

312th Meeting

Thursday, 6 June 1985, at 2 p.m.

Chairman: Mr. LOEWE (Austria)

*The meeting was called to order at 2.10 p.m.***International commercial arbitration (continued)**
(A/CN.9/246, annex; A/CN.9/263 Add.1-2, A/CN.9/264)*Article 8. Arbitration agreement and substantive claim before court**Article 8 (1)*

1. Mr. GRIFFITH (Australia) said the expression "in a matter" was too narrow and suggested that it should be replaced by "involving a matter", since although the matter itself might not be the subject of the arbitration agreement, it could be related to a matter that was.
2. Mr. HERRMANN (International Trade Law Branch) said that to use a phrase such as "relating to a matter" or "involving a matter" might introduce substantive differences, since a matter which was the subject of an arbitration agreement need not necessarily be the subject of a particular dispute. Legal systems differed widely in defining what was the subject-matter of a dispute. If it was only a question of drafting, he recommended that the Commission should retain the existing wording, which was that used in the 1958 New York Convention.
3. Mrs. RATIB (Egypt) found article 8 (1) acceptable. Her delegation agreed that the court should not of itself be empowered to refer the parties to arbitration and that a request for referral to arbitration outside the time-limit was inadmissible.
4. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) found article 8 (1) acceptable. He proposed that article 8 (2) should be amended so as to empower the court to order the suspension of arbitration proceedings. He further proposed that the Commission should re-examine articles 8, 16, 34 and 36 in order to overcome the problem created by the fact that under those articles it was possible for a party to challenge the validity of the agreement repeatedly, while relying on the same reasoning.
5. The CHAIRMAN said that whether or not a court had the power to suspend arbitration proceedings depended on the national procedural law in force. Moreover, in certain procedural laws, a decision taken on the validity of an arbitration agreement would bind all courts of the same level in subsequent proceedings.
6. Sir Michael MUSTILL (United Kingdom) said that the answer just given by the Chairman provided a good illustration of the problems which his delegation had wished to raise in connection with article 5 and of the problem of repeated unmeritorious applications. Where local procedural law permitted a court to suspend its proceedings, would that not be an instance of intervention by the court?
7. The CHAIRMAN pointed out that article 8 (1) said that the court had to refer the parties to arbitration. It had been suggested that the court could either take action upon the merits or refer the parties to arbitration. The proposal had been made that the court should have a third possibility, i.e. that of referring the parties to arbitration while keeping its own proceedings open until a later stage. In his opinion, that was not explicit in the text, and the question of whether court proceedings would theoretically remain open would depend on the provisions of the local procedural law.
8. Sir Michael MUSTILL (United Kingdom) said that the present discussion illustrated the problem of interpretation of the words "governed by this Law" in article 5. The question of what a court should or might do if the action in court was in relation to the subject of an arbitration agreement was governed by that law. He understood from the explanation by the secretariat that once a topic was found to be dealt with in the Model Law, the court could look only to the Model Law and not to local law. The court had no power to take steps not permitted in article 8.
9. The CHAIRMAN thought that that was too narrow a view of article 8. The court must accept an action and then decide whether the agreement was null and void; in that case, it would follow the normal court procedure. If it found that the agreement was valid, it would refer the parties to the arbitral tribunal. However, the details of court procedure could not be included in a uniform law since they were a matter of civil procedure in each State. In article 5, only the type of intervention was limited.
10. Mr. MOELLER (Observer for Finland) said that there was an inconsistency between articles 8 and 16 in the case where the arbitral tribunal had ruled but had made no award and there was an action before the court. In considering whether preference should be given to article 8, it was advisable to be consistent with article 6 (3) of the 1961 Geneva Convention.
11. Mr. HOLTZMANN (United States of America) said that the problem was in part alleviated by the definition of what was meant by "the beginning of arbitral proceedings" set out in article 21 of the Model Law.
12. The CHAIRMAN, noting that there were proposals for more than one draft of article 8 (1), suggested that the text should be left unaltered but that the report for the present session should state that the course of the judicial proceedings was not described there, so that it was quite possible for a decision to be taken to refer the parties to arbitration, while the case remained open pending a further possible application. If there was no objection, he would take it that the Commission agreed to that course.
13. *It was so agreed.*

Article 8 (2)

14. Mr. SEKHON (India) suggested the insertion of the words "unless a stay is granted by the court" in article 8 (2). That point would be regulated by local law, although he thought there were difficulties relating to the intervention by the court.

15. Mr. HJERNER (Observer for the International Chamber of Commerce) said that although the criticisms of article 8 (2) were understandable, the provision should be retained in the interests of the efficiency of the arbitral proceedings, regardless of actions by one party in a local or foreign court to delay or prevent them.

