

### 318th Meeting

Tuesday, 11 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 and Add.1-2, A/CN.9/264)

*Article 34. Application for setting aside as exclusive recourse against arbitral award (continued)*

*Article 34 (2) (b) (i)*

1. Mr. PELICHET (Observer for the The Hague Conference on Private International Law) said that subparagraph (b) (i) was completely unacceptable and might even be dangerous as it could permit a party to an arbitration agreement to have an award set aside in any State and thereby contradicted the principle that, in the absence of a choice by the parties, the law governing the substance of the dispute was the one which was applied to the question of arbitrability. Although the Working Group had decided to retain subparagraph (b) (i) in article 34 (2), it had indicated that the issues involved were of great practical importance and required further study. After giving the subject due consideration, his organization proposed that the subparagraph should be deleted.
2. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that in its report, the Working Group had solicited the comments of Governments and organizations on the matter (A/CN.9/246, para. 137) but that very few had been received. He disagreed with the Observer for The Hague Conference that the provision would make it possible for an award to be set aside by a court in a State alien to the arbitration. The only country whose courts could be asked to set aside an award was the country whose law governed the arbitration; the courts of a third country could not set aside an award made outside their jurisdiction. That was why he believed that subparagraph (b) (i) should be left as it was.
3. Mr. LOEFMARCK (Sweden) said that he agreed with the Observer for The Hague Conference and believed the subparagraph should be deleted. It was disturbing that the question of whether an award was in conflict with public policy could be settled by a court only if the parties so requested. A court located in the country where enforcement was sought ought to be able to take a decision of its own motion and not only at the request of a party.
4. Mrs. RATIB (Egypt) supported the proposal to delete the subparagraph. If it was deleted, the issue of setting aside an award would still be covered by subparagraph (b) (ii), where the issue of arbitrability related to public policy, and by subparagraph (a) (i), where it was connected with the validity of an arbitration agreement.
5. Mr. MOELLER (Observer for Finland) said that his delegation favoured the deletion of subparagraph (b) (i) for the reasons given by the Observer for The Hague Conference. In some States, arbitration might be restricted by local peculiarities unknown in other countries.
6. Mr. STROHBACH (German Democratic Republic) said that he shared the view of the representative of the International Council for Commercial Arbitration and would prefer subparagraph (b) (i) to be retained. The difficulties which might arise in connection with that provision could be

avoided if the parties chose as their place of arbitration a country in which the particular dispute could be settled by arbitration.

7. Sir Michael MUSTILL (United Kingdom) said that his delegation had no strong views on the subject but recalled that in accordance with a decision taken at the initiative of the Soviet Union, a provision would be included in article 1 to stipulate that the Model Law would be overruled by any local law governing the arbitrability of certain matters. Any attempt to arbitrate under the Model Law would accordingly be illegitimate if, under the law of the State in question, the subject-matter was not arbitrable. With regard to the suggestion that the parties themselves should solve the problem of the place of arbitration, he recalled that the Working Group's discussion had produced a sharp distinction in the text between subparagraph (a), which was to be invoked only if the party making the application furnished proof, and subparagraph (b), under which the court could take up a matter on its own motion. It was for that very reason that subparagraph (b) (i) had been placed in article 34 (2) (b) rather than article 34 (2) (a).
8. The CHAIRMAN said that an arbitral award could be set aside only if a party so requested; the court did not have the power to make such a ruling of itself.
9. Mr. SZASZ (Hungary) said that although a State might decide not to allow certain types of claims to be settled by arbitration, a party relying on the law of that State should not be denied the right to have an award set aside. He would prefer the subparagraph to be retained.
10. Mr. ROEHRICH (France) said that, for the reasons advanced by the Observer for The Hague Conference, his delegation favoured the deletion of subparagraph (b) (i) and believed that if it was deleted, subparagraph (b) (ii) should be deleted as well. He did not deny that the questions of arbitrability and public policy were extremely important, but they would be dealt with under article 36.
11. The CHAIRMAN suggested a compromise solution of deleting the phrase "under the law of this State". That would leave open the question of whether the law of a given State or international law would apply. It must be understood, however, that in most cases a State would apply its own law.
12. Mr. PELICHET (Observer for The Hague Conference on Private International Law) said that he could fully support the Chairman's compromise solution.
13. Mr. GRIFFITH (Australia) said that he concurred with the delegation of Hungary. The subparagraph should be retained; the matter should not be covered exclusively under article 36.
14. Mr. SEKHON (India) said that for the reasons advanced by the representative of Hungary, his delegation would favour the retention of the subparagraph.
15. Mr. SZASZ (Hungary) said that his delegation had no objection to the Chairman's compromise solution, particularly

