322nd Meeting

13 June 1985, at 2 p.m.

Chairman: Mr. PAES de BARROS de LEAES (Brazil)

The meeting was called to order at 2.15 p.m.

International commercial arbitration *(continued)* (A/CN.9/264, annex; A/CN.9/263 and Add.1-2; A/CN.9/264)

Article 22. Language (continued)

1. Mr. HERRMANN (International Trade Law Branch) said that the purpose of article 22 (1) was to allow the arbitral tribunal to determine the language or languages to be used in the proceedings. Article 22 (2) empowered the tribunal to require translations of documents. The Working Group had assumed that, since the languages chosen would constitute the languages of the proceedings, translation and interpretation would be part of the costs. The Commission might wish to clarify that there was no intention of preventing a party or a witness from expressing his views in his own language.

2. Mr. ROGERS (Australia) said that he realized that the suggestions made for changes in article 20 and now in article 22 had been motivated by a desire to ensure the overall fairness of the proceedings. At the same time, he was disturbed by what seemed to be a tendency to limit the arbitrators' discretion and to regulate the proceedings in minute detail. What had been described as the "Magna Carta of arbitral procedure" (A/CN.9/264, p. 44) was enshrined in article 19, and more especially in article 19 (3) in the form of the essential requirement that "the parties shall be treated with equality and each party should be given a full opportunity of presenting his case". That provision should satisfy the needs of those delegations which wished to introduce amendments. In selecting their arbitrators, the parties entrusted them with extensive powers to decide matters of fact and of law. Since the arbitrators were already entrusted with such wide decision-making powers, it could be left to them to act fairly and properly, in accordance with article 19, without trying to anticipate every procedural problem that could arise. It was not possible to foresee every circumstance and to cater for every possible difficulty. His delegation was therefore opposed to any change in article 22.

3. Mr. SAMI (Iraq) said that his delegation had agreed with the Observer for the International Chamber of Commerce in regard to the principle of giving equal treatment to each side in respect of the presentation of the case. Its own proposal had been limited to a situation in which, in the case of disagreement on the language or languages to be used in the arbitral proceedings, those of the two parties should constitute the working languages of the proceedings. If the arbitration agreement opted for the language of one of the parties, however, all documents should be translated for the purposes of the other party and the cost should be an integral part of the arbitration costs and thus be borne by the losing party, except in the case of an agreement to share the costs.

4. Mr. CHO (Observer for the Republic of Korea) thought that, if the guideline in the second sentence of article 22 (1) was clarified, the third sentence would become unnecessary.

5. Mr. AYLING (United Kingdom) said that the overriding objective regarding the details of the arbitral proceedings was that the parties should be treated fairly. Language could be an important aspect of the proceedings and was therefore covered by article 19 (3). The second objective was one of practicality. Arbitral proceedings should be capable of being held in the manner which was most practical and convenient in the light of the circumstances and facts of the case. Requirements could vary enormously from case to case. Both those objectives were satisfied by the existing text of article 22 and he therefore strongly supported the position of Australia.

6. Mr. BOUBAZINE (Algeria) said that his delegation supported the proposal by Iraq as being intended to ensure equal respect for languages and the sharing of the costs of arbitration.

7. Mr. MTANGO (United Republic of Tanzania) suggested that paragraph (3) of article 19 should become a separate article. That would have the advantage of raising the status of equality of treatment and making it clear that the principle applied to the whole of chapter V. That would also solve the problem in regard to languages and there would be no need to amend article 22 (2).

8. Mr. SEKHON (India) supported the view expressed by the delegation of Iraq. He was not sure that, as it stood, the wording of article 22 would enable a party to use the best possible vehicle for putting forward his case, namely his own language. It was argued that, on the basis of the provision in article 19 (3), the dictates of fairness would require each party to have an opportunity to present his case in his own language. He felt, however, that the special provisions of article 22 excluded the general provisions of article 19. Regarding article 22 (2) his delegation felt that the word "translation" should be preceded by the phrase "duly certified". That would bring it into conformity with the provisions of article 35 (2) and would help to clarify the term "translation", which was not defined anywhere in the Model Law.