16. Mr. SEKHON (India) said he had raised the point because he felt that it should be made clear beyond doubt that the arbitral proceedings should continue regardless of any action in court unless a stay was granted by the court.

17. Mr. SZASZ (Hungary) felt that the text should state that the arbitral tribunal could make an award under the agreement, since under article 16 it had the power to decide on its own jurisdiction.

18. Mr. de HOYOS GUTIERREZ (Cuba) said that there was no reason to continue the proceedings if the arbitration agreement was not valid.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) could not agree that article 8 (1) implied a decision that questions concerning the court should not be touched upon. He suggested that article 8 (2) should be replaced by two provisions. The first would state that even where one party had already applied to the court, the other party could start arbitral proceedings. From the existing draft, it might be wrongly concluded that if arbitral proceedings had not been started prior to the application to the court, they could no longer be initiated while the matter was pending before the court. The second provision, following article 6, paragraph 3, of the 1961 European Convention, might state that if arbitral proceedings had been started before the filing of a court action, the court should stay a ruling on the arbitrator's jurisdiction until the award was made.

20. It was unrealistic to provide only for the possibility of continuing arbitral proceedings, since in most cases, arbitrators, knowing that their competence was being considered by the court, would prefer not to continue with the proceedings. Delay would be avoided if the arbitral proceedings were allowed to reach a conclusion. A dissatisfied party would still be able to apply to the court to have the award set aside under article 36.

21. Mr. RUZICKA (Czechoslovakia) proposed that the court procedure should be completed before continuing with the arbitral proceedings. The court decision would of course have to be final. However, the essential thing was to establish a clear preference as between the court and the arbitral tribunal, and his delegation could accept the opposite view, namely that the tribunal should have precedence, if that was the generally accepted view. The arbitral proceedings could then continue up to the point of the award.

22. Mr. HOLTZMANN (United States of America) believed in the principle that arbitration should proceed and not be stayed by the court. He supported the Hungarian proposal, which clarified the matter, and also favoured the USSR proposals.

23. Mr. STALEV (Observer for Bulgaria) strongly supported the USSR proposals, which would bring clarity and effectiveness to arbitral proceedings.

24. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) supported the USSR proposals. He drew attention to the view that the issue before the court, as dealt with in article 8 (1), was not the "issue of its jurisdiction", so that article 8 (2) should be rephrased accordingly. It was not the matter of jurisdiction that was before the court. The agreement might be valid, but the tribunal not competent because the conditions set in the agreement were not fulfilled. Article 8 (2) was ambiguous and it was therefore important to seek another form of words.

25. Mr. HOLTZMANN (United States of America) said that, in principle, arbitration should not be stayed by court

proceedings. The reasons had been well stated by the observer for the International Chamber of Commerce and those who had agreed with him. His delegation, therefore, supported the Hungarian proposal as clarifying and implementing the principle better than the existing text. It also found the USSR proposals attractive, for the same reason.

26. Mr. STALEV (Observer for Bulgaria) was in favour of a closer alignment with the 1961 European Convention on International Commercial Arbitration and accordingly supported the USSR proposals.

27. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) also supported the USSR proposals. The point that article 8 (2) was ambiguously worded had been raised by Cyprus in its written comments, and the question of language was also referred to in those of the Soviet Union (A/CN.9/263, p. 21, para. 6). A distinction must be drawn between the two different problems and, while paragraph 1 of article 8 was clear, paragraph 2 was not.

28. Mrs. RATIB (Egypt) said that it would be useful to give the courts power to order the suspension of the arbitral proceedings when they considered that the most likely outcome would be that the agreement was null and void. That would save both time and expense. Her delegation therefore suggested restoring the phrase "unless the court orders a stay of the arbitral proceedings", which had been in the original text but had been deleted by the Working Group.

29. Sir Michael MUSTILL (United Kingdom) thought that attention was perhaps being drawn away from the nature of the situation with which article 8 (2) was concerned, as expressed in the title of the article. Article 16 of the draft Law was concerned with the situation in which a court became involved because one of the parties to an arbitration challenged the arbitral tribunal's jurisdiction. The situation in article 8 was quite different: it concerned an attempt to have the substantive dispute itself decided by a court. If both of the Soviet Union's suggestions were adopted, the result would be that the same dispute would go forward in two different places: the court would retain the matter if it concluded that the arbitral tribunal had no jurisdiction and would make a judgement, but the arbitral proceedings would also go forward. It was surely not desirable to have a double decision on the same substantive matter. He favoured the philosophy suggested by the Egyptian representative, which was implicit in the existing text in any case. He therefore urged that the text should be retained in its existing form.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) explained that the aim of his delegation's proposals was precisely to avoid the possibility of two substantive decisions. The aim was that, where one of the parties had gone to the court with a substantive claim, the court should refrain from making a ruling on the arbitrator's jurisdiction until after the arbitral award, thus avoiding the possibility of two substantive decisions on the same matter.

