on 1 April 1975.

International Sale of Goods. Doubts were expressed, however, whether the general conditions should contain the same provisions as those laid down in the Sales Convention, taking into consideration that the general conditions are part of the contract.

23. Several representatives were of the opinion that a set of "general" general conditions would not correspond to commercial needs. Some of those representatives observed that "general" general conditions could only be based on general provisions which would necessarily be analogous to the provisions of the uniform law on sales; for this reason, and because of the work carried out in respect of the revision of the Uniform Law on the International Sale of Goods (ULIS), there would be little interest, if any, in preparing "general" general conditions. The view was expressed that the Commission should prepare general conditions for use in specific trades or for specific commodities only if a desire for such conditions had been expressed by the trade concerned.

24. The Commission was in agreement that the Secretariat should continue its work on general conditions. In particular, the Secretariat should consult with interested commercial circles in respect of the practical need for "general" general conditions or for general conditions for use in a specific trade or for a specific commodity and should report thereon to the Commission at a future session. It was agreed that, for this purpose, the Secretariat would be authorized to establish a study group composed of representatives of regional commissions, interested trade associations, chambers of commerce and similar organizations from different regions.

Decision of the Commission

25. The Commission, at its 152nd meeting, on 1 April 1975, unanimously adopted the following decision:

The United Nations Commission on International Trade Law

Requests the Secretary-General:

(a) To make inquiries about the practical need for "general" general conditions for use in a wide variety of trades, and, if appropriate, to continue work on the preparation of such conditions;

(b) To establish, for purposes of consultation, a study group composed of representatives of regional commissions, interested trade associations, chambers of commerce, and similar organizations from different regions;

(c) To report to the Commission at a future session on the progress made in respect of this project.

# CHAPTER III

# INTERNATIONAL PAYMENTS

## A. Negotiable instruments

### Report of the Working Group

26. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its third session, held at Geneva from 6 to 17 January 1975 (A/CN.9/99). The report sets forth the progress made by the Working Group (a) in preparing a final draft uniform law on international bills of exchange and international promissory notes, and (b) in considering the desirability of preparing uniform rules applicable to international cheques. 16/

### (i) Uniform law on international bills of exchange and international promissory notes

27. As indicated in the report, the Working Group at its third session considered articles 63 to 78 of the draft uniform law on international bills of exchange and international promissory notes prepared by the Secretary-General in response to a decision by the Commission. 17/ The proposed uniform law will establish uniform rules applicable to an international negotiable instrument (bill of exchange or promissory note) for optional use in international payments.

28. The report sets forth the deliberations and conclusions of the Working Group with respect to notice of dishonour upon non-acceptance or non-payment, the sum that is due to the holder and to a party secondarily liable, discharge of liability on an instrument and the question of limitation of legal proceedings and prescription of rights arising in the context of an international instrument.

### (ii) Uniform rules applicable to international cheques

29. The Commission, at its fifth session, also requested its Working Group on International Negotiable Instruments to consider the desirability of preparing

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16/ For the terms of reference of the Working Group, see Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61 (Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (United Nations publication, Sales No.: E.73.V.6), part one, chap. II, sect. A, para. 61.

17/ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 35 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, chap. II, sect. A, para. 35. The draft uniform law and commentary are set forth in A/CN.9/WG.IV/WP.21.

uniform rules applicable to international cheques, and to consider whether this can best be achieved by extending the application of the draft uniform law on international bills of exchange and international promissory notes to international cheques or by drawing up a separate uniform law on international cheques. The Working Group was requested to report its conclusions on these questions to the Commission at a future session. At its third session, the Working Group had before it a note by the Secretariat (A/CN.9/WG.IV/CRP.5) setting forth the first results of inquiries made by the Secretariat in consultation with the UNCITRAL Study Group on International Payments. The Working Group requested the Secretariat and the Study Group to complete their inquiries and to submit, at a future session, a full report on the use of cheques for settling international payments and the legal problems arising in this connexion. In particular, the Secretariat was requested to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for settling international payments.

Consideration of the report by the Commission 18/

30. The Commission, in accordance with its general policy of considering the substance of the work carried out by working groups only upon completion of that work, took note of the report of the Working Group on International Negotiable Instruments. Representatives who spoke on the subject expressed satisfaction with the progress made by the Working Group.

31. The Commission decided to consider the timing of the fourth session of the Working Group in relation to schedules for other working groups under item 11 of the agenda, entitled "Future work". 19/

Decision of the Commission

32. The Commission, at its 154th meeting on 3 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Takes note with appreciation of the report of the Working Group on International Negotiable Instruments on the work of its third session;

2. Requests the Working Group to continue its work under the terms of reference set forth by the Commission in the decision adopted in respect of negotiable instruments at its fifth session and to complete that work expeditiously;

3. Requests the Secretary-General to carry out, in accordance with the the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on

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18/ The Commission considered this subject at its 154th meeting on 3 April 1975.

19/ See chap. IX, para. 116 below.

International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

## B. Bankers' commercial credits 20/

33. This subject is concerned with the revision by the International Chamber of Commerce (ICC) of "Uniform Customs and Practice for Documentary Credits", drawn up by ICC in 1933 and subsequently revised by it in 1951 and 1962. At previous sessions, 21/ the Commission stressed the importance of commercial letters of credit in ensuring payment for international trade transactions and expressed the opinion that it would be in the interest of international trade if the views of countries not represented in ICC were taken into account by ICC in the revision of "Uniform Customs". In order to achieve this, the Commission, at its third session, requested the Secretary-General to invite Governments and interested bank and trade institutions to communicate to him, for transmission to ICC, their observations on the operation of "Uniform Customs and Practice for Documentary Credits", so that these observations could be taken into account by the Commission on Banking Technique and Practice of ICC entrusted with the revision.

34. At the present session, the Commission had before it a note by the Secretary-General, setting forth, in annex I, the observations of ICC in respect of its work and, in annex II, the text of the 1974 revision of "Uniform Customs and Practice for Documentary Credits" (A/CN.9/101). The Commission also had before it a report of the Secretary-General, setting forth an analysis of the observations received in respect of the 1962 version of "Uniform Customs and Practice for Documentary Credits" and its revision by ICC (A/CN.9/101/Add.1).

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20/ The Commission considered this subject at its 155th meeting on 3 April 1975, and at its 171st meeting on 17 April 1975.

21/ Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 48, subparas. 23 and 28 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. 1, sect. A, para. 48, subparas. 23 and 28); ibid., Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 90-95 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. II, sect. A, paras. 90-95); ibid., Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 119-126 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. III, sect. A, paras. 119-126); ibid., Twenty-sixth Session, Supplement No. 17 (A/8417), paras. 36-43 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, chap. II, sect. A, paras. 36-43); ibid., Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 63-66 (Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (United Nations publication, Sales No.: E.73.V.6), part one, chap. II, sect. A, paras. 63-66); ibid., Twenty-eighth Session, Supplement No. 17 (A/9017), paras. 37-45 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, chap. II, sect. A, paras. 37-45); and ibid., Twenty-ninth Session, Supplement No. 17 (A/9617), paras. 30-35.

35. There was general agreement among representatives that, while the Commission could not adopt the 1974 revision of "Uniform Customs", it should consider the desirability of commending the use of "Uniform Customs" in transactions involving the establishment of a documentary credit.

36. The observer of ICC, in commenting on the 1974 text of "Uniform Customs", expressed his appreciation for the valuable assistance which the Commission and its secretariat had given to ICC in the work of revision and commended the secretariat for the depth and accuracy of its analysis of the observations and comments submitted in respect of the 1962 text. That analysis indicated the changes that had been made in the 1962 text and listed the proposals that had been rejected. The observer of ICC stated that the rejection of certain proposals was due to a variety of reasons, but mainly because these proposals related to special cases and were therefore not a suitable basis on which to frame a general rule.

37. Representatives who spoke on the subject emphasized the importance of the rules contained in "Uniform Customs" in that they promoted international trade through the facilitation of payment. Several representatives commended ICC for the efficient manner in which it had promoted co-operation between ICC and those countries whose Chambers of Commerce were not members of ICC. As a result of that approach, the 1974 revision of "Uniform Customs" was a much more acceptable text than the 1962 version.

38. Some representatives, while expressing general agreement with the 1974 revision of "Uniform Customs", drew attention to the fact that "Uniform Customs" were not a set of legal rules. Because of this, they had doubts about the language used in paragraph (a) of the General Provisions and Definitions, according to which the provisions, definitions and articles of "Uniform Customs" were "binding upon all parties thereto unless otherwise expressly agreed" (A/CN.9/101, annex II). In the view of these representatives, that language was more suited to a statutory legal provision than to a rule expressive of usage or practices. The rules of "Uniform Customs" were in the nature of general conditions and were binding upon parties only if expressly accepted by them. These representatives hoped that ICC, in a future revision, would modify the formulation of the paragraph in question. The observer of ICC stated in reply that the rules contained in "Uniform Customs" were actually written into every documentary letter of credit and every application for a letter of credit; the forms used for letters of credit and for applications contained an express clause to the effect that the credit was subject to the provisions of "Uniform Customs". It was against that factual background that paragraph (a) of the General Provisions and Definitions had been formulated.

39. With regard to what action the Commission should take in respect of the 1974 revision of "Uniform Customs", most representatives expressed the opinion that, in view of the practical importance of "Uniform Customs" for international trade and of the successful collaboration between the Commission and ICC in respect of the subject, the Commission should recommend the use of the revised rules. One representative expressed doubts whether the Commission was authorized to commend a document emanating from another source. It was noted that the Commission, at its second session, had commended the use of "Uniform Customs" and of "Incoterms".

40. The Commission, at its 155th meeting on 3 April 1975, established a drafting group, composed of the representatives of Australia, Brazil, Egypt, Hungary and Japan, under the chairmanship of the representative of Brazil, to prepare a draft decision in respect of the item entitled "Bankers' commercial credits".

Decision of the Commission

41. After consideration of the draft decision, the Commission, at its 171st meeting on 17 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of "Uniform Customs and Practice for Documentary Credits", which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce on 14 October 1974 and adopted by the Executive Committee of the International Chamber of Commerce on 3 December 1974,

Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in transport technology and changes in commercial practice,

Having regard to the fact that, in revising the 1962 text of "Uniform Customs", the International Chamber of Commerce has taken into account the observations made by Governments and banking and trade institutions of countries not represented within it and transmitted to it through the Commission,

Noting that "Uniform Customs" constitutes a valuable contribution to the facilitation of international trade,

Commends the use of the 1974 revision, as from 1 October 1975, in transactions involving the establishment of a documentary credit.

## C. Bank guarantees 22/

42. The Commission had before it a note by the Secretary-General setting forth the observations of ICC in respect of its work on contract guarantees and payment guarantees (A/CN.9/101).

43. The Commission was informed that ICC had encountered in its work on bank guarantees a number of fundamental problems, partly because it had attempted to prepare one set of rules applicable to several different types of guarantee. The observer of ICC stated that ICC was now carrying out a fundamental re-examination of the problem and of the working methods that should be used to carry the work to a successful conclusion. In this connexion, he stated that ICC hoped that the

22/ The Commission considered this subject at its 155th and 156th meetings on 3 and 4 April 1975.

Commission's participation in the work might be enhanced and that this might be achieved either by the Commission's nominating a representative to attend the meetings of ICC on the subject or by the establishment of a study group, similar to the one on international payments, that would be consulted by ICC in connexion with its work on bank guarantees.

44. Representatives who spoke on the subject expressed their appreciation to ICC for wishing to strengthen its collaboration with the Commission in the field of bank guarantees. However, they were of the view that no one representative of the Commission would be able to attend the meetings of ICC and express the views of the Commission as a whole when the Commission had not yet decided what its views were.

45. Following consultations among representatives of the Commission, the Secretariat and the observer of ICC, the observer of ICC informed the Commission that ICC would not press for the participation of representatives of the Commission in the work of its Working Group, and that instead it would establish a study group on contract guarantees, in which representatives of the Commission who were interested in the question could participate in their personal capacity, together with representatives of the Commission's secretariat and of other international organizations. The Commission took note, with satisfaction, of the suggestions of the observer of ICC.

Decision of the Commission

46. The Commission, at its 156th meeting on 4 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

1. Takes note of:

(a) The progress made by the International Chamber of Commerce in respect of the preparation of uniform rules on contract guarantees and payment guarantees;

(b) The suggestions made by the International Chamber of Commerce in respect of methods of work that would ensure a closer co-operation between it and the Commission in the field of bank guarantees;

(c) The intention of the International Chamber of Commerce to establish a study group on contract guarantees and to invite representatives of the Commission to participate in meetings of this study group in a personal capacity;

2. Invites the International Chamber of Commerce to submit progress reports on its work on contract and payment guarantees to the Commission at future sessions.

## D. Security interests in goods

47. At its third session, the Commission requested the Secretary-General to make a study of the rules on security interests in goods under the principal legal systems and to make the information available to the Commission. 23/

48. At the present session, the Commission had before it a "Study on security interests", prepared by Professor Ulrich Drobnig of the Max Planck Institute for Foreign and Private International Law, Hamburg, the Federal Republic of Germany (ST/LEG/11) and a report of the Secretary-General, entitled "Security interests in goods" (A/CN.9/102). Section I of the Secretary-General's report summarizes the study, while section II sets forth the conclusions reached in respect of the possible unification or harmonization of the law of security interests in the context of international trade, and suggestions for future work on this subject.

49. The "Study on security interests", which is based on existing studies in this area and on the replies sent by 19 Governments in response to a request for information, contains a comparative study of the law on this subject in a number of countries.

50. The report of the Secretary-General suggests that, on the basis of the study, it could be concluded that an important need in international commerce would be filled if a security interest, which would be enforceable by the foreign creditor against the debtor and third parties in the country where the goods are situated, were made available, through uniform rules, to merchants and trade and financing institutions.

51. The report also suggests that the Commission might wish to consider the feasibility of preparing uniform rules at a later stage in the light of a further study that would bring into focus the kind and scope of such rules.

### Consideration of the study and report of the Commission 24/

52. The suggestion was made by several representatives that the "Study on security interests" (ST/LEG/11) should be completed by including the law of additional countries in particular of the socialist States of Eastern Europe, in view of the fact that it contained erroneous information on security interests recognized by the laws of several countries, and in particular those of the socialist States of Eastern Europe.

53. The Commission was informed of the current programme of work of the European Economic Community in respect of security interests. The observer of the Commission of the European Communities stated that the Community was preparing three drafts: one draft convention concerned the unification of rules of conflict concerning rights in rem, in respect of movable and immovable goods; a

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23/ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 145 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. III, sect. A, para. 145).

24/ The Commission considered this subject at its 157th and 158th meetings on 7 April 1975.

second draft convention dealt with the recognition and enforcement of security interests and their effect in the event of bankruptcy or other liquidation proceedings resulting from the insolvency of a debtor; a third draft directive was designed to ensure the recognition of a security interest established in one member State of the Community when the encumbered goods were moved to another.

54. The Commission was also informed that the Law Association for Asia and the Western Pacific (LAWASIA), in collaboration with the Asian Development Bank, was engaged in a programme of research on the types of security interests which national development banks and other financing institutions of the same kind might employ.

55. The Commission was in agreement that, in view of the possible practical importance of security interests in international trade, the subject deserved to be studied further. It was suggested that a further study should include a consideration of the practical economic significance of creating a security interest for international trade, as well as the form which any such security interest might take.

56. Some representatives stated that the study should concentrate on the rights of the unpaid seller. Other representatives were of the view that the rights of institutions financing the sale should also be considered. One representative suggested that the study should concentrate on security for medium-term credit. Still other representatives considered that, at this stage, no limitations should be put on the study to be conducted by the Secretariat on the principle that the Commission could not decide on the direction its work should take until the study had been completed.

57. Several representatives suggested that special attention should be given to the trust receipt. It was suggested that the Secretariat consult with the International Chamber of Commerce on the feasibility of preparing uniform rules governing trust receipts where banks are financing the transaction.

58. Some representatives suggested that the study should consider whether a new security interest for the financing of international trade should be limited to the financing of goods not intended for resale, since security interests in inventory raised difficult problems in respect of the rights of third party purchasers of goods encumbered by a security interest.

59. The observer of the International Institute for the Unification of Private Law (UNIDROIT) referred to the growing practice of leasing equipment and machinery where the user was able to specify exactly which type of equipment he wished the lessor to purchase. It was suggested that this form of contract served many of the same economic functions as a security interest.

60. One representative suggested that, if it were considered desirable that any security interest for the financing of international trade should have as one element a system of registration, the possibility of a world-wide computer-assisted registration system should be explored.

61. Another representative suggested that the relationship between the rights of the creditor under a security interest in specific goods and the rights of the State to seize those goods because of unpaid taxes should be explored.

62. Several representatives requested the Secretariat to make available in a document the introduction given by it orally to the Commission in respect of article 9 of the Uniform Commercial Code of the United States of America.

Decision of the Commission

63. The Commission, at its 158th meeting, on 7 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Requests the Secretary-General:

(a) To complete the "Study on security interests" by including the law of additional countries, in particular of the socialist States of Eastern Europe;

(b) To continue the feasibility study on the possible scope and content of uniform rules on security interests in goods and, for this purpose, to consult with interested international organizations and trade and financing institutions;

(c) To submit a progress report to the Commission at its ninth session and a final report at its tenth session.

## CHAPTER IV

## INTERNATIONAL LEGISLATION ON SHIPPING

### A. Introduction

64. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo. 25/ The Commission decided that:

> "The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) 26/ and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations."

65. To carry out this programme of work, the Commission established an enlarged Working Group on International Legislation on Shipping consisting of 21 members of the Commission. The reports of the Working Group on its first six sessions have been previously reviewed by the Commission. 27/ At the present session 28/ the reports of the Working Group on the work of its seventh (A/CN.9/96) and eighth (A/CN.9/105) sessions were placed before the Commission, and introduced by the Chairman of the Working Group.

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25/ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), paras. 10-23 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, chap. II, A, paras. 10-23). For the Commission's prior action on the subject of international legislation on shipping, see ibid., Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 114-133 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, chap. II, sect. A, paras. 114-133); ibid., Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 157-166 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970, part two, chap. III, sect. A, paras. 157-166); ibid., Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 44-51 (Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (United Nations publication, Sales No.: E.73.V.6), part one, chap. II, sect. A, paras. 44-51); ibid., Twenty-eighth Session, Supplement No. 17 (A/9017), paras. 46-61 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, chap. II, sect. A, paras. 46-61); and ibid., Twenty-ninth Session, Supplement No. 17 (A/9617), paras. 38-53.

26/ League of Nations, Treaty Series, vol. 120 (1931-1932), No. 2764.

27/ For references to the reports of the work of the Commission at these sessions, see foot-note 25 above.

28/ The Commission considered the subject at its 156th meeting on 4 April 1975.