9. Mr. SCHUMACHER (Federal Republic of Germany) continued to believe that his delegation's proposal to amend article 22 by inserting a reference to article 19 (3) would constitute a useful compromise. Language constituted a greater problem for some States, including his own, whose languages were not those in wide use.

10. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that judges and arbitrators had had to deal with the problem of different languages since arbitration first began. He urged the members of the Commission to trust the arbitrators in the matter. The arbitrators themselves might have three different languages, none of which was the language of the parties. Their first task would obviously be to consider how best to carry on their work in the circumstances. If the arbitrators were not trusted, the procedure itself was not trusted and would become an exercise in futility. It was impossible to legislate for all situations, nor could there be any universal solution, since a party's use of his own language might not be satisfactory if all the documents were in some other language. Article 22 was already too prescriptive. The guiding principle was that stated in article 19 (3), and it should be left to the arbitrators to apply it.

11. Mr. RAMADAN (Egypt) supported the proposal of Iraq, which he found similar to the proposal of the Observer for the Cairo Regional Centre for Commercial Arbitration.

12. Mr. GRAHAM (Observer for Canada) said that his delegation was satisfied with the article as it stood, although the amendment suggested by the Federal Republic of Germany would help to ensure that the elements of equality and fairness were maintained.

13. The CHAIRMAN noted that there did not seem to be sufficient support for the proposal of Iraq.

14. Mr. SCHUMACHER (Federal Republic of Germany) said that his delegation would not insist on its proposal since it too lacked any strong support.

15. Mr. SEKHON (India) asked the Chairman for a ruling on his delegation's proposal to insert the words "duly certified" in article 22 (2).

16. Mr. HOLTZMANN (United States of America) said that his delegation had agreed to the use of the expression "duly certified" in article 35 (2) because the documents therein mentioned were being submitted to a court which would have its own definition of "duly certified". In article 22, the Commission would be asking the arbitrators to say what constituted a certified translation. Actually, good translations could often be provided by the parties themselves. Where outside certified translators had to be used, the cost invariably rose. His delegation joined the Observer for the Chartered Institute of Arbitrators in urging the Commission to trust the arbitrators and not to get involved in the technical details of the proceedings.

17. Mr. HUNTER (Observer for the International Bar Association) agreed with the United States representative. He was aware, as a practitioner, that outside translation arrangements could be very disruptive and time-consuming.

18. Mr. RAMADAN (Egypt) recalled that his delegation had also made a proposal to amend article 22 (2) by inserting the phrase "one of the" before "languages".

19. Mr. LOEFMARCK (Sweden) had no objection in principle but thought that the concept behind the Egyptian proposal was already implicit in the existing wording.

20. Mr. HOLTZMANN (United States of America) felt that the arbitrators should be left discretion to require translation into more than one language.

21. Mr. HERRMANN (International Trade Law Branch) said it was his understanding that the Egyptian representative had feared that the phrase "the language or languages" might be misinterpreted as requiring translation of documents into

two languages without allowing the discretion of requiring translation into only one language in particular cases.

22. Mr. RAMADAN (Egypt) said that in cases where the parties had agreed on the use of several languages, he would like the arbitral tribunal to be authorized to choose one of those languages, in order to save time and costs.

23. Mr. MTANGO (United Republic of Tanzania) suggested that the Egyptian representative's point could be covered by replacing the phrase "the language or languages" by "a language or languages".

24. Mr. JOKO-SMART (Sierra Leone) said he had no difficulty with the text as it stood.

25. Mr. HOLTZMANN (United States of America) suggested that the Commission should accept the Egyptian proposal in principle and leave it to the drafting committee to decide where to insert appropriate wording.

26. The CHAIRMAN said that, as he heard no objection, he would take it that article 22 was referred to the drafting committee on that basis.

