

323rd Meeting

Friday, 14 June 1985, at 9.30 a.m.

Chairman: Mr. SZASZ (Hungary)

The meeting was called to order at 9.45 a.m.

International commercial arbitration (continued)
(A/CN.9/246, annex; A/CN.9/263 and Add.1-2, A/CN.9/264)

Article 23. Statements of claim and defence (continued)

Article 23 (2)

1. Mr. SEKHON (India) suggested that the word "relevant" should be inserted before "circumstances" in the last line.

2. Mr. PENKOV (Observer for Bulgaria) said that the autonomy granted to the parties and the discretion granted to the arbitrators were not compatible with the mandatory provisions of the Model Law. For example, the right of each party to be given a full opportunity of presenting his case, as provided for in article 19 (3), implied the right of each party to make any amendments to his claim or defence throughout the proceedings. The provision was, moreover, inconsistent with the single-tier jurisdiction which was characteristic of arbitral proceedings. Greater autonomy might lie with the party occupying the stronger bargaining position, but the award of additional costs was a proper remedy against dilatory tactics. His delegation was, therefore, in favour of omitting the limitation on the right of a party to amend or supplement his claim or defence.

3. Mr. ABOUL ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that, subject to article 32 (2) (b), the arbitral tribunal should not have the power to prevent a party from changing his defence during the proceedings. He suggested that the last three lines of the

paragraph should be amended to read: "However, the arbitral tribunal may consider it inappropriate to allow the amendment of the claim, having regard to the delay in making it or the prejudice to the other party." The words "or any other circumstances" should be deleted because the factors of delay and prejudice included all the circumstances that it was appropriate to cover.

4. Mr. ZUBOV (Union of Soviet Socialist Republics) agreed that the paragraph gave the arbitrators too much freedom; the words "or any other circumstances" should certainly be deleted. He noted that any amendment or supplement submitted by one party would be to his advantage and consequently to the prejudice of the other party. It would, therefore, be more just to grant the parties the right to submit amendments or supplements at any time until the arbitrators announced the termination of the proceedings.

5. Mr. STROHBACH (German Democratic Republic) endorsed the comments made by the representatives of Bulgaria and the Soviet Union. There were many ways for the arbitrators to remedy injustices; in the event of delay, for example, they could make a partial award or increase the costs allowed. The limitation in the second part of the paragraph was thus superfluous and he proposed its deletion; the paragraph should end with the words "arbitral proceedings" at the end of the second line.

6. Mr. SAMI (Iraq) said that the right of the parties to submit amendments or supplements during the proceedings

must be guaranteed until the award was announced. He supported the deletion proposed by the representative of the German Democratic Republic.

7. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the powers of the arbitral tribunal with respect to the matters covered in the paragraph should be limited. He suggested that the words "or supplement" should be inserted after "amendment" in the fourth line.

8. Mr. HOLTZMANN (United States of America) said that he appreciated the concerns expressed by previous speakers, but his delegation was also concerned about questions of practicality and cost. If the limitation in the second part of the paragraph was deleted, the arbitral tribunal would not have the power to prevent abuses of an unlimited right. The way would then lie open to delays, additional costs and injustices. Article 20 of the UNCITRAL Arbitration Rules laid down clear guidelines to prevent possible abuse. Similar provisions were contained in the present text, which his delegation wished to retain in full.

9. Mr. ROEHRICH (France) agreed that the provision should be read in conjunction with articles 19 (3) and 32 (2). The arbitral proceedings should allow not only an initial exchange of claim and defence but also the continuation of the dialogue. Arbitration was above all a matter for the parties and they should be able to submit amendments or supplements when such submissions helped to clarify the subject-matter of the dispute. He was therefore opposed to limiting that right. He proposed the deletion of the reference to prejudice to the other party, which was already covered by article 19 (3), and dropping the formula "or any other circumstances", which was far too broad. The paragraph would then end at the words "in making it".

10. Mr. LOEFMARCK (Sweden) said that, for the reasons given by the representative of the United States, he was strongly opposed to the deletion of the last part of the paragraph.

11. Mr. GRIFFITH (Australia) agreed with the representative of the United States that the text should be on the same lines as article 20 of the UNCITRAL Arbitration Rules.

12. Mr. MOELLER (Observer for Finland) said that he opposed the deletion of the second part of the paragraph, for it was necessary to try to prevent abuses. He could accept the deletion of the words "or any other circumstances" and he could live with the French proposal even though he would prefer retaining the reference to prejudice to the other party.