## B. Report on the seventh session of the Working Group

66. In his introduction of this report, the Chairman of the Working Group pointed out that the Working Group had considered the following subjects: contents and legal effect of documents evidencing the contract of carriage; validity and effect of letters of guarantee; and definition of contract of carriage and of consignee. The work of the Working Group at its seventh session is summarized in paragraphs 67 to 69 below.

### (i) Contents and legal effect of documents evidencing the contract of carriage

67. The Working Group considered the advisability of formulating a definition of the term "bill of lading", and decided that such a definition would serve a useful purpose (A/CN.9/96, paras. 17-19 and 61). The Working Group also considered the required contents of a bill of lading, and decided that the bill of lading should set out certain items of information additional to those required to be set out by the Brussels Convention of 1924 (A/CN.9/96, paras. 21-36 and 61). With respect to documents evidencing contracts of carriage other than bills of lading, the Working Group decided that when a carrier issues a document other than a bill of lading, such a document should be prima facie evidence of the taking over by the carrier of the goods as therein described (A/CN.9/96, paras. 56-59 and 61). In regard to particulars supplied by the shipper concerning the description of the goods, the Working Group decided that, where the carrier had reasonable grounds for suspecting that they did not accurately represent the goods taken over, or where he had no reasonable means of checking their accuracy, he should be bound to make special note on the bill of lading of such grounds or inaccuracies, or of the absence of reasonable means of checking (A/CN.9/96, paras. 39-42 and 61). In regard to the evidentiary effect of particulars stated by the carrier in the bill of lading, the Working Group decided that, except for particulars in regard to which the carrier had entered a reservation, the bill of lading should be prima facie evidence of the taking over by the carrier of the goods described in the bill of lading, and that proof to the contrary should not be admissible when the bill of lading had been transferred to a third party who in good faith had acted in reliance on the description of the goods therein (A/CN.9/96, paras. 46-49 and 61). The Working Group adopted texts giving effect to these decisions (A/CN.9/96, para. 61).

### (ii) Validity and effect of letters of guarantee

68. The Working Group considered difficulties which might arise where a letter of guarantee was given to the carrier by a shipper undertaking to indemnify the carrier for the liability the carrier might incur towards a third party as a result of inaccurate information in the bill of lading regarding matters such as the weight, quantity and condition of the goods. The Working Group decided that such a letter of guarantee or agreement should be void as against any third party to whom the bill of lading had been transferred (A/CN.9/96, para. 61). It also decided that it should be void as against the shipper where the carrier, by omitting a reservation relating to the condition of the goods, intended to defraud a third party who acted in reliance on the description of the goods in the bill of lading (A/CN.9/96, paras. 75-84 and 86). The Working Group adopted texts giving effect to these decisions (A/CN.9/96, para. 86).

(iii) Definition of contract of carriage and of consignee

69. The Working Group considered it desirable that definitions of these terms should be formulated, and adopted texts containing such definitions (A/CN.9/96, paras. 97-103 and 105).

## C. Report on the eighth session of the Working Group

70. In his introduction of this report, the Chairman of the Working Group stated that the Working Group had at its eighth session completed two assignments. Firstly, it had considered and adopted texts on the topics not considered at previous sessions of the Working Group; and secondly, it had completed the second reading of the preliminary version of a draft convention on the liability of carriers of goods by sea, which consisted of the draft provisions approved by it at its third to the seventh sessions. The work of the Working Group at its eighth session is summarized in paragraphs 71 to 73 below.

71. The topics considered by the Working Group for the first time were: the basic rule on the exoneration of the shipper from liability; 29/ dangerous goods; 30/ notice of loss, damage or delay; 31/ relationship of the draft convention with other conventions; 32/ and general average. 33/ The Working Group adopted texts on all these topics.

72. The Working Group completed the second reading of the preliminary version of a draft convention on the liability of carriers of goods by sea, and adopted a text entitled "Draft Convention on the Carriage of Goods by Sea" (A/CN.9/105, sect. B, para. 2). The text adopted by the Working Group is set forth as an annex to its report (A/CN.9/105). The Working Group did not consider draft provisions concerning implementation, declarations and reservations or final clauses for the draft Convention. It requested the Secretariat to prepare draft articles dealing with these topics for consideration by the Commission at its ninth session (A/CN.9/105, sect. B, parts VIII, IX and X). The Working Group noted that, in accordance with a decision taken by the Commission at its seventh session, 34/ the text of the draft Convention on the Carriage of Goods by Sea should be transmitted to Governments and interested international organizations for comment and that the Secretary-General was requested to prepare an analysis of such comments for consideration by the Commission at its ninth session.

73. In conclusion, the Chairman of the Working Group expressed his appreciation of the spirit of co-operation which had prevailed within the Working Group, and which had enabled it to complete its task successfully.

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29/ A/CN.9/105, sect. A, 1. For the text adopted on this topic by the Working Group, see the Draft Convention on the Carriage of Goods by Sea (A/CN.9/105, annex), art. 12.

30/ Ibid., sect. A, 2. For the text adopted on this topic, see ibid., annex, art. 13.

31/ Ibid., sect. A, 3. For the text adopted on this topic, see ibid., annex, art. 19.

32/ Ibid., sect. A, 4. For the text adopted on this topic, see ibid., annex, art. 25.

33/ Ibid., sect. A, 5. For the text adopted on this topic, see ibid., annex, art. 24.

34/ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 53.

## D. Discussion of the reports of the Working Group

74. All representatives congratulated the Working Group on the successful completion of the task assigned to it. They also congratulated the Chairman of the Working Group, Professor Mohsen Chafik (Egypt), and the Chairman of the Drafting Party, Professor E. Chr. Selvig (Norway), for the outstanding contributions they had made to the work.

75. There was also agreement that the draft Convention should be considered by the Commission at its ninth session, in the light of the comments received from Governments and interested international organizations. In this connexion, the hope was expressed that, in view of the economic importance of the proposed Convention, many Governments would submit comments.

76. In regard to the future status of the Working Group, the Commission was agreed that the Working Group should, for the time being, be kept in existence, since it might be necessary to refer certain matters to it after the Commission had considered the draft Convention, but that, for the present, no new mandate should be given to the Working Group. The Commission was also agreed that it would revert to its programme of work in the field of international legislation on shipping after it had completed its work on the draft Convention on the Carriage of Goods by Sea.

### Decision of the Commission

77. The Commission, at its 156th meeting, on 4 April 1975, adopted unanimously the following decision:

> The United Nations Commission on International Trade Law
>
> 1. Takes note with appreciation of the reports of the Working Group on International Legislation on Shipping on the work of its seventh and eighth sessions;
>
> 2. Congratulates the Working Group on the expeditious and successful completion of the task entrusted to it;
>
> 3. Decides to consider the draft Convention on the Carriage of Goods by Sea at its ninth session.

## CHAPTER V

## INTERNATIONAL COMMERCIAL ARBITRATION

78. The Commission, at its sixth session, requested the Secretary-General:

> "In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade." 35/

79. The Commission had before it the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97). The Commission noted that, in accordance with its decision, the preliminary draft 36/ had been given widespread circulation, and had been transmitted for comments to the regional commissions of the United Nations and to some 70 centres of international commercial arbitration. The Commission was informed that the preliminary draft rules had been considered at the Fifth Conference of the Inter-American Commercial Arbitration Commission, held at Bogotá, from 4 to 6 December 1974, and at the Fifth International Arbitration Congress, held at New Delhi, from 7 to 10 January 1975.

80. The Commission had also before it observations submitted by the Government of Norway and by interested national and international organizations and institutions (A/CN.9/97/Add.1, 3 and 4) and a document setting forth suggested modifications to the draft rules resulting from the discussions by the Fifth International Arbitration Congress (A/CN.9/97/Add.2).

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35/ Ibid., Twenty-eighth Session, Supplement No. 17 (A/9017), para. 85 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3, part one, chap. II, sect. A, para. 116).

36/ The initial version was prepared by the Secretariat in consultation with Prof. Pieter Sanders of the University of Rotterdam, the Netherlands, who serves as a consultant to the Secretariat on the subject. At the invitation of the Secretariat, the International Committee on Commercial Arbitration of the International Arbitration Congress, a body composed of representatives of centres of international commercial arbitration and of experts in this field, appointed a Consultative Group composed as follows: (a) Dr. Carlos A. Dunshee de Abranches, Director-General of the Inter-American Commercial Arbitration Commission; (b) Professor Tokusuke Kitagawa, Tokyo Metropolitan University; (c) Mr. Donald B. Straus, President of the Research Institute of the American Arbitration Association; (d) Professor Heinz Strohbach, President of the Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic. This consultative group submitted comments on two earlier versions of the draft arbitration rules.

81. The Commission was agreed that, in considering the preliminary draft arbitration rules, it would concentrate on the basic concepts underlying the draft and on the major issues dealt with in the individual articles thereof. The Commission was further agreed that, at the present session, it should not reach final conclusions on matters of substance, and that the main purpose of its deliberations was to have a general debate on the preliminary draft as a whole.

82. A summary of the Commission's deliberations 37/ is set forth in annex I below.

Decision of the Commission

83. The Commission, at its 171st meeting on 17 April 1975, adopted unanimously the following decision:

> The United Nations Commission on International Trade Law,
>
> Having considered the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade,
>
> Requests the Secretary-General:
>
> (a) To prepare a revised draft of these Rules, taking into account the observations made on the preliminary draft in the course of its eighth session;
>
> (b) To submit the revised draft Arbitration Rules to the Commission at its ninth session.

37/ The Commission considered the subject at its 159th and 160th meetings held on 8 April 1975, its 161st and 162nd meetings, held on 9 April 1975, its 163rd and 164th meetings, held on 10 April 1975, its 165th and 166th meetings, held on 11 April 1975, its 167th meeting, held on 14 April 1975, and its 171st meeting, held on 17 April 1975.

## CHAPTER VI

## MULTINATIONAL ENTERPRISES

84. The General Assembly, at its twenty-seventh session, adopted resolution 2928 (XXVII) on the report of the United Nations Commission on International Trade Law on the work of its fifth session. In paragraph 5 of the resolution, the General Assembly invited the Commission:

> "To seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and to consider, in the light of this information and the results of available studies, including those by the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, what further steps would be appropriate in this regard".

85. In response to a decision taken by the Commission at its sixth session, 38/ a questionnaire concerning legal problems presented by multinational enterprises was sent to Governments and international organizations.

86. At its seventh session, the Commission had before it a note by the Secretary-General (A/CN.9/90), which set forth the text of the questionnaire and information in respect of the replies received at that time from Governments, United Nations organs and agencies, and international and national organizations.

87. At its current session, the Commission had before it a report of the Secretary-General (A/CN.9/104) setting forth (a) a description of the studies and activities within the United Nations system in respect of multinational enterprises, especially as those studies and activities concerned legal problems; (b) an analysis of legal problems presented by multinational enterprises based on an analysis of replies to the questionnaire received from Governments and interested organizations and on an analysis of studies within the United Nations system; (c) a description of existing national legislation affecting multinational enterprises and (d) conclusions and suggestions for future work. The report also sets forth in an annex a note on investment laws.

### Consideration of the report by the Commission 39/

88. The Commission noted that, in December 1974, the Economic and Social Council had created the Commission on Transnational Corporations, which was to be assisted

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38/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 116 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3) part one, chap. II, sect. A, para. 116).

39/ The Commission considered this subject at its 170th meeting, on 15 April 1975, and its 171st meeting on 17 April 1975.

by an Information and Research Centre on Transnational Corporations. It was also noted that the Commission on Transnational Corporations would submit to the Economic and Social Council, in 1976, a detailed draft programme of work on the full range of issues relating to transnational corporations. The Commission further noted that the Commission on Transnational Corporations, at its first session, held in New York from 17 to 28 March 1975, had considered a draft programme of work which included several items with significant legal aspects.

89. There was general agreement that the legal issues in respect of multinational enterprises were closely intertwined with those of an economic, social and political nature and that, at the present time, no specific legal issues susceptible of action by UNCITRAL had been identified. Some representatives pointed out that matters clothed in a legal form always have an economic and social character, and are oriented towards an end constituting legislative policy. The Commission discussed the means it should take to identify such issues.

90. Several representatives were of the view that UNCITRAL should itself engage in a programme of studies intended to identify legal issues on which it might take action. Among the subjects suggested for study by the Commission were (a) the legal provisions in company laws, investment laws and the like that are designed to elicit information about the activities of multinational enterprises and (b) the feasibility of developing an information system, including standardized accounting procedures and statistical systems for specific data reporting.

91. Other representatives, however, were of the opinion that UNCITRAL should follow closely the work of the newly created Commission on Transnational Corporations and the studies to be carried out by the Information and Research Centre on Transnational Corporations, and that it should defer a decision on its own programme of work in this field until the Commission on Transnational Corporations had identified specific legal issues that would be susceptible of action by UNCITRAL.

92. The Commission, after deliberation, was agreed that it should follow the latter course of action and that, through its Chairman, it should inform the Commission on Transnational Corporations of its decision and of its readiness to consider favourably any request which the Commission on Transnational Corporations might wish to address to it. At the same time, the Commission on Transnational Corporations should be informed of the views expressed by many representatives that work could usefully be carried out by UNCITRAL on the development of model rules which States could embody in their national legislation with a view to exercising a greater degree of control over the activities of multinational enterprises and on the development of an information system, including standardized accounting procedures and statistical systems for specific data reporting.

93. The Commission requested the Secretariat to keep it informed about the programme of work of the Commission on Transnational Corporations.

Decision of the Commission

94. The Commission, at its 170th meeting, on 15 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Takes note of the establishment by the Economic and Social Council of the Commission on Transnational Corporations and of the Information and Research Centre on Transnational Corporations;

2. Decides:

(a) To maintain on its agenda the item concerning multinational enterprises;

(b) To inform, through its Chairman, the Commission on Transnational Corporations that the United Nations Commission on International Trade Law had not taken a definitive decision concerning its programme of work in the field, but would continue to keep the subject under review, pending the identification by the Commission on Transnational Corporations of specific legal issues that would be susceptible to action by the United Nations Commission on International Trade Law, and that it will favourably consider any request which the Commission on Transnational Corporations may wish to address to the United Nations Commission on International Trade Law.

3. Requests the Secretary-General to submit at future sessions reports concerning the programme of work carried out by the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations.

## CHAPTER VII

## LIABILITY FOR DAMAGE CAUSED BY PRODUCTS INTENDED FOR OR INVOLVED IN INTERNATIONAL TRADE

95. The General Assembly, at its twenty-eighth session, adopted resolution 3108 (XXVIII), of 12 December 1973, on the report of the United Nations Commission on International Trade Law on the work of its sixth session. In paragraph 7 of the resolution, the General Assembly invited the Commission:

> "To consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution, taking into account the feasibility and most appropriate time therefor in view of other items on its programme of work."

96. At its seventh session the Commission had before it a note by the Secretary-General (A/CN.9/93) setting forth background information relating to this paragraph of the resolution, and suggesting possible action by the Commission in response thereto. At that session, the Commission adopted the following decision:

> "The United Nations Commission on International Trade Law,
>
> Having regard to General Assembly resolution 3108 (XXVIII) of 12 December 1973,
>
> Requests the Secretary-General to prepare a report for consideration by the Commission at its eighth session, setting forth:
>
> (a) A survey of the work of other organizations in respect of civil liability for damage caused by products;
>
> (b) A study of the main problems that may arise in this area and of the solutions that have been adopted therefor in national legislations or are being contemplated by international organizations;
>
> (c) Suggestions as to the Commission's future course of action." 40/

97. At the present session the Commission had before it a report of the Secretary-General on "Liability for damage caused by products intended for or involved in international trade" (A/CN.9/103), prepared in response to the request made to the Secretary-General by the Commission. The report contains a survey of the work of other organizations in respect of civil liability for damage caused by products, a study of the main problems that may arise in this area and the solutions that are being contemplated therefor by international organizations and suggestions with respect to the Commission's future course of action.

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40/ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 81.

Consideration of the report by the Commission 41/

98. The discussion of the report by the Commission revealed a large measure of agreement on several matters. There was general agreement that, for certain reasons, the feasibility of formulating unified rules on liability deserved serious consideration. Many of the products manufactured today had the potential for causing serious injury to person or damage to property. Apart from giving rise to legal problems, the consequences of such injury or damage had both a social and an economic impact. One aspect of this was the feeling that the law should give adequate protection to the consumer of products. Another aspect was the need to consider the availability and cost to producer and consumer of liability insurance. Many representatives also believed that divergencies in the rules relating to liability might lead to distortion of the terms of trade. It was further noted that uniform rules would enable the producer to know in advance the extent of his liability. It was observed that the proposed uniform rules should not deal with damage to the product itself; this question should be dealt with in the uniform law on the international sale of goods.

99. It was generally acknowledged that the preparation of uniform rules on products liability posed serious problems. At a technical level, it would be necessary to evolve a set of legal rules which would be acceptable within the framework of different legal systems. It would also be necessary to formulate a criterion which would identify the international trade transactions to which the proposed uniform rules were to apply. Further, in order to define the scope of the rules, agreement would have to be reached on certain extra-legal considerations which would determine the legal solutions adopted for the problems involved.

100. In view of the difficulties mentioned above, some representatives expressed the view that the Commission should not undertake work in this field until the projects on which the Commission was presently engaged had been completed. They pointed out that certain other international organizations had commenced or completed work in this field, and that it might be desirable to observe the results of their work before the Commission itself undertook any project. They also noted that in many States the national law in this field was at present somewhat uncertain, and that it might therefore be more expedient to postpone work until the law was more settled. It was further suggested that an increase in the extent of products liability in a time of economic inflation might lead to an increase in the prices of goods.

101. Most representatives, however, were of the view that further preparatory work designed to enable the Commission to take a final decision on its future course of action should be undertaken. It was observed that the work presently being carried out by other organizations was at a regional level, and that an examination of the subject in a wider context was therefore desirable. It was thought that the fact that national law was at present relatively undeveloped might facilitate rather than hinder efforts at unification. It was also pointed out that an increase in the extent of liability for products need not necessarily lead to an increase in the prices of goods.

102. There was general agreement that, for the time being, further work should be carried forward through the Secretariat, and that it was premature to establish a working group. It was also felt that, while the work should not be unduly delayed, it should proceed at a pace which would permit a full investigation of the many

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41/ The subject was considered by the Commission at its 152nd and 153rd meeting, held on 4 and 5 April 1975.

problems involved, and would allow consultations with regional bodies and interested commercial organizations. The Commission was of the view that the Secretariat should also consider the advisability of circulating, at an appropriate time, a questionnaire designed to elicit information on relevant legal rules and case law, and also on governmental attitudes to the issues involved.