as it believed the deletion of the phrase in question would not substantially change the meaning of the subparagraph.

16. Mr. HOELLERING (United States of America) said that he endorsed the text as it stood and did not favour the compromise solution because it would create confusion and uncertainty.

17. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) supported the deletion of subparagraph (b) (i) but preferred subparagraph (b) (ii) to be retained.

18. Mr. de HOYOS GUTIERREZ (Cuba) said that he supported the Chairman's suggestion to delete the closing phrase because that phrase was too restrictive.

19. Mr. LAVINA (Philippines) shared the views expressed by the representative of Hungary and urged the retention of the subparagraph as it stood.

20. Mr. BOGGIANO (Observer for Argentina) said that, as he understood it, the phrase "under the law of this State" referred to substantive law. If a State wished to apply the law of another country, it should be free to do so and not be forced to apply its own law. He endorsed the comments made by the Observer for The Hague Conference but found acceptable the Chairman's suggestion, which would leave it to the court to decide which law was applicable.

21. Mr. MTANGO (United Republic of Tanzania) said that he favoured the retention of both subparagraphs (b) (i) and (b) (ii).

22. Sir Michael MUSTILL (United Kingdom) said that he believed the subparagraph was of extremely limited practical importance; nevertheless, he endorsed the views expressed by the representative of Hungary and opposed the Chairman's suggestion, which would obscure the meaning of the subparagraph.

23. Mr. SAWADA (Japan) said that he supported the retention of the subparagraph.

24. Mr. BONELL (Italy) said that his first preference would be the retention of the subparagraph unaltered but that he could accept the Chairman's suggestion.

25. Mr. VOLKEN (Observer for Switzerland) said that he favoured the deletion of the subparagraph but could accept the Chairman's compromise solution. He would be interested to know, from those delegations which favoured its retention, whether in the case of (2) (b), under their countries' legislation, a court could set aside an award of its own motion. There was a curious dichotomy in the text between paragraphs (2) (a) and (2) (b), in other words, between the party making an application and the court acting on its own motion; moreover, the procedure for setting aside an award under article 34 was not compatible with the procedure for recognition and enforcement under article 36. The provisions of subparagraph (b) (ii) would have great merit in a procedure on recognition and enforcement, but not in an action on the setting aside.

26. Mr. SCHUMACHER (Federal Republic of Germany) said that he favoured the retention of subparagraph (b) (i) and thought that the compromise proposal left the most important question wide open and could create more problems than it solved.

27. Mr. TANG Houzhi (China) said that even though the compromise solution might cause some problems, it was the most reasonable and practical of the available approaches, and his delegation supported it.

28. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that he endorsed the Chairman's suggestion.

29. Mr. ROEHRICH (France) said that he too could accept the Chairman's suggestion.

30. Mr. GRAHAM (Observer for Canada) said that the Chairman's suggestion was a reasonable one, which would allow States to decide whether they wanted arbitration to be delocalized.

31. Mr. HOLTZMANN (United States of America) said that in his delegation's view, the "compromise" solution was in fact the most radical one. When parties sat down to draft a contract, they needed to know whether local laws of the place of arbitration permitted arbitration of the kinds of dispute that might arise. The Model Law should enable the parties to know in advance under what conditions arbitration might take place, but the Chairman's suggestion would have the effect of leaving them entirely in the dark on that point. This compromise could lead parties to choose arbitration where there was certainty rather than in less-developed legal systems.