27. *It was so agreed.*

28. Mr. HERRMANN (International Trade Law Branch) referred to the earlier proposal made by the representative of the United Republic of Tanzania. It had always been the understanding of the Working Group, as was indicated in the secretariat's commentary on article 19 (A/CN.9/264, p. 44), that the fundamental principle enunciated in article 19 (3) would apply to arbitral proceedings in general; it would thus govern all the provisions in chapter V and other aspects, such as the composition of the arbitral tribunal, not directly regulated therein. He thought it would be within the mandate of the drafting committee, subject to the wishes of the Commission, to consider whether the fundamental principles in article 19 (3) should be highlighted by placing them in a separate article, perhaps at the beginning of chapter V.

29. Mr. AYLING (United Kingdom) recalled that the Commission had not completed its discussion of article 19. He presumed that the proposal of the representative of the United Republic of Tanzania, which his delegation supported, would be taken up when the Commission returned to that article.

30. The CHAIRMAN said that the Commission would consider the proposal at that point.

Article 23. Statements of claim and defence

Paragraph (1)

31. Mr. AYLING (United Kingdom) referred to the discussion in the Working Group on the subject of whether certain provisions of the Model Law should be mandatory or not (A/CN.9/246, p. 43). His delegation, like the United States in its written comments on article 23 (1) (A/CN.9/263, p. 35, para. 2), considered that the form of statements of claim and defence should be subject to the agreement of the parties. There were cases, such as those relating to the quality of commodities or to claims which had been set out in correspondence between the parties, where written pleadings were inappropriate.

32. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that the article related to the mechanics of arbitration and his organization felt that such matters should be left to the arbitrators and not legislated in great detail. The first part of article 23 was cast in mandatory form, but the question of statements of claim and defence should be left instead to the parties concerned, who could adopt suitable institutional rules to fit the case. The amendment proposed by the United Kingdom delegation would meet his concern.

33. Mr. HUNTER (Observer for the International Bar Association) agreed with the two previous speakers. Arrangements should be flexible and where the parties so agreed, there was no necessity for formal statements of claim and defence.

34. Mr. ROEHRICH (France) said that he understood the practical reasons which had motivated the United Kingdom proposal but he was concerned at the possible consequences of adopting it. Article 23 embodied the basic principle of providing the claimant and the respondent with the opportunity to state their respective cases. There could be flexibility as to the manner of their presentation, but the principle of the right of defence required that the arbitrators should be seized of all the facts involved in the dispute submitted to them. How would that be possible if, under the United Kingdom proposal, parties could agree to present neither a claim nor a response?

35. Mr. HOLTZMANN (United States of America) said he appreciated the support which had been voiced for his Government's written comments on article 23 (1) (A/CN.4/263, p. 35, para. 2), inspired by the UNCITRAL Arbitration Rules. However, a number of arbitration institutions had different rules with regard to the timing and content of pleadings. That was probably the case with the Soviet Foreign Trade Arbitration Commission and it was certainly the case with the American Arbitration Association. The latter body, which dealt annually with 40,000 cases, both national and international, only required that the initial statement should give notice of the intention to submit the dispute to arbitration and of its nature. Information as to the facts supporting the claim and the points at issue, which usually included legal and factual arguments, were not required at that stage. The Model Law, which accepted the concept of party autonomy, should permit parties to agree on the rules of an established arbitration institute or on the UNCITRAL Arbitration Rules. He therefore supported the United Kingdom amendment.

36. Mr. SAMI (Iraq) said that article 23 (1) should not be deleted. He agreed with the French representative that it should provide for minimum procedural standards. However, he was not opposed to the insertion of a phrase such as "unless otherwise agreed" since, as the United States representative had pointed out, there were a large number of arbitration institutes which had their own rules for pleadings.