31. The CHAIRMAN said that if the Commission felt it inconsistent to confine article 8 (2) to arbitral proceedings that were already under way, the wording could be changed to "are about to commence or have already commenced". The second problem was that of how far the arbitral tribunal should be able to continue its proceedings. The USSR proposal was closer to the 1961 Convention, which said that if the proceedings had already been initiated before any resort to a court, the court must stay its ruling on the arbitrators' jurisdiction until the arbitral award was made. In the other interpretation, not only would the parties be allowed to go to court but the arbitral

proceedings could continue even if the court found that the arbitration agreement was non-existent or null and void.

32. Sir Michael MUSTILL (United Kingdom) said that the question, as he saw it, was whether to protect the claimant against the risk of delay through an objection of no merit, or the defendant against a waste of time and money in being brought before an arbitral tribunal which was ultimately found not to have existed in any real sense. Both parties lost if the dispute had to be fought twice. His delegation felt that the court should be able to decide from the beginning whether the arbitration should go ahead. If it found that it should, the court would relinquish jurisdiction. If, however, it decided that the agreement was void, it would continue its consideration of the case.

33. The CHAIRMAN pointed out that the article said that the arbitral proceedings could continue, not that they must continue. However, difficult questions of international competence were also involved: for example, the court's decision might not be recognized in the other country concerned. If the court said that the agreement was null and void, the decision might be binding only in the territory of "this State". The defendant might consider that, even with a court decision, if the arbitral proceedings continued as far as an award, it might be possible to enforce it, if not in the country where the court's decision was binding, perhaps in another country.

34. Mr. SZASZ (Hungary) said the question was that of which party's interests should be protected. He felt that the wisest course would be not to give room to purely dilatory tactics and to allow the claimant to decide whether it was worthwhile going on with the arbitral proceedings.

35. Mr. HOLTZMANN (United States of America) felt strongly that there should be one set of proceedings at a time, and that it should be arbitration proceedings. It was not a question of favouring either the claimant or the defendant but of favouring the arbitration process. The question of the validity of the arbitration agreement could be decided by the arbitrators themselves as a preliminary question, and the presumption was that they would do so in appropriate cases.

36. Mr. MTANGO (United Republic of Tanzania) thought that the Model Law should make sure as far as possible that the parties were subjected to only one set of proceedings. He therefore supported the United Kingdom proposal to leave the text as it was.

37. Mr. SEKHON (India) said that the impression that had been given that the provision was founded on the 1961 European Convention was incorrect. He read out the text of article 6 (3) of that Convention, stressing the final phrase "unless they have good and substantial reasons to the contrary". That was not exactly what was being said in article 8 (2). He noted that some of the arguments that had been put forward assumed that the courts would not act objectively, impartially and fairly; in his judgement, that was a wrong assumption.

38. The CHAIRMAN said that most of the delegations involved in the preparation of the 1961 Convention had thought that the phrase just quoted seriously weakened it.

39. Mr. LEBEDEV (Union of Soviet Socialist Republics) felt that article 6 of the 1961 European Convention embodied a very valuable compromise and perhaps article 8 (2) ought to be drafted in exactly the same way. As for the contention that his delegation's proposal would not prevent the parties from going to court after arbitration proceedings had started, he

pointed out that one of the parties might need to go to court to suspend the running of the prescription period in order to protect his rights. The question was not one of protecting the interests of either the plaintiff or the defendant but of protecting the institution of arbitration itself, as the United States representative had pointed out.

40. The CHAIRMAN said that no clear majority seemed to have emerged in favour of changing the text. The discussion closely paralleled that in the Working Group, the outcome of which had been the existing article 8. In order to avoid further lengthy discussion, he proposed that the existing text of article 8 should be retained.