32. The CHAIRMAN suggested that, as most delegations seemed to favour the retention of subparagraph (b) (i), the text should be left unaltered.

33. *It was so agreed.*

*Article 34 (2) (b) (ii)*

34. Mr. SEKHON (India) said that his delegation would prefer to see subparagraph (b) (ii) deleted. The expression "public policy" was much too vague and had very little to do with the law of arbitration. If the subparagraph were retained, the Commission should consider deleting the phrase "or any decision contained therein", which was superfluous as the whole necessarily included all of its parts, and a decision was part of an award.

35. Mr. LOEFMARCK (Sweden) said that his delegation would prefer the subparagraph to be deleted but would not insist upon it.

36. Mrs. VILUS (Yugoslavia) said that she agreed with the comments of the representative of India. The subparagraph could be interpreted to mean that an award could be set aside because "a decision contained therein", i.e. a part of that award, conflicted with certain principles of the law of the forum which were irrelevant to the merits of the case. The subparagraph was not, moreover, compatible with a restrictive interpretation of the notion of public policy.

37. Mr. SAMI (Iraq) said that his delegation also felt that the phrase "in conflict with the public policy of this State" was very ambiguous. He would prefer a wording such as "in conflict with the legal order of this State". If the wording was not changed, he would prefer the subparagraph to be deleted.

38. The CHAIRMAN said that "public policy" was a translation of the French term "*ordre public*" and meant the fundamental principles of law.

39. Mr. OLUKOLU (Nigeria) also felt that subparagraph (b) (ii) should be deleted. The term "public policy" was too vague to provide the guidance that the countries applying it should be able to expect from the Model Law.

40. Mr. JARVIN (Observer for the International Chamber of Commerce) thought that the idea of public policy was perhaps vague. It should, however, be further developed in the Model Law and a distinction made between international and national public policy. The Model Law was intended to apply to international trade.

41. Sir Michael MUSTILL (United Kingdom) pointed out that the term "public policy" was used again in article 36 (1) (b) (ii). In his delegation's view, the question was linked with the general problem of whether there should be a general provision encompassing all cases of serious procedural injustice. It was important to know, therefore, whether a case of serious procedural injustice would be regarded as contrary to public policy. If the term would allow the court to intervene in such cases, his delegation would regret the deletion of the subparagraph. If the subparagraph was not concerned with such cases, he would not object to its deletion.

42. The CHAIRMAN said that during the drafting of the 1972 European Convention on State Immunity, subsequently ratified by both the United Kingdom and Austria, there had been a long discussion on "*ordre public*". Ultimately, the French text of the Convention had used simply "*ordre public*", while the English text had had to specify a violation of a fundamental rule of procedure in the form of "no adequate opportunity fairly to present his case". That language had been used to make it clear that the notion was not limited to substantive law.

43. Mr. ROEHRICH (France) said that he felt the same concern as the United Kingdom representative. He had said earlier that his delegation would have no objection to the deletion of subparagraph (b) (ii). However, since a discussion had arisen on an addition to the provision in order to meet the anxiety of the common law States, an approach must be found which would cover the notion expressed in the 1972 European Convention on State Immunity. A formula was needed that would be acceptable to all States, irrespective of their legal systems. His delegation favoured retaining the subparagraph, provided it could be reworded to deal with those anxieties.

44. Mr. GOH (Singapore) was in favour of deleting the subparagraph. He felt that its retention would allow the court to intervene in matters which the parties had agreed to submit to arbitration.

45. The CHAIRMAN thought that subparagraph (b) (ii) was the best place for an improved explanation of the idea. The problem raised by the United Kingdom delegation could be solved by using different wording, because the intention was to refer to deviations from the fundamental principles of the law "of this State", both substantive and procedural. There was a public policy clause in all 38 conventions of The Hague Conference. He urged the Commission not to delete the subparagraph simply because the notion of "public policy" was strange, but rather to find a more comprehensive formula which would meet the fears of the United Kingdom and other delegations.