13. Mr. SZURSKI (Observer for Poland) said that in dealing with cases not covered by agreement of the parties, the Model Law should be flexible and allow them to correct any error that might have been made in a claim or defence. He could therefore agree to the proposal to delete the limitation in the second part of the paragraph. He suggested that the words "until the arbitral proceedings are closed" should be inserted in the opening proviso after the words "by the parties".

14. Mr. SAWADA (Japan) said that the present text was satisfactory, for the arbitral tribunal must retain a degree of control. The only change which his delegation could accept was the deletion of the words "or any other circumstances".

15. Mr. LAVINA (Philippines) said that his delegation supported the French proposal but would be prepared to go along with a majority opinion in favour of dropping the second part of the paragraph.

16. Mr. de HOYOS GUTIERREZ (Cuba) agreed that the right of the parties to submit amendments or supplements should be limited but he did not think that the powers of the arbitrators should be too broad. He could therefore accept the French proposal.

17. Mr. AYLING (United Kingdom) said that the Working Group on International Contract Practices had decided to go into what was, in his delegation's view, excessive detail in the paragraph in order to maintain a balance between the rights of claimants and respondents. The text was a fair compromise and should remain unchanged. The French proposal was superficially attractive but would lead to the undesirable interpretation that the arbitrators were unable to take account of other important matters such as prejudice, costs and new evidence.

18. Ms. VILUS (Yugoslavia) said that her delegation preferred the French proposal, which safeguarded the interests of the arbitral proceedings and of both the parties. As second choice, she could accept the deletion of the words "or any other circumstances". Failing that, the Indian proposal was acceptable.

19. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that the paragraph contained two mutually antagonistic considerations: the equality of the parties and the requirements of justice. She supported the French proposal, which struck a fair balance between the two.

20. Mr. RAMADAN (Egypt) said that he understood the practical considerations referred to by the representative of the United States. However, the French proposal seemed to be a satisfactory compromise solution. He noted that article 30 (2) (b) provided a guarantee which should dispel any misgivings about possible abuse by the parties.

21. Mr. GRAHAM (Observer for Canada) agreed with the observer for Greece on the need to strike a balance between two conflicting considerations. The onus would be on the party concerned to demonstrate that a delay was justified. He endorsed the argument of the representatives of the United States and Australia that the Model Law should follow article 20 of the UNCITRAL Arbitration Rules. As to the French proposal, it would be going too far to remove the reference to prejudice to the other party but it might be acceptable to delete the words "or any other circumstances".

22. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that the present text allowed the arbitrators excessive freedom and he therefore supported the French proposal.

23. Mr. SCHUMACHER (Federal Republic of Germany) and Mr. BARRERA GRAF (Mexico) supported the French proposal.

24. Mr. JOKO-SMART (Sierra Leone) said that if article 19 (3) were accepted—and his delegation accepted it—there should be no difficulty in accepting article 23 (2) as well. He opposed the proposal to delete the second part of the paragraph. That would not be consistent with article 19 (3) and, moreover, it would encourage abuse of the proceedings, since the parties could simply go on submitting amendments without the arbitral tribunal being able to intervene. He was in favour of retaining the references both to delay and to prejudice. Lastly, he had no objection to the compromise of deleting the words "or any other circumstances".

25. Mr. KADI (Algeria) recalled that the Working Group had adopted the present text, but without a majority. He supported the French proposal.

