AS TO THE ADMISSIBILITY OF

Application No. 18479/91
by Jakob BOSS Söhne KG
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 2 December 1991, the following members being present:

MM.C.A. NØRGAARD, President
J.A. FROWEIN
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 June 1991 by Jakob BOSS Söhne KG against the Federal Republic of Germany and registered on 9 July 1991 under file No. 18479/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant company is a commercial limited partnership which is registered in Albstadt, Germany. In the proceedings before the Commission it is represented by Messrs. Thümmel, Schütze and Partner, lawyers in Stuttgart.

By decision of 5 December 1985 the Stuttgart Regional Court (Landgericht) granted the action of an Italian company against the applicant company for the enforcement of an arbitration award given by the ICC Court of Arbitration on 10 December 1983. According to that award, the applicant company had to pay 577,260,032 Italian Lire, 213,595 DM and 11,703 US Dollars to the plaintiff company. According

to the findings of the court, the two companies involved had agreed to have disputes between them decided by an arbitration court. The applicant company's objection, namely that the arbitration award was null and void because it had been given out of time, had already been raised without success before a first instance court in Brussels, and had been considered to be unfounded. The Regional Court considered that the time-limit in question had been prolonged in the arbitration proceedings and in any event, even if the proceedings had not been prolonged in accordance with the applicable rules of procedure, this would not constitute a violation of fundamental procedural rights as the applicant company had not thereby been affected in its right to be heard.

On appeal the Stuttgart Court of Appeal (Oberlandesgericht) quashed the Regional Court's judgment on 22 December 1986. The appellate court found that the applicant company had not been heard in the arbitration proceedings on the question of whether there had been reason to prolong the arbitration proceedings. Contrary to the first instance court, the appellate court considered that this circumstance constituted a violation of the procedural 'ordre public'.

The plaintiff company then lodged an appeal on points of law (Revision). On 14 April 1988 the Federal Court (Bundesgerichtshof) quashed the appellate court's judgment and dismissed the appeal against the first instance judgment the validity of which was thereby restored.

The Federal Court stated that in view of the fact that the International Arbitration Court had not replaced the arbitrator, but rather confirmed him in his office repeatedly, the defendant's argument that the protocol concerning the arbitration proceedings had been forged in order to show that the arbitration proceedings had been prolonged was irrelevant. The Federal Court pointed out that the applicant company had been informed of the arbitration proceedings and of the appointment of the arbitrator. It had not been prevented by the prolongation of the arbitration proceedings from pleading its case. Therefore the prolongation of the arbitration proceedings did not violate the German 'ordre public' even if the rules on the arbitration procedure had not been fully respected.

The applicant company then lodged a constitutional complaint which was rejected by the Federal Constitutional Court (Bundesverfassungsgericht) on 10 December 1990 as being clearly unfounded. The Federal Constitutional Court considered that the decisions of the

German courts complained of did not violate any fundamental rights, because, even supposing that the right to a fair hearing as guaranteed by Article 103 (1) the Basic Law (Grundgesetz) applied to arbitration proceedings, the fact alone that the applicant company had allegedly not been heard on the question of whether the arbitration proceedings could be prolonged, did not violate its right to be heard on the merits. Furthermore the Constitutional Court stated that the applicant company had not shown that it was prevented from submitting relevant arguments in the arbitration proceedings which would have justified another decision in its favour.

COMPLAINTS

The applicant company first submits that it did not tacitly renounce the rights guaranteed under Article 6 of the Convention by entering voluntarily into an arbitration agreement. It considers that Article 6 para. 1 of the Convention was violated in that the German courts enforced the final arbitration award and rejected its valid objections, thereby depriving it of the adequate instruments to remedy

severe breaches of the principle of a fair trial.

According to the applicant company, its right to a fair trial had been violated in the arbitration proceedings by lack of impartiality and independence of the arbitrator who had based his decision on evidence submitted by the plaintiff company without taking into consideration the position of the applicant company and without examining whether the evidence had not been forged. Furthermore the arbitration proceedings were unfair because the applicant company had not been given an opportunity to be heard in respect of the extensions of the time-limits for the termination of these proceedings, while, according to the ICC rules, the time-limit could only be extended exceptionally under special circumstances, but under no circumstances automatically as had been done in its case.

THE LAW

The applicant company complains that the German courts acknowledged as valid and enforceable an arbitration award given against it in arbitration proceedings that had allegedly been unfair and violated Article 6 para. 1 (Art. 6-1) of the Convention which provides in its first sentence:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission first observes that the applicant company had voluntarily entered into an arbitration agreement and thereby renounced its right to have its civil rights determined in court proceedings for the conduct of which the State is responsible under the Convention (cf. No. 11960/86, Dec. 13.7.90, unpublished).

This does not mean, however, that the respondent State's responsibility is completely excluded (cf. No. 13258/87, Dec. 9.2.90) as the arbitration award had to be recognised by the German courts and be given executory effect by them. The courts thereby exercised a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights and in particular with the right of the applicant company to be heard.

The Commission cannot find - also taking into account the applicant company's submissions - that the reasons given by the German courts disclose any arbitrariness which would amount to a violation of Article 6 (Art. 6) of the Convention.

It follows that the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER)(C.A. NØRGAARD)