Decision of the Commission

103. The Commission, at its 153rd meeting, on 5 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Having regard to General Assembly resolution 3108 (XXVIII) of 12 December 1973,

Having considered the report of the Secretary-General entitled "Liability for damage caused by products intended for or involved in international trade", 42/

1. Decides to continue work in respect of this subject and, to this end,

2. Requests the Secretary-General to prepare a further report for consideration by the Commission, if possible at its tenth session, that would examine, inter alia, the following issues:

(a) The extent to which the absence of unified rules on products liability affects international trade;

(b) The practicability and advantages of unification at a global level, as opposed to unification at a regional level;

(c) The relationship between this subject and schemes of insurance which have been or may be developed in relation thereto;

(d) The extent to which and the manner in which liability may be limited, and the possible effects of different techniques of limitation;

(e) The types of product in regard to which liability should be imposed;

(f) The classes of persons on whom liability may be imposed and the classes of persons in whose favour liability may be imposed, with particular reference to the protection of consumers;

(g) The kinds of damage for which compensation may be recoverable;

(h) The kinds of transaction falling within the scope of the proposed uniformed rules;

(i) The relationship between any proposed uniform rules and standards of safety in relation to products which are mandatorily imposed in many States by national law.

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42/ A/CN.9/103.

## CHAPTER VIII

## TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

104. The Commission had before it a note by the Secretary-General (A/CN.9/107), which sets forth the action taken by the Secretariat to implement the Commission's decision 43/ on training and assistance in the field of international trade law taken at its sixth session.

### Consideration of the subject by the Commission 44/

105. The Commission noted with satisfaction that, in 1974, a commercial bank in Austria had awarded two fellowships enabling the recipients to spend six months in the bank's legal office as interns. Similarly, the Government of Belgium had awarded two fellowships for academic and practical training at the University of Louvain. The Government of Belgium had renewed its offer of fellowships for 1975.

### International Trade Law Symposium

106. On the occasion of the Commission's eighth session, pursuant to the decision taken at its sixth session, 43/ the Commission sponsored a symposium on the role of universities and research centres with respect to international trade law. The Commission noted with appreciation that funds for fellowships to cover the travel costs of participants from developing countries had been contributed by the Governments of Austria, the Federal Republic of Germany, Norway and Sweden. The symposium was held without cost to the United Nations.

107. Fellowships were awarded to participants from 14 countries. In addition, 13 professors from nine countries participated in the symposium.

108. The Commission considered whether future symposia should be held and, if so, whether they should be held every two years. It was pointed out that, if a symposium were held every two years in connexion with the session of the Commission, it would always be held at Geneva and that it might be advisable to hold the symposium on occasion in New York. However, there was general agreement that another symposium should be scheduled on the occasion of the Commission's tenth session and that, at that time, the Commission would decide about a further symposium.

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43/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 107 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, chap. II, sect. A, para. 107).

44/ The Commission considered this subject at its 169th meeting on 15 April 1975.

109. The Commission was informed that the Secretariat had accepted contributions only from Governments to cover the cost of the symposium because of the wording of the Commission's decision at its sixth session. The decision stated that the Secretary-General was requested "to seek voluntary contributions from Governments, international organizations and foundations to cover the cost of travel and subsistence of participants from developing countries. 45/ The Commission was generally agreed that the Secretariat could solicit funds from private sources for the next symposium on the understanding that the receipt of such contributions could place no restrictions on the organization of the symposium.

110. There was general agreement on the suggestion made by several representatives that the Secretariat should consult with UNITAR on the possibility that UNCITRAL and UNITAR might each organize symposia on international trade law in alternate years, those organized by UNITAR to be held in developing countries.

111. Some representatives expressed the view that, as was the case in the International Law Commission Seminar, participants in a symposium organized in connexion with a session of the Commission should have a greater opportunity of observing the deliberations of the Commission. One of these representatives also expressed the wish that the participants should be encouraged to write reports or research papers with the assistance of the Secretariat or representatives on the subjects under consideration by the Commission.

112. Eight members of delegations to the eighth session of the Commission gave lectures to the participants. Professor Mary Hiscock (Australia) and Professor Mohsen Chafik (Egypt) spoke on the teaching of international trade law. Lectures on the programme of work of the Commission were given by Mr. Stein Rognlien (Norway) on the international sale of goods, Professor Sergei Lebedev (USSR) on the carriage of goods by sea, Professor Eric Schinnerer (Austria) on commercial letters of credit and contract guarantees, Professor Anthony Guest (United Kingdom) on negotiable instruments, Professor Kazuaki Sono (Japan) on limitation (prescription) in the international sale of goods and Professor Jerzy Jakubowski (Poland) on international commercial arbitration.

Decision of the Commission

113. The Commission at its 169th meeting, on 15 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Expresses its appreciation to those Governments which have made available fellowships in their countries for the purpose of giving practical training to nationals from developing countries, and to those Governments which have made voluntary contributions to cover the costs of transportation and subsistence for participants in the symposium on the role of universities and research centres with respect to international trade law organized in connexion with its eighth session;

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45/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 107 (Yearbook of the United Nations Commission on International Trade Law, Volume IV: 1973 (United Nations publication, Sales No.: E.74.V.3), part one, chap. II, sect. A, para. 107).

2. Requests the Secretary-General:

(a) To organize, in connexion with its tenth session, an international symposium on international trade law, and to seek voluntary contributions from Governments, international organizations, foundations and private sources to cover the cost of travel and subsistence of participants from developing countries;

(b) To explore the possibility of having the United Nations Institute for Training and Research organize seminars in developing countries on international trade law;

(c) To submit to the Commission, at its ninth session, a report setting forth suggestions regarding possible themes for the second symposium on international trade law.

## CHAPTER IX

## FUTURE WORK 46/

### A. Membership of the Working Group on the International Sale of Goods

114. The Commission, at its seventh session, appointed Czechoslovakia to replace Iran as a member of the Working Group on the International Sale of Goods. With regard to the nomination of Czechoslovakia in the place of Iran, it was understood that this would in no way prejudice the representation of regional groups in that Working Group or any other Working Group and that a member of the group of Asian States could, in the future, reoccupy the seat vacated by Iran. It was also understood that Czechoslovakia was nominated for the duration of the Working Group's consideration of a uniform law on the international sale of goods and that the composition of the Working Group would be reconsidered when new tasks were undertaken by it. 47/

115. It was stated on behalf of the group of Asian States that the group wished to reoccupy the seat vacated by Iran and that it suggested that the Philippines should be appointed a member of the Working Group on the International Sale of Goods as from the commencement of the seventh session of the Working Group, and that, at the end of the session, the original regional composition of the Working Group should be restored. The Commission decided accordingly.

### B. Date and place of sessions of the Commission and its Working Groups

116. The Commission decided that its ninth session and the sessions of its Working Groups should be scheduled as follows:

(a) The ninth session of the Commission would be held at New York from 26 April to 21 May 1976, during which a Committee of the Whole would be established. The Commission itself would meet from 26 April to 19 May 1976 and consider the draft Convention on the Carriage of Goods by Sea, prepared by the Working Group on International Legislation on Shipping, in the light of comments submitted by Governments and interested international organizations, as well as other matters on the Commission's agenda with the exception of international commercial arbitration. The Committee of the Whole would meet during the first two weeks of the ninth session, from 26 April to 7 May 1976, to consider the revised set of arbitration rules for optional use in ad hoc arbitration relating to international trade;

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46/ The Commission considered this subject at its 172nd meeting, on 17 April 1975.

47/ Official Records of the General Assembly; Twenty-ninth Session, Supplement No. 17 (A/9617), para. 84.

(b) The seventh session of the Working Group on the International Sale of Goods would be held at Geneva from 5 to 16 January 1976;

(c) The fourth session of the Working Group on International Negotiable Instruments would be held in New York from 2 to 13 February 1976.

## CHAPTER X

## OTHER BUSINESS 48/

### A. General Assembly resolution 3316 (XXIX), of 14 December 1974, on the report of the United Nations Commission on International Trade Law on the work of its seventh session

117. The Commission took note of this resolution.

### B. General Assembly resolution 3317 (XXIX) of 14 December 1974, on the report of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods

118. The Commission also took note of this resolution.

### C. Report of the Secretary-General on current activities of other international organizations

119. The Commission took note of this report (A/CN.9/106).

120. The observer of the International Institute for the Unification of Private Law (UNIDROIT) referred to the terms of reference of the Commission laid down by the General Assembly in resolution 2205 (XXI), establishing the Commission. Under these terms of reference, the Commission "shall further the progressive harmonization and unification of the law of international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them ..." The observer of UNIDROIT suggested that, for purposes of co-ordination, the legal texts prepared by other organizations should be considered by the Commission for possible submission to a conference of plenipotentiaries. In this connexion, he referred to the work of the Commission on uniform rules governing the international sale of goods and the formation and validity of contracts of international sale of goods in respect of which UNIDROIT had prepared draft texts. He proposed that the Commission should develop a procedure which would permit it to select draft texts on matters of international trade law that could appropriately be considered by the Commission.

121. At the request of several representatives, the observer of UNIDROIT stated that his organization would submit to the Commission at a future session a note setting forth concrete suggestions with respect to collaboration.

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48/ The Commission considered this subject at its 172nd meeting on 17 April 1975.

## D. Legal interest rate for bills of exchange, promissory notes and cheques

122. The Commission considered a note by the Austrian delegation on the legal interest rate for bills of exchange, promissory notes and cheques. The representative of Austria informed the Commission that the present economic and financial situation had led the Austrian authorities to reconsider the legal interest rate to be imposed by the courts. This rate was, at present, 4 per cent in civil cases, 5 per cent in commercial cases and 6 per cent for bills of exchange and promissory notes and for cheques. This latter rate was based on articles 48 and 49 of the Uniform Law on Bills of Exchange and Promissory Notes and on articles 45 and 46 of the Uniform Law on Cheques, which constitute, respectively, annex 1 of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, done at Geneva, 7 June 1930, 49/ and annex 1 of the Convention providing a Uniform Law for Cheques, done at Geneva, 19 March 1931. 50/ The change envisaged in the legal interest rate should, if it were to be effective, be accompanied by a modification of the rate of exchange provided for in national laws promulgated at the time to meet the requirements of the two Conventions. The Geneva Conventions contained, in their annexes II, lists of reservations, some of which might be declared at any time, whereas others could be formulated, at the latest, at the time the instrument of ratification or accession was deposited. This latter procedure was laid down for reservations to article 13 of the Uniform Law on Bills of Exchange and Promissory Notes and to article 23 of the Uniform Law on Cheques. Accordingly, States which failed to enter these two reservations at the time they deposited their instrument of ratification or accession were no longer allowed to do so, and this was Austria's position in respect of article 13 of annex II to the Convention on the Uniform Law on Bills of Exchange and Promissory Notes. If, in these circumstances, a State considered it necessary to change the interest rate, it would have to denounce the Convention in question; it could accede to it once again at a later date by entering the reservation. Owing to the inadequacy of legal interest rates at the present time, some courts tended to grant additional amounts by way of damages for belated payment. Obviously a solution of this kind in no way corresponded to the intention of the national or international legislator when he fixed a certain interest rate.

123. The representative of Austria stated that he wished to know whether other States that were Contracting Parties to the Geneva Conventions of 1930 and 1931 had experienced difficulties similar to those encountered by this country. If so, the possibility might be considered of amending the relevant articles of the two Uniform Laws, or of concluding one or two protocols enabling States which had not entered reservations at the time they deposited their instrument of ratification or accession to do so at any subsequent date.

124. There was general agreement that the Commission itself should not undertake any initiative in this respect and that the Governments concerned should either concert with a view to reaching agreement on procedures that would lead to the result intended by these Governments, or inform the Secretary-General as depositary of the instruments of ratification or accession.

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49/ League of Nations, Treaty Series, vol. CXLIII, No. 3313, p. 259.

50/ League of Nations, Treaty Series, vol. CXLIII, No. 3316, p. 357.

ANNEX I

## Preliminary draft set of Arbitration Rules for optional use in ad hoc arbitration relating to international trade:

## Summary of discussion by the United Nations Commission on International Trade Law

### A. Discussion of the preliminary draft Arbitration Rules a/ considered as a whole

1. During the discussion, the issues set forth below received special attention.

Scope of the Rules

2. Article 1, paragraph 1, of the Rules states that disputes between parties may be settled according to the Rules "where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules ...". The commentary to paragraph 1 notes that, while the purpose of the UNCITRAL Rules is to facilitate arbitration in international trade, the Rules do not include a provision limiting their scope of application to international trade.

3. A suggestion was made that, since the priority subject adopted for consideration by the Commission had been defined as international commercial arbitration, the scope of the rules should be limited to cover only arbitration of disputes arising out of international trade transactions. On the other hand, it was observed that the imposition of such a limitation would give rise to the need to define the term "international trade transaction", which would be a difficult task. It was also observed that, since the rules were not of a mandatory character and could be modified by the parties, the imposition of such a limitation would have no legal effect and could not prevent parties from using them in arbitrations of a purely domestic character if they so desired. It was also noted that the fact that the Rules might be made applicable by the parties to arbitrations of a purely domestic character did not create any difficulty, and that, on the contrary, there might be an advantage to giving such scope to the Rules.

Municipal law

4. It was observed that certain issues arising in an international commercial arbitration would always be resolved by the provisions of the municipal law applicable to those issues. Neither the parties nor the arbitrators could act in contravention of such provisions except to the extent permitted by the law itself. It would therefore follow that, where parties adopted the UNCITRAL Rules, any provision of the Rules would be of no effect to the extent to which it conflicted

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a/ Herein referred to as UNCITRAL Rules.

with the provisions of the applicable municipal law. In this context, it was observed that the Rules did not draw the attention of parties and arbitrators to this overriding effect of the applicable municipal law, and that the absence of a statement of this fact might mislead businessmen into thinking that the provisions of the Rules were definitive and not subject to review by judicial tribunals. It was suggested that attention might be drawn to the overriding effect of the applicable municipal law whenever it was appropriate in relation to any article in the Rules. Statements formulated to achieve this result might be incorporated either in the article in question, or in the commentary thereto.

Autonomy of the parties

5. It was observed that the autonomy of the parties to regulate the arbitration to the extent permitted by the applicable municipal law was a basic principle of arbitration. This principle was incorporated in article 1, paragraph 1, of the UNCITRAL Rules, which states that, where parties referred disputes to arbitration under the Rules, such disputes are to be settled according to the Rules "subject to any modifications that may be agreed upon by the parties". It was suggested, however, that in some respects the Rules did not sufficiently give effect to this principle. Thus, certain articles were drafted in a form which might lead businessmen to suppose that they were incapable of modification. Further, the manner in which a modification might be made under article 1, paragraph 1, was not clearly specified in the Rules. Again, the provisions of several articles specified that decisions in regard to the regulation of the arbitration proceedings were to be taken by the arbitrators, and not by the parties. Reference to those provisions will be made in the account set forth below in section B of the present annex of the discussion by the Commission of the individual articles. It was stated that the extent to which the Rules should give greater emphasis to the principle of party autonomy should be considered when the Rules were being redrafted.

"Administered" arbitration

6. The scope of the Rules in their present form includes two categories of arbitration, which are referred to in article 2 of the Rules as "administered" and "non-administered" arbitration. Article 2, paragraph 1, and the commentary thereto describe "administered arbitration" as arbitration which takes place where the parties have at any time selected an arbitral institution to administer the arbitration under the UNCITRAL Rules. The term "non-administered arbitration" refers to arbitration which takes place where the parties have agreed to arbitration under the UNCITRAL Rules without selecting an arbitral institution to administer the arbitration.

7. Differing views were expressed as to the desirability of including "administered arbitration" within the scope of the Rules. On the one hand, it was suggested that there were good reasons for excluding such arbitration from the scope of the Rules. Most arbitral institutions possessed their own set of arbitral rules, and might be unwilling to apply rules other than their own. Before including "administered arbitration" within the scope of the Rules, investigation was necessary as to the extent to which arbitral institutions were willing to apply the UNCITRAL Rules. It was observed that arbitral institutions wished to maintain an appreciable degree of control over arbitrations conducted under their auspices,

and that the UNCITRAL Rules did not give arbitral institutions the requisite degree of control. It was further noted that ad hoc arbitration as commonly understood did not involve the participation of an arbitral institution as an administering authority, and that therefore in this regard the Rules might not accord with the mandate given by the Commission at its sixth session. On the other hand, it was observed that "administered arbitration" as envisaged in the Rules was an innovation in arbitral procedure which may prove to be acceptable. Under the Rules the function of the arbitral institution in the case of "administered arbitration" related to the appointment of arbitrators, including initial appointment, challenges and substitution, and to the fixing and collection of arbitrators' fees, which were matters closely related to appointment. Therefore such "administered arbitration" could not be classified as "institutional arbitration", as opposed to ad hoc arbitration. Since the Rules were of an optional character, parties should have the freedom to choose in advance a specific individual or institution to exercise these appointing authority functions. Even where parties chose "administered arbitration", the individual or institution selected was free to agree to act, or decline to act, in accordance with the UNCITRAL Rules. It was felt that it might be desirable to give parties the option of choosing one or the other form of arbitration.

8. After a full discussion on the subject, the prevailing view among representatives was to exclude, for the time being, "administered arbitration" from the scope of the Rules, but to permit the parties to designate in advance a person or an institution to carry out the functions of an appointing authority as specified in the Rules.

Time-limits

9. It was observed that the provisions of several articles contained time-limits within which action relating to the arbitration had to be taken by the parties, or by the arbitrators. Under the Rules such time-limits were capable of modification. Thus, under article 12, paragraph 1, the time-limits set forth in section II of the Rules for the appointment of arbitrators could at any time be extended by agreement of the parties. Under article 20, paragraph 2, the parties could agree to extend the time-limits laid down in section III of the Rules. In the absence of such agreement, the arbitrators were entitled to extend the time-limits if they concluded that such extension was desirable. Further, under article 1, paragraph 1, a provision of the Rules (including a provision as to a time-limit) was subject to any modifications that may be agreed upon by the parties. The view was expressed that the time-limits laid down by the Rules were too short and did not give the parties sufficient time for deliberation or consultation prior to taking action. It was felt that longer time-limits would accord with the needs of current arbitration practice, and that it would be preferable to lengthen the time-limits rather than compel parties to extend the time-limits specified at present under the provisions for extension noted above. In any event, extension under articles 1, paragraph 1, 12, paragraph 1 and 20, paragraph 2 depended on the agreement of the parties to such extension, and it was possible for one party to withhold unreasonably his consent to an extension.

Appointing authority

10. Article 6, paragraph 2 (a), (b) and (c), and article 7, paragraph 7, of the Rules contain provisions specifying three authorities, one of whom would, on the

application of the claimant, appoint a sole arbitrator or a presiding arbitrator in the event of a failure by the parties to reach agreement either on the identity of such an arbitrator or on the identity of an appointing authority to appoint such an arbitrator. There was general agreement that it was necessary that the Rules should contain provisions specifying such an authority, and that it was desirable that the Rules should specify only a single appointing authority. However, there were differences of view as to which authority could be considered as the most suitable.