26. Mr. SEKHON (India) opposed the deletion of the reference to prejudice to the other party, since the phrase served a useful purpose. There would be prejudice to the other party if, for example, a party sought an amendment which involved a subject outside the scope of the arbitral agreement.
27. Mr. TANG Houzhi (China) said that the second part of article 23 (2), which reproduced the wording in article 20 of the UNCITRAL Arbitration Rules, seemed to offer too much latitude both to the parties and to the arbitral tribunal. He supported the compromise suggestion to delete only the concluding words "or prejudice to the other party or any other circumstances".
28. Mr. VOLKEN (Observer for Switzerland) supported the view that a better balance was needed between the freedom allowed to the parties and the control exercised by the arbitral tribunal. As for the reference to other circumstances, it could be deleted.
29. The CHAIRMAN said that there appeared to be some support for deleting the whole of the second part of the paragraph, and also considerable support for maintaining the text as it stood, or at least for deleting only the words "or any other circumstances". An intermediate solution had also been proposed, namely to delete the concluding passage "or prejudice to the other party or any other circumstances": the paragraph would thus end with the words "having regard to the delay in making it". He suggested that the Commission might agree to that proposal, which would be a balanced solution.
30. *It was so decided.*
31. Mr. SZURSKI (Observer for Poland) fully supported the decision, on the understanding that the reference to delay was understood to mean delay in submitting a claim.
32. Mr. HOLTZMANN (United States of America) recalled that, at the previous meeting, the Mexican representative had raised the question of counter-claims and that it had been agreed that the Commission should consider it after completing article 23. He understood the Working Group's view to be that a counter-claim was a form of claim and was therefore covered by the right to make a claim. The same applied to defence. He suggested that a sentence should be included in article 23, or wherever else it was relevant, to the effect that "claim" and "defence" included counter-claim and defence to a counter-claim, respectively.
33. The CHAIRMAN suggested that the matter should be left until the Commission had reached the end of the Model Law, in case a separate provision were needed.
34. Mr. BARRERA GRAF (Mexico), referring to his Government's proposal in its comments (A/CN.9/263, p. 55, para. 2), said that he would prefer a reference to counter-claims to be added at the end of article 23 (1). If necessary, however, he would not raise any objection to the matter being dealt with at the end of the Model Law, or to an appropriate reference being included in the report.
35. The CHAIRMAN said that the Mexican representative's point would be noted. It would be better to leave the matter until the end of the Model Law, to see whether it applied to other articles.
36. *It was so decided.*
37. Mr. RUZICKA (Czechoslovakia) said that his Government also had made a proposal (A/CN.9/263, p. 55, para. 3). He was in favour of drafting a separate article, in which it should also be pointed out that such claims could be made only within the scope of the arbitration agreement.

Article 24. Hearings and written proceedings

Paragraphs (1) and (2)

38. Mr. AYLING (United Kingdom) drew attention to the United Kingdom comment (A/CN.9/263/Add.2, para. 18) and to the United States proposal on the same lines (A/CN.9/263, p. 35, para. 1), which he supported. The United Kingdom maintained that, in the absence of agreement between the parties, if either party so requested, the proceedings should be held orally and not in writing.

39. Mr. HOLTZMANN (United States of America) drew attention to the text of his Government's proposal (A/CN.9/263, p. 35, para. 1) and in particular to the words "at any appropriate stage of the proceedings", which had been introduced to meet the concern of a number of representatives about the possibility of a party being able to request oral hearings for unlimited periods and on unlimited occasions. He suggested that an explanation could be included in the article (or possibly in the report) to the effect that nothing therein limited the power of the arbitral tribunal to determine the length of hearings or the stage at which they should be held.

40. Mr. REINSKOU (Observer for Norway) found the wording of article 24 (1) too rigid. He would be satisfied if it were made clear in the Commission's report that article 24 (1) should not be understood as ruling out the possibility of the proceedings being partly oral and partly on the basis of documents. He supported the United States proposal.

41. Mr. MOELLER (Observer for Finland) said that there would seem to be no justification for allowing a party to request oral proceedings if the parties had agreed that there should be only written proceedings. Where the parties had not agreed on either oral or written proceedings, a party should have the right to ask for oral proceedings; he therefore suggested that the existing text of article 24 (1) should be amended to state that the arbitral tribunal "may" (not "shall") decide on the issue of oral proceedings. As for the United States proposal, it appeared suitable for inclusion in the Commission's report, although he would have no objection if members preferred to see it in the text itself.

42. Mr. JARVIN (Observer for the International Chamber of Commerce) agreed with the representatives of Finland, the United States and other countries. He also pointed out that the right to request oral proceedings was not assured in the French version of article 24 (2), which stated that the arbitral tribunal "shall hold" ("*organise*"), whereas the English text said "may . . . hold". He supported the idea that either party had the right to request oral proceedings.

43. Mr. LEBEDEV (Union of Soviet Socialist Republics), referring to the written comments, including his own Government's (A/CN.9/263, p. 37, para. 5), said that the right of the parties to request oral proceedings was fundamental. In his delegation's opinion, article 24 (1) and article 24 (2) were inconsistent with that basic principle; he therefore supported the United States proposal (A/CN.9/263, p. 35, para. 1), but it would be necessary to consider the drafting. The first sentence specified that either party could make a request "at any appropriate stage of the proceedings" and he suggested

that it should be made clear that when there was no agreement by the parties, the question should be decided at the commencement of the proceedings. Once the principle had been agreed upon, the wording could be left to the drafting committee.

44. Mr. LAVINA (Philippines) said it was a fundamental principle of most legal systems that there could be no proceedings without a hearing—unless, of course, the parties agreed to dispense with it. He therefore supported the United States proposal, which had the merit of combining the present paragraphs (1) and (2) and also of using the mandatory “shall”. He also supported the Norwegian suggestion that the idea of a hearing accompanied by presentation of documents should not be ruled out, and suggested that that idea should be incorporated into the United States proposal.