41. *It was so decided.*

Article 9. Arbitration agreement and interim measures by court

42. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that, at first sight, article 9 was rather enigmatical. Paragraph 1 of the secretariat's analytical commentary on the article (A/CN.9/264, p. 25) sought to explain that the fact that the parties had entered into an arbitration agreement did not mean that they had renounced their right to go to court for interim measures. If that was the whole content of the article, it was harmless and possibly even unnecessary. Supposing, however, that the parties had agreed between themselves in their arbitration agreement that they would not apply to a court for interim measures, the question arose whether such an agreement was rendered invalid by article 9. A rule precluding such application to a court was contained in the rules of the London Court of International Arbitration, and that provision had been found valuable and acceptable. If there was no intention to make agreements of that kind invalid, some clarification was necessary on the lines of "It is not incompatible with a submission of a dispute to arbitration for a party . . .".

43. Mr. HERRMANN (International Trade Law Branch) said that the Working Group's intention in article 9 had been to express that the mere existence of an agreement to arbitrate should not prevent a party from requesting interim measures of protection from a court, or prevent a court from granting such measures. The article had been felt necessary because there had been instances in judicial practice in which the existence of an agreement to arbitrate had resulted in the full exclusion of court jurisdiction. There was no intent to take away the effect of agreements to refrain from requesting interim measures from a court.

44. Mr. HOELLERING (United States of America) said his delegation noted that the scope of interim measures which a court might grant was wide and included pre-arbitration attachments. He suggested that there should also be a clear understanding that in appropriate circumstances protection would extend to trade secrets and other proprietary information, particularly in respect of articles 26 and 27 relating to the production of documents, goods or other property for the inspection of an expert appointed by the arbitral tribunal or sought by a court. He thought that such a clarification would be useful in view of the increasingly complex nature of international commercial transactions giving rise to arbitral disputes; those transactions included nowadays complicated long-term agreements on such matters as construction of industrial works or the transfer of technology.

45. Mr. LAVINA (Philippines) said that article 9 was intended to cover more than just the question of the

favourable response of a court to a party's request for interim measures. He therefore suggested that the final phrase, "to grant such a measure", should be replaced by "to act on the request".

46. Mr. ROEHRICH (France) said that there had been a proposal for a substantive amendment to article 9 which would tend to support an interpretation that the national courts were bound to respect a prior agreement by the parties not to apply to the courts for interim measures. His delegation was satisfied with the present text of article 9 precisely because it left that issue open. Such a course was also in the interests of the parties themselves, who could not foresee every eventuality in advance. He suggested that the original text should be maintained.

47. Mr. AYLING (United Kingdom) suggested that the text could perhaps be improved by replacing the words "the arbitration agreement" in the first line by "an arbitration agreement".

48. Mr. ROEHRICH (France) said he had no objection to that amendment.

49. Mr. HJERNER (Observer for the International Chamber of Commerce) observed that there was some difficulty in the relationship between articles 5, 9 and 18. If a party asked for interim measures first from the arbitral tribunal and subsequently from the court, that might well result in conflicting interim measures being ordered.

50. The CHAIRMAN said that a Model Law could not go into details of that nature. If there were no further comments, he would take it that article 9 would be retained, on the understanding that the drafting suggestion by the United Kingdom would be incorporated.

51. *It was so agreed.*

Chapter III. Composition of the arbitral tribunal

Article 10. Number of arbitrators

52. Mr. SCHUMACHER (Federal Republic of Germany) said that his delegation had submitted a written proposal (A/CN.9/263, p. 22) that chapter III should mention the principle that the composition of the arbitral tribunal must guarantee an impartial decision; that seemed to be the most important guideline for arbitration. His delegation was withdrawing that proposal because it would cause problems with the interpretation of articles 12 and 13 from which it followed that each arbitrator, even nominated by one party, must be impartial and independent. Accordingly, it followed that the tribunal itself must be impartial.

Article 11. Appointment of arbitrators

Article 11 (1)

53. The CHAIRMAN noted that there were no comments on article 11 (1).

Article 11 (2)

54. Mr. HJERNER (Observer for the International Chamber of Commerce) asked whether it would not be desirable to state expressly in article 11 (2) that all arbitrators should be impartial and independent, in view of the vast differences in practice.

55. The CHAIRMAN pointed out that lack of impartiality or independence were grounds for challenge and for setting aside the award.

56. Mr. SEKHON (India) stated that it would be better to start the paragraph with the phrase "Subject to the provisions . . . of this article".

Article 11 (3)

57. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to the written amendment which his delegation had submitted to article 11 (3) (a) (A/CN.9/263, p. 23), namely to replace the words "within thirty days of having been requested to do so by the other party" by the words "within thirty days of receipt of such request from the other party".

58. The CHAIRMAN said that the secretariat would take the appropriate action.

59. Mr. de HOYOS GUTIERREZ (Cuba) suggested that for the purposes of speeding up proceedings, it would be desirable to insert a time-limit also in article 11 (3) (b), with respect to the appointment of a sole arbitrator.