(i) Article 6, paragraph 2 (a). "An appointing authority designated pursuant to United Nations General Assembly resolution .... (  ) by the Government of the country where the respondent has his principal place of business (siège réel) or habitual residence".

11. The view was expressed that the designation of an appointing authority in this way was not appropriate. It was observed that, in the first place, it was questionable whether the resolution contemplated by this provision could be obtained from the General Assembly. Further, even if such a resolution were obtained, there would be no certainty that all Governments would designate an appointing authority pursuant to the resolution. It was also stated that it was undesirable that the appointing authority should be designated by the Government of a country with which one of the parties was closely connected. While in certain countries there existed arbitral or trade institutions with a high reputation for impartial conduct which could be designated as appointing authorities, such institutions may not exist in all countries.

(ii) Article b, paragraph 2 (b). "an arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators".

12. The view was reiterated that it was undesirable that the appointing authority should belong to a country with which one of the parties was closely connected. It was also observed that, while chambers of commerce with experience in appointing arbitrators would be available in some countries, they may be lacking in others.

(iii) Article 6, paragraph 2 (c). "the appointing authority designated by the Secretary-General of the Permanent Court of Arbitration at The Hague".

13. There was some support for this provision. It was observed that, while the primary function of the Court was arbitration involving issues of public international law, arbitration rules had been framed for the settlement by the Court of international disputes between two parties, of which only one was a State, and that the Court had some experience of international commercial arbitration in disputes of this character. However, the view was also expressed that the Permanent Court of Arbitration lacked sufficient knowledge and experience in the practice of commercial arbitration, that it did not have a universal character, and that therefore it was not an appropriate body for the designation of an appointing authority. The view was also expressed that the competent authority should be the competent authority at the place of arbitration. Recourse to a central authority can only be envisaged in cases where there had been no designation of the place of arbitration, or of a competent authority at the place of arbitration. In such cases an ad hoc committee connected with the secretariat of UNCITRAL should be established as the central authority.

14. There was considerable support for the view that the establishment of an appointing authority under the aegis of the United Nations was desirable and deserved careful consideration.

Need for the Rules

15. There was considerable agreement on the need for a set of rules such as the UNCITRAL Rules to regulate ad hoc arbitration. It was observed that existing arbitral rules were not designed for application in all areas of the world. The arbitration rules formulated by the regional commissions of the United Nations such as ECE or ECAFE (now ESCAP) were primarily designed for regional application. The UNCITRAL Rules could therefore perform a valuable function in facilitating international trade.

## B. Discussion by the Commission on the individual articles of the draft UNCITRAL Arbitration Rules

### Article 1

"1. Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, such disputes shall be settled according to these Rules, subject to any modifications that may be agreed upon by the parties.

"2. 'Parties' means physical or legal persons, including legal persons of public law.

"3. 'Agreement in writing' means an arbitration clause in a contract or a separate agreement, including an exchange of letters, signed by the parties, or contained in an exchange of telegrams or telexes."

### Summary of discussion

Paragraph 1

16. Differing views were expressed as to whether this paragraph should be reworded so as to make the UNCITRAL Rules only applicable to the arbitration of disputes arising out of international trade transactions. These views are set forth in section A above under the heading "Scope of the Rules" (paras. 2 and 3).

17. The paragraph as now formulated permits parties to agree to refer to arbitration disputes existing between them, or future disputes "that may arise out of a contract concluded by them ...". It was observed that the specific reference to "a contract concluded by them" unduly narrowed the scope of the Rules, and that it might be desirable to grant a wider latitude to parties in respect of the type of transactions, in regard to which possible future disputes might be submitted to arbitration. It was accordingly suggested that a phrase such as "defined legal relationships existing between the parties" might be substituted for the phrase "contract concluded by them". It was pointed out, however, that such a modification might introduce an element of uncertainty into the scope of application of the rules.

18. In its present wording, paragraph 1 only applies where the parties have concluded an agreement in writing for the submission of disputes to arbitration. The question was discussed as to whether this requirement of writing should be dispensed with. Although the view was expressed that the restriction introduced by this requirement was undesirable, there was considerable support for maintaining it. It was noted that article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, b/ only included within its scope an "agreement in writing" by parties to submit disputes to arbitration; certain national laws also only gave legal effect to arbitration clauses or agreements which were in writing. It was therefore observed that maintaining this requirement increased the chances that the arbitral proceedings would result in an enforceable award. In this connexion, some representatives suggested that, if the requirement of writing were maintained, it would be desirable to specify that the modifications referred to in the last phrase of the paragraph should also be in writing.

19. It was noted that the model clause set forth in the report of the Secretary-General (A/CN.9/97, para. 6) permitted parties to refer to arbitration "Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), ...". c/ However, paragraph 1 of article I of the Rules permitted parties to refer to arbitration "... a dispute existing between them or disputes that may arise out of a contract concluded by them ...". c/ It was suggested that the model clause and paragraph 1 should be brought into harmony in this respect. It was also observed that the phrase "Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, ..." might be regarded as implying that persons who were not parties to such an agreement could not participate in an arbitral proceeding. It was suggested that a provision should be included in the Rules defining the circumstances in which a person not a party to such an agreement might participate in an arbitral proceeding, since in certain circumstances the participation of such persons might be desirable.

Paragraph 2

20. There was considerable support for the view that this paragraph should be deleted. It was argued that a definition of the type of persons who would qualify as "parties" was a matter to be left to the applicable municipal law. It was also observed that, if it were considered desirable that the term "parties" be defined, it might be considered equally desirable to define a number of other terms which appeared in the Rules. On the other hand, it was suggested that the definition should be retained, since it served a desirable purpose in clarifying that a Government, State agency, or State organization could be a party to an agreement for arbitration under the Rules.

Paragraph 3

21. There was some support for the view that this paragraph should be deleted, since it attempted to resolve a question which should be left to be decided by the

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b/ United Nations, Treaty Series, vol. 330, No. 4739.

c/ Underlining added.

applicable municipal law. Those representatives who had been of the view that the requirement in paragraph 1 that the agreement to submit disputes to arbitration must be in writing should be deleted observed that, if this view were accepted, paragraph 3 would become superfluous and should be deleted.

Article 1 considered as a whole

22. The view was expressed that the whole of article 1 should be deleted. The draft Rules were not mandatory, and any provision therein could be modified by agreement of parties. It was therefore inappropriate to include provisions attempting either to delimit the scope of the Rules, or to formulate definitions of terms appearing in the Rules.

## Article 2

"1. The parties may at any time select an arbitral institution to administer the arbitration or may choose non-administered arbitration.

"2. If the parties reach no agreement regarding the choice of administered or non-administered arbitration, they shall be deemed to have selected non-administered arbitration.

"3. If the arbitral institution selected by the parties is for any reason unable or unwilling to administer the arbitration, and if the parties do not select another arbitral institution, the parties shall be deemed to have selected non-administered arbitration."

### Summary of discussion

23. The consideration of this article centred on the issue of whether the scope of the Rules should include "administered arbitration" as defined herein. The discussion on this issue is set forth in section A above under the heading "Administered Arbitration" (see paras. 6 to 8). An observation was also made that, even if "administered arbitration" were excluded from the scope of the UNCITRAL Rules, provision should be made to regulate the effect of an arbitration agreement in which parties had agreed that disputes were to be referred to arbitration under the UNCITRAL Rules, and had also agreed to select an arbitral institution to administer the arbitration. It was suggested that a provision as set forth below might be appropriate:

"Where the parties have agreed to select an arbitral institution to administer the arbitration, they shall be deemed to have selected the arbitration rules which such institution may have established for such purpose, unless they have expressly specified otherwise."

## Article 3

"1. The party initiating recourse to arbitration (hereinafter called the 'claimant'), shall give to the other party (hereinafter called the 'respondent'), notice that an arbitration clause or agreement concluded by the parties is invoked.

"2. Such notice (hereinafter called 'notice of arbitration') shall contain the following:

"(a) the names and addresses of the parties;

"(b) a reference to the arbitration clause or agreement that is invoked;

"(c) a reference to the contract out of which the dispute arises;

"(d) the general nature of the claim and an indication of the amount involved, if any;

"(e) the relief or remedy sought;

"(f) a reference to any agreement between the parties as to having one or three arbitrators, or, if the parties did not previously reach such agreement, the claimant's proposal as to their number (i.e. one or three).

"3. In the case of administered arbitration, the notice of arbitration shall also be sent to the arbitral institution. The following shall also be attached to such notice:

"(a) a copy of the contract out of which the dispute arises;

"(b) a copy of the arbitration clause or agreement, if not contained in the contract annexed pursuant to subparagraph (a) of this paragraph."

## Summary of discussion

### Paragraph 1

24. It was noted that paragraph 1 of the commentary to this paragraph stated that "The notice of arbitration under article 3 serves to inform the respondent (and any administering arbitral institution) that arbitral proceedings have been started and that a particular claim will be submitted for arbitration". There was considerable support for the view that the text of the article itself should clearly specify the point of time at which arbitration proceedings commenced. The time of commencement would have particular relevance to the question of whether provisions on prescription of rights or limitation of claims were operative in relation to the dispute or disputes submitted to arbitration. In this connexion, it was suggested that, since both the draft Rules and the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15) were texts produced by the Commission, it might be desirable to incorporate the language used in article 14 of the Convention in the text of this paragraph. However, the view was also expressed that the Rules should not deal with the issue of the point of time at which arbitration proceedings commenced in relation to the question of prescription or limitation, since that issue would be regulated by the Convention or by municipal law where the Convention or municipal law would regulate questions of prescription or limitation.

25. The view was expressed that the paragraph should lay down a rule as to the language in which the notice was to be given, since each party to an international trade transaction might use a different language. It was suggested that, where parties had not agreed beforehand on the language to be used, it should be the language of the contract, or the language used in their correspondence with each other. However, it was observed that a rule as to what language should be used might be unnecessary, as the notice in question would be comparatively short and in a simple form.

26. It was suggested that the paragraph should specify the method by which the notice was to be transmitted by one party to the other.

Paragraph 2

27. The question was raised whether it was desirable to amalgamate the notice of arbitration under this article with the statement of claim required by article 16. The view was expressed that such an amalgamation would be undesirable for several reasons. Article 16 contained several requirements with regard to the statement of claim which could not be met at the stage at which the notice of arbitration was required to be given under this article. Thus, at this early stage, there may be inadequate time to obtain all the relevant documents required to be annexed to the statement of claim by article 16, paragraph 1; and it may be impracticable to give a full statement of the facts and a summary of the evidence as required by article 16, paragraph 2 (b). Further, it was suggested that it may be premature to impose an obligation to communicate the details required by article 16 at the early stage of the arbitral process to which article 3 applied, since parties may still be discussing the terms of a possible settlement. It was also observed that the notice of arbitration under this article and the statement of claim under article 16 referred to two distinct stages in the arbitral process. The notice of arbitration was given when one party first apprised the other party of his intention to have recourse to arbitration, while the statement of claim occurred as part of the process of clarifying the points at issue between the parties. The notice and statement should therefore be kept apart. It was further suggested that the requirement that the notice of arbitration contain "the relief or remedy sought" be deleted, and that such statement be only required to appear in the statement of claim. On the other hand, it was observed that, if the claimant were given an option to amalgamate the notice of arbitration under this article and the statement of claim, if he so desired, this might serve to accelerate the arbitral proceedings, and also might reduce expenses. It was noted that these were important considerations in relation to arbitration.

28. It was also suggested that the words "inter alia" should be added after the word "contain" in the opening words of this paragraph, since the applicable municipal law might require that additional particulars be stated.

Paragraph 3

29. It was observed that, if "administered arbitration" were excluded from the scope of the Rules, paragraph 3 would be unnecessary and could be deleted.

## Article 4

"1. Any party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party, and, in the case of administered arbitration, also to the arbitral institution. This communication is deemed to have been given where an arbitration is initiated by a counsel or agent or where a counsel or agent submits a statement of defence and counter-claim for the other party.

"2. All communications between the parties, or between the parties and the arbitrators, or, in the case of administered arbitration, between the arbitral institution and the parties or arbitrators, shall be effective when received by the addressee.

"3. It is presumed that a communication sent by telegram or telex has been received one day after it was sent, and a communication by registered air mail five days after it was sent."

## Summary of discussion

### Paragraph 1

30. It was observed that the second sentence of paragraph 1 appeared to assume that the initiation of an arbitration, or the submission of a statement of defence and counter-claim, by a counsel or agent was sufficient evidence that such counsel or agent possessed the requisite authority to act for the party on whose behalf he purported to act. It was suggested that such an assumption might be unjustified and that therefore the present formulation of this sentence should be reconsidered. It was also suggested that the word "considered" might be substituted in the second sentence of this paragraph for the word "deemed" as being more appropriate.

### Paragraph 2

31. The view was expressed that this paragraph might be deleted, since the rule contained in it was universally accepted and did not need to be expressly stated. Most representatives, however, felt that its retention would be desirable as it resolved with certainty an important issue. It was also suggested that the paragraph might be brought into harmony with article 14, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods by adopting the rules contained in that article to determine when a communication shall be effective. It was further observed that the rule contained in this paragraph should be reconsidered in relation to the various articles of the Rules laying down time-limits and in particular in relation to article 9.

### Paragraph 3

32. Divergent views were expressed on the question of whether this paragraph should be retained or deleted.

33. Many representatives expressed the view that the paragraph should be deleted. In support of this view, it was stated that the paragraph created a presumption; presumptions, however, were matters of law which were regulated by the rules of the applicable law, and should not be regulated by a set of optional rules, such as the ones now being considered. Further, the provision was of the nature of a rule of evidence, and could therefore be in conflict with article 21, paragraph 5, which stated that conformity to legal rules of evidence shall not be necessary. If it were necessary to establish with certainty the time of the receipt of a communication, this could be better done by evidence (such as a postal receipt) obtained from the postal authorities. The provision also did not eliminate possible disputes as to the actual time of receipt, since, as seen from the commentary to the paragraph, it was possible to rebut the presumption created therein by contrary evidence. Further, it was noted that the applicable municipal law would contain a rule on this issue, and that the paragraph was therefore unnecessary.

34. The view was expressed, however, that the rule contained in the paragraph was both necessary and useful. Since paragraph 2 of the article stated that a communication was to be effective when received by the addressee, it was necessary to have a rule as to when receipt took place. Further, since the sending of communications by one party to another was an essential part of arbitral proceedings, it was necessary to have simple rules by which arbitrators could determine that a communication had been received. In the absence of such a rule, difficulties may arise when a party chooses to ignore the communications of the other party, or claims not to have received them.

35. It was also suggested that, if the paragraph were retained it would be necessary, in the interests of clarity, to insert in the text of the paragraph the statement at present contained in the commentary that the presumptions created by the paragraph might be rebutted by evidence to the contrary.

36. There was general agreement that the periods of time specified in the paragraph might be too short in the light of the experience of the working of the postal services in certain regions. If the paragraph were to be retained, these time periods would have to be reconsidered.

37. It was also suggested that it might be inappropriate to specify a single time period in respect of all communications required to be sent under the Rules; it might be necessary to specify different time periods as appropriate to communications of different kinds.

38. It was also noted that the paragraph needed to be supplemented by rules specifying how the time periods specified therein were to be calculated and dealing, inter alia, with questions such as whether holidays and non-working days were excluded or included in estimating the periods.

## Article 5

"If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within /8/ days from the date of receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator,

three arbitrators shall be appointed. I the case of administered arbitration, any such agreement by the parties regarding the number of arbitrators shall be communicated promptly to the arbitral institution."

Summary of discussion

39. Different views were expressed in regard to the rule stated in the first sentence of the article to the effect that, if within a specified period of days from the date of receipt by the respondent of the claimant's notice of arbitration, the parties had not agreed that there shall be only one arbitrator, three arbitrators shall be appointed. One view was that in these circumstances one arbitrator should be appointed. This view was supported by the argument that the arbitration proceedings would thereby be rendered less expensive than would be the case with three arbitrators. As against this, it was stated that it was the commonly accepted practice in international commercial arbitration to have a tribunal with three arbitrators. Further, in a major arbitration involving a substantial sum of money, the presence of three arbitrators was necessary to ensure that the tribunal possessed a sufficient degree of competence and expertise. It was also observed that, where the tribunal was composed of three arbitrators, each of the two party-nominated arbitrators, who was usually of the same nationality as the party nominating him, brought to the tribunal a special knowledge of the commercial law and practice of the country to which the party who nominated him belonged. This was of great benefit to the presiding arbitrator.

40. It was also suggested that, while the tribunal should be composed of three arbitrators where a substantial sum of money was at stake in the arbitration, it might be desirable for the article to provide for one arbitrator where the sum involved was comparatively small. However, it was noted that there might be cases where, although the sum involved was comparactively small, an important principle was in issue, which made a tribunal composed of three arbitrators desirable.

41. There was general agreement that the period of eight days, tentatively proposed in the article, within which parties had to agree whether there should be only one arbitrator, was too short and should be extended.

42. The suggestion was also made that, even if the rule were to be that the tribunal was to consist of three arbitrators where the parties failed to agree within the stipulated time on one arbitrator, provision should be made in the article to enable the parties to agree at a later stage to a tribunal consisting of only one arbitrator.

## Article 6 d/

"1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties.

| Non-administered | Administered |
| --- | --- |
| 2. The parties shall endeavour to reach agreement on the choice of the sole arbitrator. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator. | "2A. The arbitral institution shall invite the parties to agree on the choice of the sole arbitrator. |
| "If within 15 days of the receipt by the respondent of the claimant's proposal, the parties have not agreed on the choice of the sole arbitrator and if the parties have not previously agreed on an appointing authority, the claimant may, by telegram or telex, propose the names of one or more third parties, one of whom would serve as appointing authority. | "If within 15 days of the receipt of such invitation by both parties, the arbitral institution has not received a communication evidencing agreement by the parties on the choice of the sole arbitrator, the arbitral institution shall serve as appointing authority." |
| "If within 15 days of the receipt of the last-mentioned proposal the parties do not agree on the designation of an appointing authority, the claimant may apply to: | |
| "(a) an appointing authority designated pursuant to United Nations General Assembly resolution ... (...) by the Government of the country where the respondent has his principal place of business (siège réel) or habitual residence, or, | |

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d/ Article 6 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 2A and 3A in the column dealing with "administered" arbitration were not considered.

Non-administered

"(b) an arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators, or,

"(c) the appointing authority designated by the Secretary-General of the Permanent Court of Arbitration at the Hague.

"2 bis. If the appointing authority selected pursuant to para. 2 above agrees to function as such, the claimant shall send a copy of his notice of arbitration (article 3) to the appointing authority, together with a copy of the contract out of which the dispute arises and a copy of the arbitration agreement if it is not contained in that contract.