45. Mr. SZURSKI (Observer for Poland) said that arbitration agreements rarely stipulated that oral proceedings must be held; it was also rare for the parties to request an oral hearing in their statement of claim or defence. Actually, from his experience, he could safely assert that oral proceedings were essential to the proper conduct of international commercial arbitration. He accordingly proposed that the two paragraphs under discussion should be merged and a provision included to the effect that, unless the parties had agreed otherwise, or explicitly renounced oral hearings, the arbitral tribunal would be bound to hold oral hearings for the presentation of evidence or for oral argument. Alternatively, the proposal submitted by Poland and the United States (A/CN.9/263, p. 35, para. 1) could be slightly amended to read “. . . the arbitral tribunal, having asked the parties, shall hold hearings . . .”.

46. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that he preferred the original text for the reasons given in the secretariat’s comments (A/CN.9/264, p. 54).

47. Mr. ROEHRICH (France) said that his delegation preferred the original text because it could be more easily incorporated into the legal systems of different countries. He proposed that in article 24 (2) the word “may” should be replaced by “shall”, to read “the arbitral tribunal shall . . . hold hearings”.

48. Mr. GRAHAM (Observer for Canada) expressed support for the proposal of the United States of America and Poland (A/CN.9/263, p. 35, para. 1), which safeguarded a party’s right to an oral hearing. He could, however, also support the amendment proposed by the French representative to the original text, which would achieve the same result.

49. Mr. BONELL (Italy) pointed out that, under article 24 (2) in its present form, a party who had initially agreed that no hearings should be held might break that agreement at a later stage, in which case the arbitral tribunal would be obliged to comply with his request for oral hearings. He therefore supported the proposal by the United States and Poland, possibly with the clarification suggested by the United States representative.

50. Mr. GRIFFITH (Australia) supported the United States proposal.

51. Mr. RAMADAN (Egypt) said that the United States proposal was too wide in scope. The Arabic translation of article 24 read: “the arbitral tribunal *may* . . . hold hearings”.

52. Mr. LOEFMARCK (Sweden) supported the United States proposal. The United States representative’s amend-

ment to his proposal, concerning the limitation of the length of oral hearings, should be included in the report rather than in the text of the article. Admittedly, it would be preferable to decide at an early stage whether the proceedings should be oral or written, but it would be wrong to take away the arbitral tribunal’s right to decide on such a question at any stage.

53. Mr. SAMI (Iraq) said that the present wording of article 24 (1) limited the freedom of the parties to choose their presentation of the case. It was important to observe the spirit of the Model Law and give each party equal treatment and the opportunity to present his case.

54. Mr. AYLING (United Kingdom) said that his delegation could accept the United States proposal, with or without the subsequent amendment proposed by the United States representative, or the original text with the word “may” replaced by the word “shall”. However, as the Italian representative had pointed out, a party should not be allowed to request an oral hearing if it had previously agreed that no such hearing should be held.

55. Mr. MTANGO (United Republic of Tanzania), supported by Mr. JOKO-SMART (Sierra Leone), said that a party who had originally agreed that no oral hearing should be held might subsequently decide that one was necessary after all. The word “may” in the original text gave the arbitral tribunal the power to decide in that case whether the request was justified.

56. Mr. ABoul ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) said that the original text would be preferable if the word “may” was replaced by “shall”.

57. Mr. BARRERA GRAF (Mexico) agreed with the Tanzanian representative that the word “may” should be retained. He could also support the United States proposal if the word “shall” were used.

58. Mr. SCHUMACHER (Federal Republic of Germany) said that the United States proposal was clearer than the original text and still gave the arbitral tribunal the power to prevent any attempt to delay the proceedings.

59. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) supported the United States proposal because it avoided the problem to which the Italian representative had drawn attention.

60. Mr. HOLTZMANN (United States of America) said that many speakers had stressed a party’s right to request an oral hearing at any stage, in which case article 24 (2) should read “. . . the arbitral tribunal *shall* . . . hold hearings”. However, he did not consider that a party should have the right to demand an oral hearing if it had been stated in the arbitration agreement that no such hearing should be held. The United States proposal was worded accordingly.

61. Mr. TORNARITIS (Cyprus) expressed a preference for the original text with the oral amendments which had been proposed.

62. Mr. TANG Houzhi (China), Mr. KADI (Algeria) and Mr. OLUKOLU (Nigeria) expressed a preference for the original text of article 24.

The meeting rose at 12.30 p.m.