46. Mr. BONELL (Italy) said that the purpose of the subparagraph was to make it clear that, in addition to the reasons set out in the preceding subparagraphs, there was a more general limitation beyond which an award could not go.

He pointed out that there was no other possibility of supervising the content of the award. If subparagraph (b) (ii) was deleted, there were two possibilities: either the matter would be left entirely open and the recognition of any kind of award would be allowed, or the possibility would be hinted at that not only general but less than general principles were at stake, which would be an undesirable result. The aim was to provide for a minimum of court control and supervision. If a clearer form of words could be suggested, his delegation would welcome it. He noted that the 1958 New York Convention used the same concept (article V, para. 2 (b)). That Convention had worked satisfactorily so far.

47. Mr. BOGGIANO (Observer for Argentina) felt that it would be inconsistent to retain subparagraph (b) (i) and to reject (b) (ii). His delegation considered that "*ordre public*" constituted a body of fundamental principles which included also due process of law. The subparagraph implied a guarantee of protection against serious procedural injustice in the arbitration proceedings.

48. Mr. HOELLERING (United States of America) was in favour of retaining the subparagraph as it stood. To delete it would be a radical departure from the New York Convention. It was a concept frequently used in the United Nations, and its retention would enhance the acceptability of the Model Law. He was certain that the concern of the United Kingdom could be met by means of drafting changes.

49. Mr. TORNARITIS (Cyprus) thought that the subparagraph should not be deleted simply on account of its use of the term "public policy". If a more appropriate term could be found, his delegation would have no objection to the subparagraph. He noted that the words "*ordre public*" had been used in the English text of the Fourth Protocol to the European Convention on the Protection of Human Rights.

50. Mr. MTANGO (United Republic of Tanzania) said it was inaccurate to say that the concept of public policy was unknown in some common law States. It was in familiar use in contract law, for example. He had heard the concept defined as "binding rules of the legal system". He was in favour of retaining the subparagraph, with the deletion of the phrase "or any decision contained therein" if the Commission so decided.

51. Mr. GRAHAM (Observer for Canada) sympathized with the Indian position but favoured retaining the reservation contained in the subparagraph. In Canada, the common law and the civil law systems were both present, and problems such as that under discussion had had to be faced. He associated himself with the United States position on the subparagraph. The concept of public policy (*ordre public*) was included in many international conventions, and deleting it from the Model Law would be tantamount to refusing to tolerate the civil law concept. It might be possible to include a further subparagraph in paragraph (2) to accommodate the suggestion of respect for procedural regularity. He felt, however, that it would be better to expand the notion in paragraph (2) (b) (ii) along the lines of article 20 (2) (a) of the European Convention on State Immunity.

52. Mr. de HOYOS GUTIERREZ (Cuba) favoured maintaining subparagraph (b) (ii).

53. Mr. MATHANJUKI (Kenya) also favoured retaining the subparagraph. His delegation appreciated the need to provide for a rule of general character which would cover serious misjustice to the detriment of one of the parties to the arbitration. His delegation would not insist on the term

"public policy" but would accept any form of words that reflected the seriousness with which procedural injustice was regarded in the Model Law.

54. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that the notion of public policy was fundamental to her country's legal system. Her delegation was therefore in favour of retaining the subparagraph.

55. Mr. JOKO-SMART (Sierra Leone) said that, before the debate, his delegation had been in favour of retaining the subparagraph because of its understanding of the meaning of "public policy". There now seemed to be some confusion as to whether "*ordre public*" was properly rendered by the term "public policy", and unless that term was clarified, his delegation would be in favour of deleting the subparagraph.

56. The CHAIRMAN said that the Commission seemed disposed to retain the reference in article 34 (2) (b) (ii) to public policy without amplification in the text, but with a reference in the report to what the term meant in other conventions in which it was used, namely fundamental principles of law, without differentiating between substantive and procedural law. On the other hand, several speakers had supported the deletion of the phrase "or any decision contained therein". He took it there was agreement to delete it.