"3. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

- the appointing authority shall communicate to both parties an identical list containing at least three names;

- within 15 days after the receipt of this list, each party may indicate to the appointing authority his order of preference or objections regarding the names on the list;

- after the expiration of the above period, the appointing authority shall appoint the sole arbitrator from among the names on the list transmitted to the parties, taking into account, as far as possible, any preferences and objections that may have been stated by the parties."

Administered

"3A. The arbitral institution shall appoint the sole arbitrator according to the following list-procedure:

- the arbitral institution shall communicate to both parties an identical list containing at least three names;

- within 15 days after the receipt of this list, each party may indicate to the arbitral institution his order of preference or objections regarding the names on the list;

- after the expiration of the above period, the arbitral institution shall appoint the sole arbitrator from among the names on the list transmitted to the parties taking into account, as far as possible, any preferences and objections that may have been stated by the parties."

## Summary of discussions

### Paragraph 1

43. The Commission considered the requirement under this paragraph that, in cases where "a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties".

44. The view was expressed that the rule in its present wording appeared to be of a mandatory nature. Thus, even if both parties desired to have as the sole arbitrator a person having the nationality of one of the parties, this would not be permissible. It was stated that such a result was unsatisfactory, since it militated against the principle of the autonomy of the parties to appoint an arbitrator of their choice. It might also have the result that the most competent person to serve as arbitrator might be excluded from appointment. It was therefore suggested that this restriction regarding nationality should be eliminated. An alternative suggestion was that it should be eliminated where the appointment was by agreement of parties, but should be retained where the appointment was by an appointing authority.

45. It was observed, however, that the interpretation set forth in paragraph 44 above was of doubtful validity. For if both parties agreed to the appointment of an arbitrator of the nationality of one of the parties, it followed that the parties had exercised the power given to them under article 1, paragraph 1, to modify the rule contained in article 6, paragraph 1. The appointment would therefore be valid.

46. It was noted, however, that the interrelation between this paragraph and article 1, paragraph 1, as set forth in paragraph 45 above was not self-evident and might need to be clearly expressed. It was not clear, for instance, whether a modification by implication, such as by the mere selection of an arbitrator of the same nationality as that of one of the parties, would suffice to make article 1, paragraph 1, applicable. Clarification on this issue was therefore desirable. Such clarification might either take the form of a suitable modification to the text of the paragraph, or of an appropriate statement to be inserted in the commentary.

47. It was stated by some representatives that the object of the requirement that the sole arbitrator be of a nationality other than that of the parties appeared to be to secure his independence and impartiality in the performance of his duties. If this was the object of the provision, it was suggested that it might be achieved more directly by specifying in this article that these criteria should be applied when making an appointment, rather than by the indirect method of specifying the requirement of a different nationality.

48. It was further observed that a provision which required for its application a determination as to the nationality of the parties might cause serious difficulties where one or both of the parties was a firm, corporation, or enterprise. Such a determination would have to be made in accordance with the rules of the applicable system of the conflict of laws, and such systems did not have identical rules on this matter. It was therefore suggested that this was an additional reason for seeking to eliminate the criterion of nationality from the rule contained in the paragraph.

Paragraph 2

49. It was stated that the first two subparagraphs of this paragraph in some cases required that two consecutive steps be taken by the parties in order to secure the appointment of a sole arbitrator. Under the first subparagraph, the parties were to endeavour to reach agreement on the choice of a sole arbitrator. If this endeavour failed, under the second subparagraph, the parties were to endeavour to reach agreement on the choice of an appointing authority, who would then, under paragraph 3, appoint the sole arbitrator. The view was expressed that the requirement under the second subparagraph that the parties should endeavour to reach agreement on the choice of an appointing authority was unnecessary; for if the parties could not agree on the choice of a sole arbitrator, it was very unlikely that they would be able to agree on the choice of an appointing authority. It was therefore suggested that the provision for the choice of an appointing authority be deleted.

50. The view was also expressed that, in relation to the two consecutive steps in regard to choice which the parties might have to take under this paragraph, the mandatory allocation of 15 days for making each choice should be modified. It was suggested that a composite period of 30 days should be granted within which the parties would be free to make their choice. The observation was also made that, even if the allocation of separate time periods were maintained, the period of 15 days was too short and should be extended.

51. Points (a), (b) and (c) of the third subparagraph specify three appointing authorities where the parties fail to reach agreement under the previous provisions on the choice of a sole arbitrator or the choice of an appointing authority. The views expressed on this issue are set forth in section A above under the heading "Appointing authority" (paras. 10-14).

Paragraph 2 bis

52. There was general agreement in respect of the provisions of this paragraph.

Paragraph 3

53. The view was expressed that, where the appointment of a sole arbitrator was to be made by an appointing authority, the list-procedure prescribed in this paragraph was undesirable. The appointing authority should be left free to make a direct appointment, and thereby avoid the delay necessarily arising from the list-procedure; such an appointment would also be in conformity with the will of the parties, who had left the choice of the sole arbitrator to the appointing authority.

54. As against this, it was noted that the list-procedure should be maintained since it served a useful purpose. Experience in the use of the list-procedure had shown that it often demonstrated that there was a great measure of agreement between the parties as to the most suitable persons appearing on the list, one of whom was to serve as the sole arbitrator. Thus the list-procedure enabled the appointing authority to appoint the sole arbitrator as closely as possible in accordance with the wishes of the parties.

"Appointment of three arbitrators

Article 7 e/

"1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal.

"2. The presiding arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

"3. If within 15 days after receipt of the claimant's notice appointing an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, and if the parties have not previously agreed on an appointing authority, the claimant may propose, by telegram or telex, the names of one or more third persons, one of whom would serve as appointing authority.

"If within 15 days after receipt of such proposal the parties agree on the designation of an appointing authority, that appointing authority will appoint the second arbitrator. The appointing authority may determine the method for appointing the second arbitrator.

"4. If within the above 15 days the parties do not agree on the designation of the appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the second arbitrator.

Administered

"3. The arbitral institution shall invite each party to appoint an arbitrator and to notify, by telegram or telex, both the other party and the arbitral institution of such appointment within 15 days after receipt of the invitation.

"4A. If within the above 15 days the respondent has not notified the arbitral institution of the name of the arbitrator he appoints, the institution shall appoint the second arbitrator.

"The arbitral institution may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.

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e/ Article 6 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by most representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 3A, 4A and 6A in the column dealing with "administered" arbitration were not considered.

| Non-administered | Administered |
| --- | --- |
| "4. The appointing authority may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties. | |
| "5. If within 15 days after the appointment of the second arbitrator, the two arbitrators appointed in accordance with the foregoing procedures have not agreed on the choice of the presiding arbitrator, the parties shall endeavour to agree on the designation of the presiding arbitrator. | |
| "6. The claimant shall, by telegram or telex, communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. | "6A. The claimant shall, by telegram or telex, communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator. |
| "If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator and if the parties have not previously agreed on an appointing authority, each of the parties may, by telex or telegram, propose the names of one or more third persons, one of whom would serve as the appointing authority. | "If within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator, the arbitral institution, on request by either party, shall appoint the presiding arbitrator. |
| "7. If, within 15 days after receipt of such proposal, the parties agree on the designation of an appointing authority, that appointing authority will appoint the presiding arbitrator. | "7A. The arbitral institution shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, para. 3. |
| "If, within the above 15 days the parties do not reach agreement on the designation of an appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the presiding arbitrator. The appointing authority mentioned in this paragraph shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, para. 3." | |

Summary of discussion

Paragraph 1

55. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 2

56. The Commission considered the rule contained in this paragraph which specified that the presiding arbitrator shall be of a nationality other than the nationality of the parties. It was agreed that the relevant considerations on this issue corresponded to those arising out of the requirement in article 6, paragraph 1, that a sole arbitrator should be of a nationality other than the nationality of the parties. An account of the consideration of article 6, paragraph 1, is set forth in paragraphs 43 to 48 above.

57. It was suggested that the rule may be modified to permit the appointment of a presiding arbitrator of the nationality of one of the parties in cases where the parties agreed in writing to such an appointment.

Paragraph 3

58. The rules contained in this paragraph generally correspond to the rules contained in the first two subparagraphs of article 6, paragraph 2. It was agreed that the issues raised by this paragraph likewise corresponded to those raised by the aforementioned subparagraphs of article 6, paragraph 2. An account of the consideration of article 6, paragraph 2, is set forth in paragraphs 49 to 51 above.

Paragraph 4

59. This paragraph, made operative, in the circumstances mentioned therein, the provisions of article 6, paragraph 2 (a), (b) and (c). An account of the consideration of those provisions is set forth in section A above, under the heading "Appointing authority" (paras. 10 to 14). There was general agreement that the concluding subparagraph of this paragraph was acceptable.

Paragraph 5

60. It was observed that under this paragraph, the parties are permitted to endeavour to agree on the designation of the presiding arbitrator only after the two arbitrators appointed in accordance with the procedures laid down in the article had failed to reach agreement on such a designation. It was stated that it would be preferable if the paragraph were to provide that in the first instance the parties should endeavour to reach agreement on the designation of a presiding arbitrator; only if the parties could not so agree shall the designation be made by the two arbitrators appointed pursuant to this article.

Paragraph 6

61. It was noted that the provisions of subparagraph 1 of this paragraph corresponded to those of the second sentence of subparagraph one of article 6, paragraph 2, and that the provisions contained in subparagraph 2 of this paragraph corresponded to the provisions of subparagraph 2 of article 6, paragraph 2. It was agreed that the issues raised by this paragraph accordingly corresponded to those raised by the latter provision. An account of the consideration of article 6, paragraph 2 is set forth at paragraphs 34-36 above.

Paragraph 7

62. There was no objection to the acceptance of the provisions of subparagraph 1 of this paragraph.

63. It was noted that the first sentence of subparagraph 2 of this paragraph made operative, in the circumstances mentioned therein, the provisions of article 6, paragraph 2 (a), (b) and (c). An account of the consideration of those provisions is set forth in section A above, under the heading "Appointing authority" (paras. 10 to 14).

64. It was noted that the first sentence of subparagraph 2 of this paragraph made the provisions of article 6, paragraph 3 applicable to the cases coming within the ambit of this paragraph. An account of the consideration of article 6, paragraph 3, is set forth in paragraphs 38 and 39 above.

## Article 8

"1. Either party may challenge an arbitrator, including an arbitrator nominated directly by a party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

"2. The circumstances mentioned in para. 1 include any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent.

"3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed, shall disclose any such circumstances to the parties and the arbitral institution unless they have already been informed by him of these circumstances."

## Summary of discussion

Paragraph 1

65. At the commencement of the consideration of this paragraph, a statement was made on behalf of the Secretariat that the text which appeared in document A/CN.9/97 contained certain typographical errors. The text should correctly read as follows:

"1. Either party may challenge an arbitrator, including the arbitrator nominated directly by the other party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence".

66. It was pointed out that the text in its present wording would permit a party to challenge even the arbitrator nominated by him, while the intention was that a party should only be permitted to challenge an arbitrator nominated by the other party.

67. The prevailing view, however, was that a party should be permitted to challenge even the arbitrator nominated by him. For circumstances unknown at the time of the nomination may emerge thereafter revealing that the arbitrator had a bias against the party nominating him, or in favour of the other party. There were valid grounds, therefore, for retaining the text as reproduced in document A/CN.9/97.

68. It was noted that a challenge could be made under this paragraph if circumstances existed that gave rise to justifiable doubts as to the impartiality or independence of any arbitrator, including a party-appointed arbitrator. This implied that it was incumbent on a party-appointed arbitrator to be impartial and independent even in regard to the party who nominated him. Divergent views were expressed on the question as to whether an arbitrator should be required to be impartial and independent in regard to the party who appointed him. On the one hand, it was stated that the imposition of such a duty was desirable. The institution of arbitration would gain greater respect if arbitrators acted with such independence and impartiality. It was further observed that the provision was in accord with the arbitration law of many countries, would be widely acceptable, and would not conflict with the applicable law governing the arbitration. It was also pointed out that, under article 1, paragraph 1, parties were free to waive this requirement by agreement if they chose to do so.

69. As against this, it was noted that it was impractical and unrealistic to impose such an obligation on a party-appointed arbitrator. One reason for this was that such an arbitrator would often depend for his fees on the party who appointed him. It was therefore suggested that the possibility of a challenge on this ground should be restricted to challenge of a presiding arbitrator. Another suggestion was that the grounds for challenge of party-appointed arbitrators should be restricted to the grounds specifically mentioned in paragraph 2 of this article.

Paragraph 2

70. It was noted that this paragraph listed certain specific grounds for challenge which were among the circumstances giving rise to justifiable doubts as to the impartiality or independence of an arbitrator within the meaning of paragraph 1. It was stated that it was unnecessary to make specific mention of these grounds, since they were already included within the general description set forth in paragraph 1. On the other hand, it was argued that specific mention of these grounds served to focus the attention of parties and arbitrators on them and that the provision therefore served a useful purpose.

71. Divergent views were expressed as to the advisability of retaining a "commercial tie with either party or with a party's counsel or agent" as a ground for challenge of an arbitrator. It was observed that businessmen frequently acted as arbitrators, and that they would often have such a commercial tie with one of the parties. If this ground were maintained, many otherwise well-qualified arbitrators would be excluded from appointment. It was therefore suggested that

a commercial tie should be a ground for challenge only where it was likely to result in a lack of independence or impartiality on the part of the arbitrator. However, a contrary view was expressed to the effect that this ground of challenge should be retained as it encouraged the appointment of arbitrators possessing impartiality and independence. In regard to the advisability of retaining a "family tie" as a ground for challenge, it was observed that the closeness of the family tie which would constitute such a ground should be defined. It was also suggested that commercial or family ties of the kind specified in this paragraph should constitute grounds for challenge only in those cases where such ties gave rise to justifiable doubts as to an arbitrator's impartiality or independence. In this connexion, a suggestion was made that the possible grounds for challenge might be divided into two categories: "absolute" grounds for challenge and "relative" grounds for challenge. The former category would only include as grounds for challenge a direct financial or personal interest in the outcome of the dispute on the part of an arbitrator, and certain specified close ties, such as close family ties, between an arbitrator and a party. Proof of these grounds would result automatically in the success of the challenge. The latter category would include other grounds for challenge, such as remote family ties. For a challenge based on these grounds to succeed, it would be necessary to prove not only that they existed, but that they gave rise to justifiable doubts as to the impartiality or independence of an arbitrator.

72. There was wide agreement that any financial or personal interest in the outcome of the arbitration should be a ground for challenge.

73. The question was raised whether it would be desirable to insert in this paragraph an exhaustive list of the grounds for challenge. On the one hand, it was stated that it would be undesirable to have an exhaustive list, as cases falling outside the list might occur which could nevertheless be regarded as justifiable grounds for challenge. On the other hand, it was stated that, if a list were to be included at all, it would serve no useful purpose unless it were exhaustive. It was also observed that, if the paragraph were not intended to contain an exhaustive list of the grounds for challenge, this situation should be clarified.

74. The observation was also made that the specific grounds for challenge mentioned were worded in general terms, and might give rise to difficulties of interpretation.

Paragraph 3

75. It was noted that this paragraph imposed a duty of disclosure at two stages. At the first stage, a prospective arbitrator was bound to disclose to those who approached him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Once appointed, an arbitrator was also bound to disclose such circumstances to the parties and the arbitral tribunal unless they had already been previously informed by him of such circumstances. It was observed that it was only necessary to impose an obligation of disclosure on an arbitrator who was appointed, and that an obligation of disclosure prior to appointment might be considered unnecessary.

76. It was also suggested that the duty of disclosure at the second stage might be intended to apply to cases where, after the appointment of an arbitrator, circumstances arose giving rise to justifiable doubts as to his impartiality or independence. Such circumstances could not have been disclosed at the stage when he was first approached with regard to his possible appointment.

The article considered as a whole

77. It was noted that the question of challenge of arbitrators would ultimately be

regulated by the provisions of the applicable municipal law. It might therefore be desirable to insert a provision in the text of the article, or a statement in the commentary. drawing the attention of the parties to this fact.

## Article 9

"1. The challenge of an arbitrator shall be made within 15 days after his appointment has been communicated to the challenging party or, if the circumstances mentioned in article 8 became known to such party at a later time, within 15 days after such time.

"2. The challenge shall be made by written notice to both the other party and the arbitrator and shall state the reasons for the challeng

"3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment."

## Summary of discussions

### Paragraph 1

78. It was noted that it was undesirable to set time-limits within which a challenge to an arbitrator should be made. The time within which a challenge should be made would be determined by the applicable municipal law and, under the arbitration laws of many countries, a challenge was permissible at any stage of the hearing. For this reason, it was suggested that paragraph 1 might be deleted.

79. On the other hand, it was suggested that a challenge could be made before arbitral proceedings commenced and therefore before the applicable law began to govern such proceedings. The objection noted above would therefore not be relevant to the setting of time-limits for challenges which may be made prior to the commencement of the arbitral proceedings. Furthermore, it was observed that it was reasonable to permit parties to enter into contractual agreements concerning the time-limits for challenging arbitrators.

### Paragraph 2

80. It was suggested that it was undesirable to specify that the challenge had to be made in writing. It should be open to the parties to make a challenge in any form. On the other hand, it was stated that it was desirable to maintain the requirement of writing, which introduced an element of formality to the making of the challenge, since a challenge was a matter of importance having serious consequences both for the arbitrator challenged and for the party nominating him.

### Paragraph 3

81. There was general agreement that the provisions of this paragraph were acceptable.

### The article considered as a whole

82. It was observed that, as was the case with article 8, the questions regulated by this article would ultimately be regulated by the applicable municipal law.

It might therefore be desirable to insert a provision in the text of the article itself, or a statement in the commentary, drawing the attention of the parties to this fact.

## Article 10 f/

"1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the arbitral institution or appointing authority that made the initial appointment shall decide whether the challenge is justified.

"2. If the initial appointment was not made by an arbitral institution or appointing authority, the decision on the challenge will be made:

| Non-administered | Administered |
|---|---|
| by an appointing authority to be agreed upon by the parties, if they have not previously agreed on such an authority. If the parties do not promptly agree on an appointing authority, the challenging party in accordance with the provisions of article 6, paragraph 2, may request any one of the appointing authorities mentioned in that article, to decide on the challenge. | by the arbitral institution that administers the arbitration. |

"3. The decision of the arbitral institution or appointing authority concerning the challenge is final. If the decision sustains the challenge, a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment."

## Summary of discussions

### Paragraph 1

83. It was observed that, under this paragraph, a decision as to whether a challenge of an arbitrator was justified was to be made by the very institution or appointing authority that had appointed the arbitrator. It was suggested that this was undesirable, since the institution or appointing authority might be reluctant to uphold a challenge to its own appointee. It would therefore be preferable if the decision were taken by an independent authority.