37. Mr. BOUBAZINE (Algeria) supported the views expressed by the French representative.

38. Mr. HERRMANN (International Trade Law Branch) said that the intention of the Working Group, which had held similar discussions, had been to express a principle and it was difficult to envisage how a decision on a dispute could be reached without statements from the parties concerned. There was the question not only of timing but of whether or not the pleading should be in written form. The form of words proposed by the United Kingdom delegation appeared somewhat awkward, and he suggested the insertion in the opening phrase of the words "and in the manner" after the words

"period of time". He preferred the word "manner" to "form" since it was wider and could include aspects such as relief.

39. Mr. BARRERA GRAF (Mexico) said that the provisions in article 23 (1) were essential since they constituted the basis of the dispute submitted to arbitration. There could be no claim without a defence. He would go further and, as his Government had suggested in its written comments (A/CN.9/263, p. 55, para. 2), he urged that the text should also refer to the possibility of the respondent presenting a counter-claim. He was prepared to accept the addition to article 23 (1) proposed by the representative of the secretariat, if that would facilitate matters.

40. Mr. OLUKOLU (Nigeria) said he was in favour of the provisions not being mandatory in view of the need for flexibility. He was disposed to support the United Kingdom proposal but he was concerned that the actions of parties should nevertheless be subject to rules, which could be those applied by established arbitration institutes.

41. Mr. de HOYOS GUTIERREZ (Cuba) supported the present text of article 23 (1). A time-limit should be set for claims, and the statements of both parties must be accompanied by relevant proof, even if some arbitration institutes did not insist upon it. One of the purposes of arbitration was to guarantee an effective settlement within a limited period of time.

42. Mr. ROEHRICH (France) said it would perhaps be possible to find a common ground on the lines of the secretariat proposal, if necessary by simplifying the wording of article 23 (1), which was perhaps much too precise to take account of the rules of different institutions. However, even shorn of some detail, the provision must retain its basic structure and state that the arbitration of a dispute began with an indication of the claim and the response to it. He would also support the Mexican proposal.

43. Mr. LOEFMARCK (Sweden) supported the amendment suggested by the French representative. His delegation would be satisfied with a much vaguer formulation. The Swedish arbitration code merely stated that the arbitrator should give the parties an opportunity to present their cases.

44. Mr. ILLESCAS ORTIZ (Spain) said it was important to maintain article 23 (1). Neither the fundamental principle enunciated in article 19 (3) nor the inclusion in article 34 of a general clause regarding the equitable nature of the procedure would be sufficient to guarantee the necessary even-handed treatment of both parties. Article 23 should state that the parties must submit the facts of the dispute so that the arbitrators could uphold the rights of each party. It was important to specify the stages of the arbitral proceedings down to the award. He felt that the Mexican proposal might well be introduced into article 23 (2).

45. Mr. JARVIN (Observer for the International Chamber of Commerce) supported the views expressed by the French representative on article 23 (1).

46. Mr. ROGERS (Australia) supported the views expressed by the United States and United Kingdom representatives. Regarding the remarks of the representative of Spain, he felt that by inviting the parties to protect themselves against themselves, the Model Law would be paying lip service to party autonomy but actually be tying the parties down hand and foot. Some of the previous speakers had indicated that they knew of no cases when the parties could proceed to arbitration without submitting the material mentioned in article 23 (1). In response, he would draw attention to the cases of arbitration of disputes relating to claims for damage to goods. In those cases the arbitrators simply inspected the goods on the spot and the parties were not obliged to comply with a minimum standard that might be unsuited to the facts of the case. In conclusion, he joined the Observer for the Chartered Institute of Arbitrators in appealing that once a matter had been submitted to the arbitrators, they should be allowed to do their work as they saw fit and that the principle of party autonomy should be fully implemented.

47. Mr. BOGGIANO (Observer for Argentina) said that in article 23 (2), the parties were granted the right to alter their statements of claim and defence and thereby to alter the subject-matter of the proceedings; that freedom should also be reflected in article 23 (1).

48. Mr. SEKHON (India) said that he agreed with the reasoning of the representative of France. Article 23 (1) should be retained, but if greater flexibility was to be introduced, Mr. Herrmann's suggestion was acceptable.