57. *It was so agreed.*

58. The CHAIRMAN, reverting to the issue which the United Kingdom delegation had raised in respect of subparagraph (a) (ii) of article 34 (2), said that perhaps the subparagraph could be widened a little so as to cover procedural irregularities. He suggested that the United Kingdom representative might submit a draft amendment for consideration by the Commission.

59. Mr. TORNARITIS (Cyprus) said that he agreed that public policy meant the general principles of law, both procedural and substantive.

60. Mr. LOEFMARCK (Sweden) said he agreed that there should be no attempt to define "public policy" in the text of paragraph (2) (b) (ii). With regard to paragraph (2) (a), he was in favour of adding something about errors of procedure which had affected the outcome of the case, such as false evidence. He also felt that provision should be made for the possibility of new grounds for challenging an arbitrator which became known between the announcement of the award and the application for setting it aside. That aspect was not covered by paragraph (2) (a) (iv). He had no objection to an attempt being made to meet his point by an amendment to paragraph (2) (a) (ii), although it did not concern an error of procedure.

61. Mr. HOELLERING (United States of America) said his delegation also did not favour the insertion of a definition of public policy in paragraph (2) (b) (ii). As to a possible amendment to paragraph (2) (a) (ii), he thought it should not be so broad as to include mistakes by arbitrators, mistakes of fact of any kind or newly discovered evidence, but should be restricted to situations where the award was procured by fraud, corruption or undue means.

62. Mr. ROEHRICH (France) said he understood that the Swedish proposal referred only to grounds for a challenge discovered after the handing down of the award. Otherwise, paragraph (2) (a) (iv) would apply. If the Swedish proposal implied the creation of new grounds for setting aside the

award, he would have serious objections to its introduction into article 34. In connection with the suggested United Kingdom addition to paragraph (2) (a) (ii) to deal with relatively exceptional cases, an attempt should be made to find a wording which was not too precise. It should concentrate on violations of the fundamental principles of procedure or failure to respect the legitimate expectations of parties with regard to the proper conduct of arbitration proceedings and not on the non-observance of ordinary procedural rules.

63. Sir Michael MUSTILL (United Kingdom) said that for the purposes of drafting an addition to paragraph (2) (a) (ii), it was essential to know the decision of the Commission on a point which had not yet been discussed and which had been raised in the comments of the Swedish Government on paragraph (2) (a) (A/CN.9/263, p. 47, para. 8). Briefly, it was whether the right to set aside an award existed whenever the facts set out in article 34 (2) (a) were proved or only if those facts had affected the result of the arbitration. Some countries believed that if a procedural injustice was proved, it was improper to allow an award to stand. Others took the view that the award should stand if the procedural injustice had made no difference. The Commission's decision on that point would have a bearing on whether or not the formulation should be along the lines of "if in any other case, there has been a substantial procedural injustice materially affecting the award".

64. Mr. ROEHRICH (France) said his delegation would prefer to have some objective elements which implicitly involved the principle of a party's motive to act. It would be very difficult to draft a definition of the concept of affecting the content of an award, in view of differences in legal systems. Once it was determined relatively clearly that the fundamental principles of procedure had been breached, there was no need to state as a further condition that it must be proved in each case that the award had been materially affected.

65. Mr. SZASZ (Hungary) said he agreed with the French representative's comments. The Commission should not go further than the present well-balanced texts in which the use of the word "may" in the opening sentence of paragraph (2) covered all the necessary elements. The court would look at the nature of the reason for setting aside an award.