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f/ Article 10 contains parallel columns in relation to paragraph 2, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by most representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraph 2, in so far as it dealt with "administered" arbitration, was not considered.

84. However, it was stated in reply that experience had shown that arbitral institutions and appointing authorities acted with complete impartiality when one of their appointees was challenged. Such institutions and appointing authorities were deeply concerned with preserving their reputation for integrity and, in fact, upheld a challenge whenever it was justified.

85. On the assumption that it was desirable that an independent authority should decide on the challenge, the question was considered as to the possible identity of such an authority. One possibility was that the other two members of the arbitral tribunal should decide the question. But it was noted that this might not lead to any decision, as these members might not agree. It was therefore suggested that the rules should provide that the court of first instance established at the place where the arbitration was being held should decide on a challenge. It was observed that, under many legal systems, this court would possess the necessary jurisdiction and competence. It was further suggested that provision should be made that the president of the chamber of commerce at the place of arbitration should make the decision where this court did not possess the necessary jurisdiction and competence.

Paragraph 2

86. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 3

87. It was observed that the decision of the arbitral institution or appointing authority concerning the challenge could be subject to review by a judicial tribunal, which would decide the question in accordance with the applicable municipal law. It was possible that the statement, in the first sentence of this paragraph, that the decision of the arbitral institution or appointing authority was final might mislead the parties by making them believe that judicial review was excluded. It was suggested, therefore, that the attention of the parties might be drawn in some form to the possibility of judicial review.

88. It was stated, however, that it was clear from the context in which the word "final" appeared in this paragraph that the word only referred to finality of decision within the framework of the arbitral proceedings, and that no special provision drawing attention to the possibility of judicial review was therefore necessary.

## Article 11

"1. In the event of the death, incapacity or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed pursuant to the procedures that were applicable to the initial appointment.

"2. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings shall be repeated at the discretion of the arbitral tribunal."

## Summary of discussion

### Paragraph 1

89. The reference in this paragraph to the "resignation" of an arbitrator was examined. It was pointed out that this term might not be sufficiently wide to cover certain situations which might arise in relation to the conduct of an arbitrator. One such situation arose where an arbitrator did not formally resign, but simply ceased to attend the arbitral hearings, or otherwise ceased to participate in the arbitral proceedings. It was suggested that an appropriate provision should be added for a presumption of resignation in such cases. Alternatively it was suggested that the phrase "failure to act" might be added to cover this situation and that such failure should entail the appointment of a substitute arbitrator under this paragraph. It was also suggested that a provision be inserted to the effect that, where an arbitrator resigns or ceases to act, he must give his reasons for such action.

90. It was pointed out that the article did not specify who would decide whether an arbitrator was subject to incapacity. One possibility would be for the other members of a three-member arbitral tribunal to decide this question. However, this may not lead to any decision since these members might not agree. Further, if there were only one arbitrator, this solution would not be practicable.

91. In the context of the discussion referred to in paragraph 90 above, it was pointed out that the present paragraph 1 of article 11 only dealt with the procedure to be followed in the event of the death, incapacity or resignation of an arbitrator, and not with questions concerning the definition of "incapacity" or "resignation". It was suggested that the advisability of adding provisions dealing with these latter questions might be considered.

### Paragraph 2

92. The rule stated in the first sentence of this paragraph to the effect that, if a sole or presiding arbitrator is replaced, any hearings previously held shall be repeated, was considered. The view was expressed that, if a verbatim record had been kept of those hearings, there should be no rehearing, since it was unnecessary and would only add to the cost of the arbitral proceedings. It was pointed out, however, that, while in most cases a rehearing in these circumstances was not desirable, cases might occur in which the sole or presiding arbitrator had made an inspection, or done some other act not fully reflected in the verbatim record. In such cases, a rehearing would be necessary. It was also suggested that, where the arbitral tribunal consisted of a sole arbitrator, a decision as to the holding of a rehearing should be made by the new sole arbitrator.

93. On the other hand, the view was expressed that, where a sole or presiding arbitrator was replaced, a rehearing should be held in all cases. Such a rehearing was necessary because of the crucial part to be played by such an arbitrator in the arbitral proceedings. It was necessary, therefore, that the new sole or presiding arbitrator should rehear any oral evidence or arguments that had been presented prior to this appointment.

94. Where an arbitrator other than the presiding arbitrator was replaced, it was suggested that there was no imperative need for a rehearing. It was therefore suggested that the word "shall" in the second sentence of this paragraph might be replaced by the word "may". It was further suggested that, where a party-appointed arbitrator was replaced, the decision as to a rehearing should be made by those members of the arbitral tribunal who had participated in the prior hearings. However, the view was also expressed that, where a party-appointed arbitrator was replaced by another party-appointed arbitrator, any hearings held prior to the replacement should always be repeated, unless the party making the replacement agreed to, and the arbitral tribunal decided to, dispense with the repetition of such prior hearings.

## Article 12

"1. The time-limits set forth in Section II for the appointment of arbitrators may at any time be extended by agreement of the parties. If the arbitration is administered by an arbitral institution, such time-limits may also be extended by that institution on its own initiative.

"2. Where names for the appointment of arbitrators are proposed either by the parties or by an appointing authority, including an arbitral institution serving as appointing authority, full names and addresses shall be given, accompanied, as far as possible, by a description of their qualifications for appointment as arbitrators."

## Summary of discussion

### Paragraph 1

95. There was general agreement that the first sentence of this paragraph was acceptable. It was noted that, if "administered" arbitration were excluded from the scope of the rules, the second sentence of this paragraph could be deleted.

### Paragraph 2

96. It was observed that, if the principle, which was at present set forth in articles 6, paragraph 1, and 7, paragraph 2, that a sole or presiding arbitrator shall be of a nationality other than that of the parties, were retained, proposals of names of persons under this paragraph to serve as sole or presiding arbitrators should conform to that principle.

## Article 13

"1. Subject to these Rules, the arbitrators may conduct the arbitration in such a manner as they consider appropriate, provided that the parties are treated with absolute equality.

"2. The arbitrators may decide that the proceedings shall be conducted solely on the basis of documents and other written materials, unless both parties agree that oral arguments shall be presented.

"3. Oral hearings must be held if one of the parties offers to produce evidence by witnesses /unless the arbitrators unanimously decide that such proposed evidence is irrelevant/.

"4. All documents or information supplied to the arbitrators by one party shall be communicated by that party at the same time to the other party."

## Summary of discussion

### Paragraph 1

97. Different views were expressed as to the desirability of the rule, stated in paragraph 2, that the arbitrators may conduct the proceedings in such a manner as they consider appropriate. On the one hand, some representatives observed that this rule infringed the principle of party autonomy; the parties should be given the power to regulate the conduct of the arbitral proceedings, and the arbitrators should regulate the proceedings only in cases where the parties failed to do so. On the other hand, most representatives stated that the present rule giving the arbitrators the power to regulate the conduct of the proceedings was preferable and should be retained.

98. It was noted that the paragraph required the arbitrators to treat both parties with "absolute equality". The view was expressed that the meaning of this requirement should be clarified. A statement was made on behalf of the Secretariat that examples of equal treatment would be the giving to each party of an equal opportunity to present his case and the ensuring that copies of documents sent by one party to the arbitrators were also sent to the other party at or about the same time. It was not possible, however, to given an exhaustive list of examples illustrating the operation of the principle of "absolute equality". In this connexion, it was observed that the adjective "absolute" was unnecessary and should be deleted; however, the view was also expressed that it should be retained.

99. In this context, the comment was made that what was important was not the imposition of an obligation to observe the principle of equal treatment, since in certain circumstances (such as when the parties made conflicting requests to an arbitral tribunal) such treatment was impossible; the real need was to stress that both parties should receive fair treatment. It was suggested, however, that the best course might be to modify the paragraph so as to impose an obligation on the arbitrators to treat the parties both with equality and with fairness.

### Paragraph 2

100. There was wide agreement that the provisions of this paragraph were too restrictive in giving arbitrators the option to decide that the proceedings shall be conducted solely on the basis of documents or other written material, unless both parties agreed that oral arguments were to be presented. It was observed that the arbitrators should be obliged to hear oral arguments even if requested to do so by only one of the parties. It was also suggested that the paragraph should be broadened to permit arbitrators to decide that proceedings should be conducted on the basis of documents and other written materials coupled with the inspection of goods.

Paragraph 3

101. There was wide agreement that this paragraph should be redrafted so as to state that the arbitrators should as a rule hold oral hearings for the presentation of evidence. It was observed that an oral hearing should be obligatory if either party requested it.

102. There was some support for the retention of the concluding words of this paragraph, which were placed within square brackets. It was argued by those favouring retention that the power given to the arbitrators by those words to exclude evidence which they considered irrelevant was necessary for the expeditious conduct of the proceedings.

Paragraphs 2 and 3 considered together

103. It was observed that the provisions of paragraphs 2 and 3 were closely connected, but that the exact interrelationship between them was not sufficiently clear. In this context, it was noted that the interrelationship of those provisions had been discussed at the Fifth International Arbitration Congress, held at New Delhi from 7 to 10 January 1975, and that a new text to replace both paragraphs 2 and 3 had been proposed. That text, which is reproduced in document A/CN.9/97/Add.2, paragraph 16, read as follows:

> "If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses or for oral argument. In the absence of such a request, the arbitrators may decide whether the proceedings shall be conducted solely on the basis of documents and other written materials."

Some representatives considered that this provision was acceptable and could replace both paragraphs 2 and 3 of article 13.

Paragraph 4

104. It was suggested that the objective of this paragraph might be better achieved by modifying it to require that documents or information supplied by one party to the arbitrators should not be acted upon by the arbitrators unless they had also been communicated to the other party.

## Article 14

"1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators.

"2. If the parties have agreed upon the place of arbitration, the arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties.

"3. The arbitrators may decide to hear witnesses, or to hold interim meetings for consultation among themselves, at any place they deem convenient.

"4. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspections."

## Summary of discussion

### Paragraph 1

105. It was observed by some representatives that the paragraph in its present wording gave the arbitrators an unfettered discretion to decide on the place of arbitration in the absence of agreement by the parties on this point. It was suggested that such a discretion was undesirable; it should be controlled by inserting into the text relevant considerations which the arbitrators would be bound to take into account in deciding on the place of arbitration. However, the present wording of the paragraph was acceptable to most representatives.

106. The Secretariat drew the attention of the Commission to two suggestions for the improvement of this paragraph, which had been made at the Fifth International Arbitration Congress. The first was that the term "place of arbitration" should be replaced by the term "seat of arbitration". The second was that the paragraph should be modified so as to require the arbitrators to determine the seat of arbitration at the commencement of the arbitration proceedings. The Commission took note of these suggestions.

### Paragraph 2

107. It was suggested by some representatives that this paragraph should be deleted as being superfluous, since the arbitrators would in any event have the power granted to them by this paragraph.

### Paragraph 3

108. It was observed that, in cases where the parties had agreed on the place of arbitration, the power given by this paragraph to the arbitrators to hold hearings or interim meetings "at any place they deem convenient" was undesirable. Holding such hearings and interim meetings at places other than the place of arbitration agreed on by the parties would increase the costs of the arbitration. On the other hand, it was stated in reply that such hearings or interim meetings might be necessary in certain circumstances, such as when witnesses refused to come

to the place of arbitration, or where goods or sites to be inspected were at some other location. It was also observed that any such hearings or interim meetings would only be held by arbitrators in the interests of the parties, and that a provision such as the one contained in this paragraph was therefore desirable.

Paragraph 4

109. There was general agreement that the provisions of this paragraph were acceptable.

The article considered as a whole

110. It was suggested that a provision might be added to the article which could enable the parties to indicate the place where the award should be delivered.

## Article 15

"1. Subject to any provision that has been made by the parties in their agreement, the arbitrators, promptly upon their appointment, shall determine the language or languages to be used in the proceedings. This determination shall apply to any written notice or statement, and, if hearings should take place, to the language(s) to be used in such hearings.

"2. Arbitrators may order that documents, delivered in their original language, shall be accompanied by a translation into the language(s) determined by the parties or the arbitrators."

## Summary of discussion

Paragraph 1

111. It was observed that this paragraph gave complete freedom to the arbitrators to determine the language or languages to be used in the arbitral proceedings. It was suggested that the granting of such complete freedom was unnecessary. For, if the parties had not expressly agreed on a language to be used, either the language of the contract or the language used in correspondence between the parties should be used in the arbitral proceedings. These languages could be considered to have been impliedly chosen by the parties.

112. On the other hand, it was stated in reply that any rigid rule as to the language to be used could cause difficulties in an international arbitration. Thus one or more of the arbitrators might not understand the language of the contract or the language used in the correspondence between the parties. It may sometimes be necessary to use two languages, for example, where the three arbitrators did not all possess sufficient knowledge of a single language which could be used in the arbitral proceedings.

113. In this context, it was suggested that the difficulties which had been referred to as arising from the choice of language by the arbitrators might be reduced if a provision were added that the arbitrators should arrange for the translation of documents and for interpretation at the hearing so that parties and arbitrators would understand the proceedings.

Paragraph 2

114. The Secretariat brought to the notice of the Commission a suggestion made at the Fifth International Arbitration Congress that the words "determined by the parties or arbitrators" appearing at the end of the paragraph should be replaced by the words "agreed on by the parties or determined by the arbitrators". The object of the suggested amendment was to give effect in more exact language to an agreement between the parties on the issue in question. The Commission took note of this suggestion.

The article considered as a whole

115. It was noted that there was a close connexion between the subject-matter of this article and that of article 13. It was therefore suggested that the amalgamation of the provisions of the two articles into a single article should be considered.

## Article 16

"1. Within a period to be determined by the arbitrators, the claimant shall send his written statement of claim to each of the arbitrators and to the respondent. All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

"2. The statement of claim shall include the following particulars:

"(a) the names and addresses of the parties;

"(b) a full statement of the facts and a summary of the evidence supporting these facts;

"(c) the points at issue;

"(d) the relief or remedy sought.

"3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered provided the respondent is given an opportunity to express his opinion concerning the change."

## Summary of discussion

Paragraph 1

116. It was noted that this paragraph required the claimant to annex to his statement of claim "all relevant documents". It was argued that this requirement should be omitted, since it was impossible for a claimant to determine at such an early stage of the arbitral proceedings what would be all the relevant documents; for example, the relevance of certain documents would depend on the position taken by the respondent in his defence. It was therefore suggested that the claimant should only

be required to annex the documents on which he relied to support his claim; however, the arbitrators should be empowered to require the submission to them of all documents relevant to the points at issue after these points had been clarified at a later stage of the arbitral proceedings. Another suggestion was that the reference to "all relevant documents" be deleted from this paragraph, and that at the same time a new subparagraph (e), as set forth below, be added to paragraph 2 of the article:

"(e) a reference to documents which the claimant will present or will offer to present."

117. It was stated in reply, however, that the need to reduce costs and the expeditious conduct of arbitral proceedings, both called for disclosure at an early stage. It was therefore advisable to retain this requirement.

118. During the consideration of the scope of article 1, paragraph 1, it had been suggested that the word "contract" appearing in that article should be replaced by a phrase such as "defined legal relationship". If this modification to article 1, paragraph 1, were adopted, it was observed that the reference in this paragraph to the need to annex "a copy of the contract" might have to be altered, so that the description of the documents to be annexed would accord with the modification to article 1, paragraph 1.

Paragraph 2

119. It was observed that the requirement imposed by subparagraph (b) that the statement should include "a full statement of the facts and a summary of the evidence supporting those facts" was too stringent. It was suggested that it was only necessary to require the inclusion of a statement of the relevant facts or a statement of the facts supporting the claim. The reasons adduced in favour of this suggestion corresponded to those set forth in paragraph 116 above in relation to the requirement in paragraph 1 that "all relevant documents" needed to be annexed. The arguments in reply corresponded to those set forth in paragraph 117 above.

120. In relation to the requirement imposed by subparagraph (c) that the statement should include "the points at issue", it was observed that those might not emerge until the respondent had stated his defence to the claim and that, therefore, it might be impractical to impose this requirement. It was suggested that the claimant should instead be required to state his submissions as to what in his view were the points at issue.

121. In relation to the requirement set forth in subparagraph (d) that the statement of claim should include "the relief or remedy sought", it was stated that it would be desirable to require the inclusion of a reference to a claim for interest, whenever such a claim was made.

122. It was pointed out that one method by which the difficulties referred to in paragraphs 119 and 120 might be resolved would be to make the requirement that the particulars described in subparagraphs (b) and (c) be included in the statement of claim optional and not mandatory; thus the subparagraphs might be amended to require such particulars to be stated where they were known, or when it was possible to do so.

Paragraph 3

123. It was stated on behalf of the Secretariat that the words "to express his opinion concerning the change" appearing at the end of the paragraph should be replaced by the words "to exercise his right of defence respecting the change".

124. There was an extended consideration of this paragraph, and the observations made in the course of the discussion are grouped under the following headings:

(a) Extent of freedom to be accorded to the claimant to supplement or alter his claim

125. It was noted that under this paragraph the claimant could supplement or alter his claim only with the permission of the arbitrators. The view was expressed that this restriction was unjustified, and that he should be free to supplement or alter his claim whenever he so desired. It was noted that, as it was in the interest of the claimant that the arbitration proceed expeditiously, he would in all likelihood exercise his right to supplement or amend his claim sparingly, and only when it was clearly necessary to do so.

126. It was stated in reply, however, that some control over the power of the claimant in this regard was desirable, and that the arbitrators were the most suitable persons to exercise such control. The claimant should be prevented from misusing this power with a view to obstructing the course of the arbitral proceedings, either by making frequent changes in his position as set out in the statement of claim, or by making frivolous or vexatious amendments. It was therefore argued that the power of the arbitrators to disallow amendments of the claim should be retained.

(b) Meaning of certain terms

127. It was noted that the possible amendments of the claim were described in the paragraph in terms of the claim being "supplemented" or "altered". It was observed that the distinction between these terms was not clear, since a claim which had been "supplemented" might be thought also to have been "altered". It was also pointed out that the term "supplemented" suggested that the claim was in some way being increased, whereas the alteration might consist in a reduction of the claim. It was therefore suggested that the single term "modification" might be employed to embrace both these terms.

128. A statement was made by the Secretariat that the word "supplemented" was intended to denote a minor modification not involving the scope of the claim, while the term "altered" was intended to denote a substantive modification involving the scope of the claim.

129. It was suggested that the desirability of maintaining the present terminology should be reconsidered.

(c) Permissible scope of amendment

130. The question of the permissible scope of an amendment of a claim was considered. The view was expressed that no amendment should be permitted which would introduce a claim falling outside the scope of the arbitration agreement.