49. Mr. REINSKOU (Observer for Norway) said that article 23 left it up to the parties or to the arbitral tribunal to decide whether a single or separate time-limit should apply to statements conveying the facts supporting a claim, the points at issue and the relief or remedy sought. Although he could accept the article as it stood, he would prefer it to be redrafted so as to indicate that the matters covered therein were subject to agreement by the parties.

50. Mr. LEBEDEV (Union of Soviet Socialist Republics) said he agreed with the representative of France that it would be illogical to place the words "unless otherwise agreed by the parties" at the very beginning of article 23 (1). He also believed that the concerns expressed by many delegations, including that of the United States, should be taken into account: many countries already had permanent arbitration institutions which had their own rules of procedure governing the requirements for statements of claim and defence, and the Model Law should not conflict unnecessarily with them. Moreover, States must be enabled to reach agreement among themselves, in accordance with the rules of procedure of such permanent arbitration institutions, concerning the contents of statements of claim and defence. The United Kingdom representative also had made a valid point: hundreds of arbitral proceedings were actually conducted daily without recourse to special rules of procedure, and the Model Law should not interfere with that process.

51. He proposed, as a compromise formula, that the words "unless the parties have otherwise agreed on the contents and the form of such statements" should be added at the end of the first sentence of article 23 (1) and that the next sentence should begin with the words "The parties may introduce, along with their statements, . . .".

52. Mr. GRAHAM (Observer for Canada) said that the Soviet Union proposals were acceptable, since they would make it possible to deal flexibly with any type of proceedings. They obviated the need for the French amendment.

53. Mr. AYLING (United Kingdom) said that the Soviet Union proposals covered all the cases discussed by the Commission and that his delegation supported them.

54. Mr. ROEHRICH (France) said that the Soviet Union representative had proposed an excellent compromise and his delegation supported it.

55. Mr. TORNARITIS (Cyprus) pointed out that even in countries which applied strict regulations concerning statements of claim and defence, those regulations could be passed over if both parties agreed on some other course.

56. Mr. SCHUMACHER (Federal Republic of Germany) suggested that the words "unless otherwise agreed by the parties" be deleted from article 23 (2) and that a third paragraph, which might read "The provisions foreseen in paragraphs (1) and (2) may be modified by agreement between the parties", should be added.

57. Mr. MATHANJUKI (Kenya) said that article 23 (1) adequately set out minimum requirements for submissions from claimants. He had no objection to the first Soviet Union proposal but believed that whatever procedure was used, the parties must above all have a clear idea of what they were claiming. He understood the second Soviet Union proposal to mean that a party was not necessarily required to annex material to its statement before the proceedings began, as some materials could not be obtained overnight and flexibility was essential.

58. Mr. LAVINA (Philippines) said that the first Soviet Union proposal was acceptable but that the second proposal was unnecessary as the sentence to which it applied was already perfectly clear. He was interested in the proposal made by the representative of the Federal Republic of Germany and would like to see it in writing.

59. Mr. HUNTER (Observer for the International Bar Association) said that the Soviet Union's very practical proposals would be completely acceptable to practitioners.

60. Mr. RAMADAN (Egypt) said that article 23 (1) mirrored article 18 of the UNCITRAL Arbitration Rules, although it was perhaps somewhat less restrictive. If consensus was reached on the Soviet Union proposal, he would prefer the second sentence of article 23 (1) to be redrafted along the lines of article 18 of the UNCITRAL Arbitration Rules, i.e. that the words "The claimant shall submit a statement of claim which indicates the following particulars" should precede the wording suggested by the representative of the Soviet Union.

61. Mr. PENKOV (Observer for Bulgaria) said that the right of parties to change or amend their statements of claim and defence was limited in two cases: when the parties so agreed and when an appropriate decision referring to various reasons and circumstances was taken by the arbitrators.

62. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 23 (1), as amended by the Soviet Union representative.

63. *It was so decided.*

The meeting rose at 5 p.m.