60. Mr. HERRMANN (International Trade Law Branch) said that the Working Group had endeavoured to avoid fixing time periods as far as possible since it was difficult to select a period which was appropriate to cover the many different cases. Furthermore, the situation in article 11 (3) (b) was not precisely the same as that in article 11 (3) (a). It resulted from a failure of the parties to agree, of which the best evidence was the request of one of them to the court to appoint the arbitrator.

61. Mr. de HOYOS GUTIERREZ (Cuba) withdrew his proposal.

62. The CHAIRMAN said he assumed that in cases where the place of arbitration had been determined, the court referred to in paragraphs 3 (a) and (b) would be the appropriate national court of the country concerned.

63. *It was so decided.*

64. Mr. HOLTZMANN (United States of America) said that the Commission must take a decision on which court should be deemed the competent court under article 11 (3) when the parties had not yet agreed upon a place of arbitration. The choice lay between the national courts in the countries where either the defendant or the claimant had his place of business. He favoured that of the claimant since the defendant had failed to appoint an arbitrator under article 11 (3) (a).

65. The CHAIRMAN pointed out that under the 1961 European Convention, the country of the defendant had been selected. It would consequently be hard for States which were parties to the European Convention to agree to any different arrangement. Perhaps, if the authority in the defendant's country failed to appoint an arbitrator, the duty might pass to the authority in the claimant's country.

66. The CHAIRMAN suggested that the secretariat, in consultation with the United States representative, might propose suitable wording. The issue appeared to be settled in respect of article 11 (3) (a). As to article 11 (3) (b), in cases where no place of arbitration had been selected, the matter was perhaps rather more difficult and it had in fact been the subject of a complete annex in the European Convention.

67. Mr. HERRMANN (International Trade Law Branch) pointed out that the situation, which might be covered by the decision just adopted, namely that it would be the authority of the defendant's country, would apply only until the place of arbitration was agreed or the parties exercised their freedom to choose another procedural law. At that stage, the problem would be solved and it was therefore questionable whether there was any need to make a special provision in the Model Law. The parties were not left in a vacuum, since there existed arbitration laws which would give assistance similar to that provided in the Model Law itself.
68. Mr. EYZAGUIRRE (Observer for the Inter-American Bar Association) said that the case envisaged was a very remote possibility for which there was adequate provision in institutional arbitration arrangements. It was not a matter of great importance whether the decision was taken by the national court of the claimant or that of the defendant or by some third party.
69. Mr. HOLTZMANN (United States of America) pointed out that under the UNCITRAL Arbitration Rules application might be made to the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.
70. Mr. STALEV (Observer for Bulgaria) thought that, in view of the rarity of the case, it would be reasonable to accept the national court of the country in which the defendant had his place of business, i.e. the same solution as in article 11 (3) (a).
71. Mr. HERRMANN (International Trade Law Branch) observed that the Model Law could state only whether, in the case of States which had adopted the Model Law, the court specified under article 6 should perform that function or not. A provision might be adopted along the following lines: "irrespective of whether this law in general applies, before the place of arbitration or, if permitted, the procedural law is chosen, the court specified under article 6 may render assistance under article 11, provided that the defendant has his place of business in this territory". With such a provision, it would be difficult for the court to refuse to act.
72. The CHAIRMAN said that the court might have doubts as to the validity of the arbitration agreement.
73. Mr. STALEV (Observer for Bulgaria) said that the court might take no action for a considerable time.
74. The CHAIRMAN, noting that such cases were very rare and that the elaborate arrangements in the 1961 European Convention had never been applied in practice, proposed that the same rule should be adopted for paragraphs 3 (a) and (b). Where no place of arbitration had been agreed, the appointment of the sole arbitrator should rest with the national court of the territory in which the defendant had his place of business, or if that court refused to act, with the national court of the territory in which the claimant had his place of business.
75. *It was so decided.*
- Article 11 (4)*
76. Mr. HOLTZMANN (United States of America) observed there was another reference in article 11 (4) to the court specified in article 6.
77. The CHAIRMAN suggested that the same rules should be adopted as in article 11 (3).
78. Mr. STROHBACH (German Democratic Republic) observed that article 11 (4) (c) referred to "an appointing authority". It might perhaps be useful to have a definition of that term in article 2.
79. The CHAIRMAN observed that the definitions in article 2 covered terms which were used in more than one place. If the term "appointing authority" appeared only in article 11, it would be better to have it defined in the rule itself.
80. Mr. STROHBACH (German Democratic Republic) said he would check whether the term was used elsewhere.

The meeting rose at 5.05 p.m.