131. The question of the possible addition of a new claim, or the amendment of the scope of an existing claim, was also considered. It was noted that, in some circumstances, it might be permissible to allow the claimant to amend the claim as regards certain of its particulars, for example, regarding principal and interest, or amount of damages. Such an amendment would not affect the substance of the claim originally made. It should, however, not be permissible to add a claim falling outside the scope of that originally made, that is, outside the subject-matter of the dispute, or to alter the substance of the claim originally made so that it became in effect a new claim.

(d) The costs occasioned by amendment

132. It was suggested that, where an amendment of a claim resulted in expense to the other party, for example, in that he had to prepare a new defence, the claimant should be required to bear such expense as costs unless the arbitrators decided otherwise.

Relationship of this article with article 3

133. The consideration of this question has been set forth in the account of the deliberations in regard to article 3.

## Article 17

"1. Within a period to be determined by the arbitrators, the respondent shall communicate in writing, a statement of defence to each of the arbitrators and to the claimant.

"2. In his statement of defence, the respondent may make a counter-claim arising out of the same contract. The provisions of article 16 with respect to the claim also apply to the counter-claim."

## Summary of discussion

Paragraph 1

134. It was noted that this paragraph did not describe the particulars that needed to be included in the statement of defence. It was desirable that the statement of defence should not be a very brief one, but should include some or all of the particulars required by article 16, paragraph 2, to be included in the statement of claim. It was suggested that, if this objective were sought to be achieved through the second sentence of paragraph 2 of this article, making the provisions of article 16, paragraph 2, applicable to the statement of defence, this might be further clarified by an appropriate modification of the paragraph.

Paragraph 2

135. It was observed that the first sentence of this paragraph was open to the construction that a counter-claim could only be made in the statement of defence, and not at a later stage. It was suggested that a limitation of this kind was

undesirable, and that the language should be modified to make it clear that, in appropriate circumstances, a counter-claim could be made even after the statement of defence had been communicated.

136. It was also observed that the counter-claim had to fall within the scope of the arbitration agreement under which the claim was made. The case was considered where there was a series of separate contracts arising out of the same transaction between the same parties, each of which contained an arbitral clause in identical terms. If a claim were made under one of those contracts by a party, the question was raised whether it would be permissible to regard a claim made at or about the same time by the other party under a separate contract in the series as a counter-claim in terms of this paragraph. It was suggested that provision should be made permitting such a claim to be regarded as a counter-claim and, to achieve this purpose, the words "same contract" might be replaced by the words "same transaction".

137. A statement was made on behalf of the Secretariat that it was not intended that a claim of the type referred to in paragraph 136 was to be regarded as a counter-claim. It was pointed out by the Secretariat, however, that it would be normal arbitral practice in such a case to consolidate the hearings of the two claims. In this context, it was observed that it would be desirable that the Rules should contain provisions relating to the consolidation of hearings in appropriate cases.

138. It was observed that the same principles which would apply to regulate the amendment of claim should also apply to regulate the amendment of a counter-claim. The consideration of the questions relating to the amendment of the claim is set forth above in the account of the deliberations in regard to article 16.

139. It was noted that the paragraph referred only to a counter-claim by the respondent, but not to a plea of set-off raised by him. It was suggested that the wording of the paragraph should be modified to include both concepts.

140. During the consideration of the scope of article 1, paragraph 1, it had been suggested that the word "contract" should be replaced by a phrase such as "defined legal relationship". If this modification were adopted, it was observed that the reference in the paragraph to "the same contract" might need to be replaced by a reference to the new phrase. It was also suggested that the addition to article 17 of the formulation used in article 16 of the Convention on the Limitation Period in the International Sale of Goods might be considered.

## Article 18

"1. The arbitrators shall be the judges of their own competence and shall rule on objections that the dispute is not within their jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

"2. An objection to the competence of the arbitrators shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. Where delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible.

"3. The arbitrators may rule on such an objection as a preliminary question or they may proceed with the arbitration and rule on such objection in their final award.

"4. The arbitrators have jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part."

## Summary of discussion

### Paragraph 1

141. The view was expressed that the rule as now stated in paragraph 1 could mislead parties, because questions as to the competence and jurisdiction of arbitrators were ultimately a matter for the courts to settle in accordance with the lex fori. Since the rule in its present wording might thus mislead the parties and might even be in conflict with some national laws, it was suggested by some representatives that the provision should be deleted. Similar objections were raised as to the power which paragraph 1 granted to the arbitrators to rule on "objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement".

142. The prevailing view, however, was that the rule as set forth in paragraph 1 corresponded to modern arbitral practice and should be retained, subject to the insertion in the text of the article or in the commentary of a statement drawing the attention of the parties to the fact that the question of the competence and jurisdiction of the arbitrators remained subject to the applicable municipal law. It was also observed that the meaning of the term "competence" appearing in paragraphs 1 and 2 of this article, of the term "jurisdiction" appearing in paragraphs 2 and 4 thereof, and of the phrase "existence or validity of the contract" appearing in paragraph 4 thereof, might need clarification, since the term "competence" might include the others within its meaning.

### Paragraph 2

143. There was general support for the rules set forth in paragraph 2. It was observed however, that provision should be made making it possible in appropriate cases to raise an objection to the competence of the arbitrators later than the statement of defence or the reply to the counter-claim; for example, if the objection were based on newly discovered facts. In this connexion, it was stated that this possibility was probably covered by the second sentence of paragraph 2, according to which the arbitrators might declare a delayed plea of incompetence admissible if the delay in raising the plea were justified under the circumstances.

144. Attention was drawn to the fact that the commentary to paragraph 2 stated that it did not seem necessary for the Rules to deal with objections that the arbitrators had exceeded their terms of reference. It was observed that the reason for such omission might have been the view taken by the authors of the Rules that paragraph 1 of article 18 covered this case. However, this interpretation of paragraph 1 was not self-evident and it was, therefore, suggested that the article should specifically deal with the case where such objections were made.

Paragraph 3

145. Under the present wording of paragraph 3, the arbitrators may rule on pleas regarding competence and jurisdiction as a preliminary question. The view was expressed that the plea regarding jurisdiction should in general be ruled on as a preliminary question, since such a ruling would affect the status of the arbitration itself. Under another view, however, this was a procedural question which should be left for the arbitrators to decide, and the present wording of paragraph 3 should therefore be maintained.

Paragraph 4

146. It was suggested that the provisions of paragraph 4 should be redrafted to make it clear, as stated in the commentary, that the validity of the arbitration clause did not depend on the validity of the contract. Hence, the validity of the arbitration clause would not be affected by a decision by the arbitrators that the contract itself was null and void.

147. The view was also expressed that paragraph 4 should be deleted or should be merged with paragraph 1.

## Article 19

"1. Arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods for presenting such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements.

"2. If a counter-claim is raised in the statement of defence, the arbitrators shall afford the claimant an opportunity to present a written reply to this claim.

"3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period as they shall determine."

## Summary of discussion

Paragraph 1

148. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 2

149. It was suggested that, where a counter-claim was raised in the statement of defence and the claimant replied, the respondent should be given the right to answer (duplique).

Paragraph 3

150. There was general agreement that the provisions of this paragraph were acceptable.

## Article 20

"1. The periods of time allowed by the arbitrators for the communication of written statements should, as a rule, not exceed 30 days.

"2. The parties may agree to extend the various time limits laid down in Section III of the Rules. In the absence of such agreement, the arbitrators shall be entitled to extend the time limits if they conclude that an extension is justified."

## Summary of discussion

151. There was general agrement that the provisions of this article were acceptable. In respect of paragraph 1, however, it was suggested that the time limit of 30 days, within which written statements must be submitted, was too short and should be extended.

## Article 21

"1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice thereof.

"2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitrators and to the other party the names and addresses of the witnesses he intends to call and the language in which such witnesses will give their testimony.

"3. The arbitrators shall make arrangements for interpretation of oral statements made at a hearing and for a stenographic record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case or if the parties have agreed thereto and have notified the arbitrators of such agreement at least 15 days before the hearing.

"4. Hearings shall be held in camera unless the parties agree otherwise. The arbitrators may decide whether persons other than the parties and their counsel or agent may be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated.

"5. Arbitrators shall determine the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary."

Summary of discussion

Paragraph 1

152. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 2

153. It was noted that under this paragraph each party was bound to communicate to the other the names of the witnesses he intended "to call". It was observed that the words "to call" might suggest that the parties had the power to order the issue of compulsory summonses for the appearance of witnesses at a hearing of an arbitral tribunal. It was observed, however, that the parties could not issue such a summons without the assistance of a judicial tribunal, and that for this reason the appropriateness of the words "to call" might be reconsidered.

154. In regard to the question as to whether parties should have the power to issue enforceable summonses, it was suggested that this should be left to be decided by the applicable municipal law.

Paragraph 3

155. There was general agreement that the provisions of the paragraph were acceptable.

Paragraph 4

156. It was noted that the second sentence of this paragraph gave the arbitrators the power to permit persons other than the parties and their counsel or agent to be present at a hearing irrespective of the wishes of the parties. It was stated on behalf of the Secretariat that what was intended was that persons other than the parties and their counsel or agent should be permitted to be present only in exceptional circumstances, and then only with the consent of the parties. There was wide agreement that the language of this sentence should be modified to reflect the intention underlying the drafting of the sentence.

157. It was observed that, at the Fifth International Arbitration Congress, it had been suggested that provision should be made for flexibility in the manner in which evidence was presented at arbitral hearings. It had been suggested that it would often save time and expense if the evidence of witnesses could be presented in the form of written statements. Such written statements could be either sworn or unsworn statements. In this connexion, it had been suggested (A/CN.9/97/Add.2, para. 19) that the following might be added as a new paragraph after paragraph 4: "Evidence of witnesses may also be presented in the form of written statements."

158. It was noted that the last sentence of paragraph 4 gave freedom to the arbitrators to determine the manner in which witnesses were interrogated. It was pointed out that the customary methods of interrogation varied under different legal systems. It was suggested that it would be inadvisable to adopt in the Rules any one of these methods. If the method of interrogation were not mandatorily regulated by the applicable municipal law, the arbitrators should be left free to devise a pragmatic solution which would best serve the needs of the arbitration in question.

Paragraph 5

159. It was noted that, while the second sentence of this paragraph stated that conformity to legal rules of evidence shall not be necessary, this position might be contrary to the applicable municipal law. It was observed in reply that some systems of law gave the arbitrators a discretion as to whether to adopt the legal rules of evidence or not, and that the provision might be given effect under such systems. The prevailing view, however, was that, since in any event the need to conform with the legal rules of evidence depended on the applicable municipal law, this sentence might be deleted.

160. It was observed that, if the second sentence of paragraph 5 were deleted, the scope of the first sentence might need to be widened, since issues additional to those of relevancy and materiality specified therein would arise, for example, under the common law rules of evidence.

## Article 22

"The arbitrators may take any interim measures they deem necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

## Summary of discussion

161. At the beginning of the consideration of this article, it was stated on behalf of the Secretariat that the suggestion had been made at the Fifth International Arbitration Congress that the following words should be added to the article: "Such interim measures may be established in the form of an interim award" (A/CN.9/97/Add.2, para. 20).

162. The relationship between the power given by the article to the arbitrators to take interim measures and the possible need to seek the assistance of judicial tribunals for the taking of such measures, was examined. It was noted that the different systems of law varied as to the extent to which arbitrators might be permitted to take such measures independently of judicial tribunals. It was suggested that, since judicial tribunals would always have the power to take interim measures, it might be simpler to provide that parties should apply to the appropriate judicial tribunals, rather than to the arbitrators, for the taking of such measures. In this connexion, attention was drawn to article VI, paragraph 4, of the European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961, g/ which reads as follows:

"4. 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."

163. It was observed that a practical solution would be to make separate provision for two distinct situations. Where the parties had agreed to the interim measures to be taken by the arbitrators, and there was no need for the enforcement of such measures, the assistance of judicial tribunals would be unnecessary. If, however, the interim measures to be taken had to be enforced, it would be necessary to seek the assistance of judicial tribunals, and provision should be made for this in the Rules.

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g/ United Nations, Treaty Series, vol. 484, No. 7041.

164. It was noted that the article in its present form conferred a power on the arbitrators to take interim measures independently of the wishes of the parties. It was suggested by some representatives that it would be desirable to modify the article so that this power could only be exercised at the request of both parties, or at least at the request of one party, and, if possible, after the other party had had an opportunity of being heard.

165. A suggestion was made that the arbitrators might be authorized to take interim measures, which would consist of requiring one of the parties to take some action in relation to the goods forming the subject-matter in dispute; for example, depositing the goods with a third party. It was observed, however, that interim measures taken in this manner would be ineffective if the party in question failed to comply with the requirement.

166. It was also suggested that consideration might be given to the possible addition of a provision to the article securing the payment to the arbitrators by the parties of any costs which might arise from the necessary interim measures taken by the arbitrators.

## Article 23

"1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

"2. The parties shall give the expert any relevant information he may require of them. Any dispute between a party and such expert as to the relevance of any required information shall be referred to the arbitrators for decision.

"3. Upon receipt of the expert's report, the arbitrators shall transmit a copy of the report to the parties who shall be given an opportunity to express, in writing, their opinion of the report.

"4. On request of either party the expert, after delivery of the report, may be heard in a hearing where the parties and their counsel or agent are present and may interrogate the expert. At this hearing either party may bring expert witnesses in order to testify on the points at issue. The provisions of article 21 are applicable to such proceedings."

## Summary of discussion

### Paragraph 1

167. It was noted that this paragraph only provided for the appointment of experts by the arbitrators. It was observed that the parties might also wish to appoint experts for the purposes set out in the paragraph. It was explained on behalf of the Secretariat that the draft Rules contemplated that, where parties wished to present the views of experts, they would be called as witnesses under the provisions of article 21. It was thereupon suggested that specific reference should be made in article 21 to the fact that a party could call an expert as a witness, since under certain legal systems experts could not be called as witnesses by the parties.

168. It was noted that, if provision were made for the appointment of experts by the parties, the relationship of the evidence of such experts to that of experts appointed by the arbitrators might need to be clarified.

169. It was noted that the first paragraph of the commentary to this article appeared to contemplate the appointment of experts on questions of law. It was observed that, while arbitrators were free to seek the assistance of experts in the matter, the actual determination on questions of law had to be made by the arbitrators.

Paragraphs 2, 3 and 4

170. There was general agreement that, subject to the observations made in relation to paragraph 1, the provisions of these paragraphs were acceptable.

## Article 24

"1. If the respondent, after having been duly notified, fails to submit his statement of defence, or if either party fails to appear at a hearing properly called under these Rules, without showing sufficient cause for such failure, the arbitrators may proceed with the arbitration and may render an award as if all parties were present.

"2. If either party, after having been duly notified, fails, without sufficient cause, to submit documentary evidence when an award is to be rendered on the basis of such evidence without an oral hearing, then the arbitrators may render their award on the evidence before them."

### Summary of discussion

Paragraph 1

171. It was noted that this article only made provision for the case where one of the parties failed to appear at a hearing properly called under the Rules, without showing cause for such failure. It was observed that the case might arise where both parties failed to appear.

172. It was stated on behalf of the Secretariat that a practical solution which would normally be adopted in such circumstances would be for the arbitrators to call a second hearing; if both parties failed to appear again, the arbitral proceedings would normally be terminated. It was suggested by one representative that, although paragraph 2 of the commentary to this article stated that it did not seem necessary to do so, express provision should be made for the case where the claimant does not present his statement of claim.

Paragraph 2

173. There was general agreement that the provisions of this article were acceptable.

## Article 25

"Any party who knows or should know that any provision or requirement of these Rules has not been complied with and proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

### Summary of discussion

174. There was general agreement that the provisions of this article were acceptable.

175. It was noted that the French and English texts of this article should be harmonized.

## Article 26

"1. The award shall be binding upon the parties. The award shall be made in writing and shall contain reasons, unless both parties have expressly agreed that no reasons are to be given.

"2. The award by an arbitral tribunal shall be determined by a majority of arbitrators.

"3. The award shall be signed by the arbitrators. Where there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the enforceability of the award. The award shall state the reason for the absence of an arbitrator's signature, but shall not include any dissenting opinion.

"4. The award may only be published with the consent of both parties.

"5. Copies of the award duly signed by the arbitrators shall be transmitted to the parties by the arbitrators. If the arbitration is administered by an arbitral institution (article 2), a signed copy of the award shall also be transmitted to the arbitral institution.

"6. If the arbitration law of the country where the award is rendered requires that the award be filed or registered, the arbitrators shall comply with this requirement within the time required by law."

### Summary of discussion

#### Paragrapns 1 and 2

176. There was general agreement that the provisions of these paragraphs were acceptable.

#### Paragraph 3

177. In relation to the second sentence of this paragraph, which states that the failure of one arbitrator to sign the award shall not impair its enforceability, a suggestion was made, where a tribunal consisted of three arbitrators, the award should not be enforceable unless the presiding arbitrator had signed it. It was suggested that the crucial position occupied by the presiding arbitrator on the arbitral tribunal should lead to this result. Most representatives, however, were satisfied with the rule as at present formulated.

178. It was observed that the rule contained in the second sentence of paragraph 3 might also conflict with certain national laws, under which an award was not enforceable unless signed by all the arbitrators. It was suggested that the attention of the parties might be drawn in the commentary to this possibility of conflict.

179. Divergent views were expressed on the question as to whether the arbitrator should be entitled to include a dissenting opinion in the award. On the one hand,

several representatives suggested that a dissenting opinion might be instructive and that therefore its inclusion in the award should be permitted. It was also suggested that the principle of fairness demanded that a dissenting arbitrator should be entitled to express his dissent in the award. On the other hand, some representatives observed that the inclusion of dissenting opinions was undesirable. A provision that an arbitrator was entitled to include a dissenting opinion in the award might put pressure on an arbitrator to express in the form of a dissenting opinion his support for the party nominating him.

180. The view was also expressed that the absence of the signature of an arbitrator did not necessarily mean that the arbitrator who had not signed the award had dissented from it. The failure to sign might, for example, be due to the absence of the arbitrator when the award was delivered, or to his death prior to the rendering of it. It was also suggested that consideration be given to the substitution of another term for the word "enforceability" appearing in this paragraph, since that word might give rise to a misunderstanding.

Paragraph 4

181. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 5

182. It was noted that paragraph 4 of the commentary to this article stated that the term "award" is meant to include interim, interlocutory or partial awards, as well as final awards. A suggestion was made to the effect that a definition of an award in the sense indicated in the commentary might be desirable and could be included in the text of this paragraph or at some other point within the article. Such a definition might also facilitate the enforcement of awards, since there would be certainty as to what decisions of arbitrators could be classed as "awards".

Paragraph 6

183. It was noted that the paragraph only imposed an obligation on the arbitrators to file or register an award if the arbitration law of the country where the award is rendered requires such filing or registration. It was observed that, if the country where the award was to be enforced was known at the time the award was rendered, and the law of such country required filing or registration, it would be desirable that the arbitrators file or register the award in the latter country as well. It was suggested that a reference to such desirability might be included in the commentary.