66. Mr. BONELL (Italy) said that he too was in favour of leaving the text of paragraph (2) as it stood. However, he considered that the Commission should have a discussion on the point raised by the United Kingdom and Swedish representatives, a point which also appeared in the Italian comments on paragraph (2) (a) (A/CN.9/263, p. 47, para. 8). It concerned the possibility that the arbitration procedure had not functioned properly in the broadest sense. If the Commission was to pay attention to that quite separate issue, there should be no attempt to include it among grounds for setting aside the award, which related only to formal errors in the arbitration proceedings. It should be dealt with separately, and it should be made clear that, in addition to the present setting-aside procedure, there might in exceptional cases be other, non-technical grounds for putting aside an award. He agreed that those additional grounds should be relevant only to the extent that they had affected the outcome of the arbitration procedure. The United Kingdom representative appeared to have been given a mandate to prepare a draft on an issue which had not so far been discussed. Apart from the problem of how to deal with that issue, there would also be the matter of the time-limit specified in paragraph (3), which would not work for such cases.

67. Mr. LOEFMARCK (Sweden) said that his proposal had really been concerned with errors of procedure which had affected the outcome of the award. He agreed with the Italian representative that they were different from the other procedural grounds and should be dealt with in a separate subparagraph. He urged the United Kingdom representative to provide a draft in that sense.

68. Mr. SZASZ (Hungary) said that further discussion should be deferred until the Commission had a draft text before it. However, as far as the United Kingdom draft was concerned, he would draw attention to the fact that the four cases given in the United Kingdom comments (A/CN.9/263/Add.2, p. 9) did not necessarily fall under the notion of procedural injustice. They were not interrelated and could not easily be covered by a single formula. More analysis was required.

69. Sir Michael MUSTILL (United Kingdom) said that the comments of the Hungarian representative were well taken. The examples were the result of a challenge to the United Kingdom delegation to produce instances in which it would be desirable to have court intervention and which were not covered in article 34. The examples it had given were not all procedural and not all of the same kind, nor was the list exhaustive. The Commission had not considered at all whether matters outside the field of strict procedural injustice should be grounds for court intervention. He regarded his drafting mandate as confined to the precise subject of the discussion. He could not draft a formulation to cover the four examples in the United Kingdom comments without further guidance from the Commission.

70. The CHAIRMAN observed that some of those examples would be covered by the reference to public policy.

71. Mr. MTANGO (United Republic of Tanzania) said that the United Kingdom list of examples was not exhaustive; there were other reasons for setting aside an award which should also be taken into account. The Commission should not close its discussion on the issue.

72. The CHAIRMAN suggested that when the United Kingdom representative had produced a draft, the Commission should consider whether it was adequate or whether a more general clause was needed.

73. *It was so agreed.*

#### *Article 34 (3)*

74. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the period of three months was rather long. He therefore suggested the insertion of the phrase "unless the parties have agreed to limit that period".

75. Mr. MTANGO (United Republic of Tanzania) thought that the period of three months was too short. Perhaps the compromise would be to leave it without qualification.

76. The CHAIRMAN observed that it would be difficult for parties to impose a time-limit on judicial procedure.

#### *Article 34 (4)*

77. Mr. STROHBACH (German Democratic Republic) said that the rule in paragraph (4) seemed rather strange but his delegation could accept it subject to further clarification. The provision should state expressly whether the arbitrators were entitled to make a new award or some substantial amendment to the original award, which remained binding and final. It was perhaps only a matter of drafting.

78. Mr. ROEHRICH (France) supported the Austrian proposal to delete paragraph (4) (A/CN.9/263, p. 48, para. 15). The procedure was indeed strange and postulated a concept of the relationship between the arbitral tribunal and State jurisdiction which it was difficult for his delegation to accept. It was not merely a matter of drafting or clarification. He feared the procedure was not likely to prove useful. Each body should perform its proper function. Once the award was made, there should be a certain control which was essential to ensure that justice was observed, but comings and goings between the arbitral tribunal and the court were not desirable and could only be prejudicial to the whole concept of arbitration.

79. Mr. SAMI (Iraq) endorsed the observations of the French representative. The procedure was unnecessary and he failed to see in what cases it would be usefully applied.

80. Mr. MOELLER (Observer for Finland) said that the procedure of "remission" appeared strange to the Finnish legal system but it was known in some common law countries. He therefore associated himself with the request of the representative of the German Democratic Republic. The procedure might be useful and the paragraph should not merely be deleted.

*The meeting rose at 5.05 p.m.*