184. It was suggested that the paragraph should be modified to make it clear that the obligation imposed on the arbitrators to file or register the award, if the arbitration law of the country where the award is rendered requires it should only arise where the law of the country in which the award is rendered requires that this be done by the arbitrators themselves, as distinct from, for example, requiring that it be done by the parties. Another suggestion was that the obligation to file the award should only be imposed on the presiding arbitrator.

## Article 27

"1. The arbitrators shall apply the law expressly designated by the parties as applicable to their contract.

"2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable.

"3. The arbitrators shall decide ex aequo et bono (as "amiables compositeurs") if the parties have authorized the arbitrators to do so and the arbitration law of the country where the award is rendered permits such arbitration.

"4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade."

### Paragraph 1

185. There was general agreement with this paragraph in so far as it was based on the principle of the autonomy of the parties. Views differed, however, as to whether this autonomy was, as in some jurisdictions, absolute or whether, as in other jurisdictions, it was limited in that the law chosen by the parties had to have some connexion with the transaction. In this context, it was observed that paragraph 1 erroneously referred to the law expressly designated by the parties as applicable to their contract. The prevailing view was that the paragraph should be modified to indicate that parties could designate the law to be applied by the arbitrators to the substance of their dispute.

186. The following further suggestions were made to improve the wording of paragraph 1:

(a) The word "expressly" should be deleted on the ground that, in the absence of an express designation, the choice of law might result from the contract itself. In this connexion, it was observed that the designation of the law by the parties could be either express, implied, presumptive or hypothetical.

(b) The words "expressly designated by the parties" should be replaced by the words "agreed to by the parties" or "determined or clearly indicated by the parties".

(c) Paragraph 1 should be redrafted on the lines of article 2 of The Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955, h/ as follows:

"The arbitrators shall apply the law designated by the parties ... Such designation must be contained in an express clause, or unambiguously result from the terms of the contract."

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h/ United Nations, Treaty Series, vol. 510, No. 7411.

(d) Paragraph 1 should follow the wording of article VII of the European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961, as follows: "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute."

(e) It should be made clear in the text that the parties could not only designate "the law" to be applied by the arbitrators, but also "rules"; often parties did not refer to a law, but to general conditions, or even to a legal text (projet de loi) which had not yet entered into force.

187. It was further observed that paragraph 1 should be reworded so as to make it clear that the provision only referred to the law applicable to the substance of the dispute and not also to arbitral procedure.

Paragraph 2

188. It was generally agreed that, in the absence of a designation by the parties of the law applicable to the substance of the dispute, reference by the arbitrators to conflict of laws rules was inevitable. It was observed that, in this respect, arbitrators should not have the same freedom that the parties have. The view was expressed that it would be desirable if paragraph 2 set forth an objective element that would direct the arbitrators as to the conflict of laws rules they should apply for the purpose of determining the law applicable to the substance of the dispute. In this connexion, several possibilities were mentioned: the conflict of laws rules of the place of arbitration; of the place of business of the claimant; of the place of business of the respondent; and of the place of enforcement. As to the suggestion that the place of enforcement should be the determinant factor, it was objected that the country in which the award would be enforced by the successful party was not always known in advance, and some disputes only involved the interpretation of the contract.

189. A suggestion was made that the paragraph should be modified to read as follows: "Failing such designation by the parties, the arbitrators shall apply the law indicated by the conflict rules that appear to the arbitrators to be applicable."

190. It was further suggested that paragraphs 2 and 4 of article 27 should be merged, by adding to the present words of paragraph 2 the following phrase: "... taking into account the terms of the contract and the usages of trade".

Paragraph 3

191. Opinions were divided concerning the retention of paragraph 3. It was observed that "ex aequo et bono" arbitration was not permitted under the law of several countries and that, therefore, the provision in paragraph 3 should be modified to make it clear that the rule was subject to the applicable municipal law; the present wording was apt to mislead parties.

192. It was suggested that the phrase at the end of paragraph 3, which reads "and the arbitration law of the country where the award is rendered permits such arbitration", should be deleted. It was also suggested that this phrase should be replaced by the following: "and the decision is not repugnant to the law of the country where the award is rendered".

Paragraph 4

193. The prevailing view was that, in view of the importance of trade usages as a source of law, this paragraph should be retained. The view was expressed that article 27 should establish the following order of importance in regard to the legal rules to be applied by the arbitrators: mandatory provisions of the law governing the substance of the dispute, the express terms of the contract and trade usages.

Settlement

Article 28

"1. If, before the award is rendered, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award.

"2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of the arbitration as specified under article 31. Unless otherwise agreed to by the parties, these costs shall be borne equally by both parties.

"3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, duly signed by the arbitrators, shall be transmitted by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution."

Paragraph 1

194. It was observed that, under this paragraph, arbitrators were obliged to record in the form of an arbitral award a settlement of a dispute agreed on by the parties only if the request of both parties to this effect were accepted by the arbitrators. It was argued that, when such a request was made by both parties, the arbitrators should have no power to refuse to record the settlement in the form of an award, since in that event the parties were entitled to have their wishes prevail. However, most representatives were of the view that the discretion currently given in this regard to the arbitrators was useful and should be retained, as the settlement agreed on by the parties might be unlawful or contrary to public policy.

195. One representative suggested that, as a compromise, the paragraph might be retained in its present form, but that a new paragraph might be added to read as follows:

"If the arbitrators are of the view that the settlement will be contrary to mandatory rules of law on public policy in commercial matters, they shall refuse to record the settlement in the form of an arbitral award. In such a case the arbitrators shall limit themselves to the issue of an order for the discontinuance of the arbitral proceedings."

196. It was noted that a discontinuance of the arbitral proceedings might be caused by circumstances other than the agreement by parties on a settlement. It was suggested that the ambit of the article should therefore be widened so as to include suitable provisions in regard to discontinuance when caused by such other circumstances. It was further suggested that, in some of these circumstances, such as when a respondent decided during the course of the arbitral proceedings that the claim was well founded, it might be desirable to make provision for the recording of an arbitral award, so that the time and effort already invested in the proceedings would not be wasted.

197. It was pointed out that the phrase "orden de suspensíon" used in the Spanish language version might be inappropriate as a translation of the French phrase "ordonnance de clôture".

Paragraph 2

198. The rule stated in the second sentence of this paragraph to the effect that, unless otherwise agreed to by the parties, the costs of the arbitration shall be borne equally by both parties, was considered. It was suggested that such a rule might not be appropriate in every case of a settlement, and that other principles for apportioning costs, such as apportionment on the basis of the proportion between the amount agreed to in the settlement and the sum claimed in the statement of claim, should also be considered. It was observed by most representatives, however, that no single principle would be appropriate for all cases and that the best rule to be adopted might be one which left the matter to the discretion of the arbitrators.

Paragraph 3

199. It was observed that the issue of the need for conformity of the Rules with the applicable law had already been considered in the context of other articles and it was noted, in this connexion, that the procedural steps required under this paragraph might have to conform to the applicable municipal law.

Interpretation of the award

Article 29

"1. Within 30 days after the communication of the award to the parties, either party, with notice to the other party, may request that the arbitrators give an official interpretation of the award, which will be binding upon the parties.

"2. Such an interpretation shall be given in writing and duly signed by the arbitrators within 45 days after receipt of the request and shall be transmitted by the arbitrators to both parties and, if the arbitration is administered by an arbitral institution, to that institution."

Paragraph 1

200. The view was expressed that the meaning of the adjective "official" used to qualify the phrase "interpretation of the award" was not clear, and that the word

did not serve a useful purpose. It was accordingly suggested that it might be deleted. The suggestion was also made that the substitution of the adjective "authentic" for the adjective "official" might be considered.

201. It was stated that the meaning to be given to the word "interpretation" in the phrase quoted above was not clear. In reply, it was suggested that the word was intended to bear the meaning "clarification", and that the latter word might therefore be substituted for it.

202. It was suggested that the time-limit of 30 days imposed by the paragraph within which a request for interpretation might be made should be deleted. It was argued in reply, however, that this time-limit was reasonable and should be retained.

Paragraph 2

203. The view was expressed that the requirement in this paragraph as to the signing of the interpretation by the arbitrators should be brought into conformity with the requirements in article 26, paragraph 3, as to the signing of the award.

204. It was suggested that a time-limit should be imposed within which the interpretation should be communicated by the arbitrators to the parties, which would take account of the provisions of article 4.

Article 29 as a whole

205. The view was expressed that the article did not serve a useful purpose and should be deleted. It was suggested that, if the "interpretation" of the award had no legal effect and was intended only as a guide for the parties, the article served no useful purpose. If, however, the "interpretation" was intended to have legal effect, difficulties would arise in relation to its execution; in particular, the question would arise whether such an "interpretation" would fall within the ambit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958. If the meaning to be attached to "interpretation" in this context was only "clarification", then an appropriate provision might be added to article 30 to enable a party to secure clarification of the award.

206. On the other hand, it was stated that the article was necessary and should be retained. The language chosen for conducting the arbitral proceedings might not be the mother tongue of all the arbitrators, and the language of the award may consequently need clarification. It was necessary to provide a formal procedure enabling the parties to secure clarification of the award where necessary. There would be a special need for such a procedure by reason of the fact that, under certain systems of law, the competence of the arbitrators would end with the making of the award, unless the parties agreed that the arbitrators were to have competence after the making of the award.

Correction of the award

Article 30

"1. Within 30 days after the communication of the award to the parties,

the arbitrators, on their own initiative or on request of a party, may correct any error in computation, any clerical or typographical error, or any error of similar nature in the award.

"2. Any such correction, in writing and duly signed by the arbitrators, shall be communicated by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

"/3. Within 15 days of the communication of the award to the parties, a party may request the arbitrators to render an additional award as to claims presented in the arbitral proceedings but omitted from the award. A copy of such request shall be sent to the other party. If the arbitrators consider the request justified, they shall complete their award within 60 days of receipt of the request. The additional award shall comply with the provisions of article 26./"

Paragraph 1

207. The view was expressed that the time-limit of 30 days imposed by this paragraph, within which the arbitrators might correct errors of the kind specified in the paragraph, should be removed; the arbitrators should be free to correct such errors even after the expiry of the 30 days. It was also suggested, however, that this time-limit should be retained, but made applicable only where a correction was requested by a party.

208. A suggestion was made that the period of 30 days should be specified as commencing not from the communication of the award, but from the day fixed in the award for the performance by the parties of their obligations thereunder.

Paragraph 2

209. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 3

210. A suggestion was made that the scope of the paragraph might be restricted to claims unintentionally omitted from the award owing to a mistake or to negligence on the part of the arbitrators.

211. It was stated that the time-limit of 15 days provided in this paragraph for requesting the rendering of an additional award was too short; if the paragraph were retained, the period should be 30 days, as in paragraph 1.

212. The view was expressed that the provisions of this paragraph were useful and should be retained; the brackets enclosing it should therefore be deleted. However, it was also stated that the paragraph could be deleted, and that a party aggrieved by an omission in the award should be left free to decide on the action to be taken by him.

Costs

## Article 31 i/

"1. The arbitrators shall fix the costs of arbitration in their award. The term 'costs' includes:

| Non-administered | Administered |
|---|---|
| "(a) the fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves; | "A (a) (i) the fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves after consultation with the arbitral institution which may make any comment it deems appropriate concerning the fee suggested by the arbitrators; |
| | "(ii) the costs of administration as declared by the arbitral institution; |

"(b) the travel and other expenses incurred by the arbitrators;

"(c) the costs of expert advice and of other assistance required by the arbitrators;

"(d) the travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

"(e) the compensation for legal assistance of the successful party, if the arbitrators deem that legal assistance was necessary under the circumstances of the case and if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators.

"2. The costs of arbitration shall, in general, be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties."

Paragraph 1

213. There was general agreement that the provision contained in the first sentence of this paragraph was acceptable.

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i/ Article 31 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs A (a) (i) and A (a) (ii) in the column dealing with "administered" arbitration were not considered.

Subparagraph (a)

214. In regard to the provision in this subparagraph which empowered the arbitrators themselves to fix their fees, the view was expressed that there should be some limitation on this power. It was suggested that the article should set out a scale of fees for arbitrators, which would, inter alia, impose a ceiling on the fees payable. It was also pointed out that different factors, for example, the amount in dispute in the arbitration and the duration of the arbitration, might need to be taken into account in determining the ceiling on the fees.

215. In a case where the parties had agreed on the designation of an appointing authority for the appointment of arbitrators, it was proposed that a provision should be added to this subparagraph requiring consultation between the arbitrators and such appointing authority on the subject of the fees of the arbitrators.

Subparagraphs (b), (c) and (d)

216. There was general agreement that the provisions contained in these subparagraphs were acceptable.

Subparagraph (e)

217. It was noted that, under this subparagraph, the term "costs" included compensation for legal assistance of the successful party only if, inter alia, "the arbitrators deem that legal assistance was necessary under the circumstances of the case". The view was expressed by several representatives that the question whether legal assistance was necessary for a party under the circumstances of the case was a matter which should be left exclusively to the judgement of that party, and that the opinion of the arbitrators on this issue should be regarded as irrelevant in the awarding of costs in respect of such assistance. It was suggested, therefore, that the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case" should be deleted.

218. It was also noted that, under certain legal systems, each party bore the expenses of legal assistance obtained by it, and a party was required to pay compensation for the legal expenses of the other party only where the former party was a claimant who had made a frivolous claim in bad faith, or a respondent who had used dilatory tactics or had set up a frivolous defence. A suggestion was made that this system of apportionment might be adopted in regard to the costs of legal assistance.

Paragraph 2

219. It was proposed that the rule contained in this paragraph that the costs of arbitrators shall, in general, be borne by the unsuccessful party should be stated in unqualified terms, and that the words "in general" appearing in the first sentence should therefore be deleted. The view was also expressed, however, that, while the words "in general" might be regarded as inappropriate, the rule should not be stated in unqualified terms, but that other language such as "ordinarily", or "in principle" should be inserted at an appropriate point in the sentence, in order to safeguard the right of arbitrators to apportion costs on a different basis if there were good reasons for doing so.

220. It was observed that any possible interrelationship between the rule on the apportionment of costs contained in this paragraph and that contained in article 28, paragraph 2, should be examined.

221. It was also observed that, during the consideration of article 16, paragraph 3, the proposal had been made that the costs occasioned to the other party by supplementing or altering a claim should be borne by the claimant. It was suggested that, if this proposal were adopted, a suitable provision giving effect to it might be inserted in this paragraph.

Article 31 as a whole

222. A suggestion was made that this article needed to be supplemented by an additional article laying down rules with respect to certain questions related to the ones dealt with herein. Such rules might, for instance, require arbitrators to keep the expenses of the arbitration to a minimum, or state that arbitrators should not be entitled to additional remuneration if they interpreted the award, or corrected mistakes in it.

"Deposit of costs

Article 32 j/

| "Non-administered | "Administered |
|---|---|
| "1. Arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of arbitration. | "1A. The arbitral institution may require, after consultation with the arbitrators, that each party deposit an equal amount as an advance for the costs of arbitration. |
| "2. During the course of the arbitral proceedings, the arbitrators may require supplementary deposits from the parties. | "2A. During the course of the arbitral proceedings, the arbitral institution may require supplementary deposits from the parties if requested to do so by the arbitrators. |
| "3. If the required deposits are not paid in full within 30 days, the arbitrators shall notify the parties of the default and give an opportunity to either party to make the required payment. | "3A. If the required deposits are not paid in full within 30 days, the arbitral institution shall notify both the arbitrators and the parties of the default and give an opportunity to either party to make the required payment. |
| "4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties." | "4A. The arbitral institution |

j/ Article 32 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 1A, 2A, 3A and 4A in the column dealing with "administered" arbitration were not considered.

| "Non-administered | "Administered |
| --- | --- |
| | shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties." |

Paragraphs 1 and 2

223. There was general agreement that the provisions of these paragraphs were acceptable.

Paragraph 3

224. It was observed that, according to the commentary to the article, this paragraph was intended to give a party an opportunity to make the deposit of the other party, who had failed to make payment when required under paragraphs 1 or 2. It was suggested that in certain language versions the text may need to be revised to clarify the meaning.

225. The question was raised as to the effect of a failure by one or more of the parties to make a deposit when required to do so. It was observed in reply that arbitrators were engaged under a contract of service, a term of which would be that the deposits in question were to be made. If such deposits were not forthcoming, the arbitrators would be entitled not to perform their contract.

ANNEX II

List of documents before the Commission

| | |
|---|---|
| A/CN.9/96 and Add.1 . . . . . | International legislation on shipping: report of the Working Group on the work of its seventh session (Geneva, 30 September-11 October 1974) |
| A/CN.9/97 and Add.1, 2, 3 and 4 . . . | International commercial arbitration: preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules): report of the Secretary-General |
| A/CN.9/98 . . . . . | International sale of goods: general conditions of sale and standard contracts: report of the Secretary-General |
| A/CN.9/99 and Corr.1 a/ . . . . . | International payments: negotiable instruments: Draft Uniform Law on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975) |
| A/CN.9/100 . . . . . | Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January-7 February 1975) |
| A/CN.9/101 and Add.1 . . . . . | International payments: bankers' commercial credits; bank guarantees: note by the Secretary-General |
| A/CN.9/102 . . . . . | International payments: security interests in goods: report of the Secretary-General |
| ST/LEG/11 . . . . . | International payments: study on security interests: note by the Secretariat |

a/ English only.

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| A/CN.9/103 . . . . . | Liability for damage caused by products intended for or involved in international trade: report of the Secretary-General |
| A/CN.9/104 . . . . . | Multinational enterprises: report of the Secretary-General |
| A/CN.9/105 . . . . . | International legislation on shipping: report of the Working Group on International Legislation on Shipping on the work of its eighth session (New York, 10-21 February 1975) |
| A/CN.9/106 . . . . . | Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General |
| A/CN.9/107 . . . . . | Training and assistance in the field of international trade law: note by the Secretary-General |
| A/CN.9/108 . . . . . | Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General |

B. Restricted series

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| A/CN.9/VIII/CRP.1 and Add.1 to 19 . . | Draft report of the United Nations Commission on International Trade Law on the work of its eighth session (Geneva, 1-17 April 1975) |
| A/CN.9/VIII/CRP.2 . . . . . | Symposium on International Trade Law |
| A/CN.9/VIII/CRP.3 . . . . . | Future work: legal interest rate for bills of exchange, promissory notes and for cheques: note by the Austrian delegation |
| A/CN.9/VIII/CRP.4 . . . . . | Draft letter from the Chairman of UNCITRAL to the Chairman of the Commission on Transnational Corporations |

C. Information series

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| A/CN.9/INF.7 and Add.1 . . . . . | List of participants |

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