

## 324th Meeting

Friday, 14 June 1985, at 2 p.m.

Chairman: Mr. SZASZ (Hungary)

*The meeting was called to order at 2.05 p.m.***International commercial arbitration (continued)**

(A/CN.9/246, annex; A/CN.9/263 and Add.1-2; A/CN.9/264; A/CN.9/XVIII/CRP.10)

*Article 24. Hearings and written proceedings (continued)**Article 24 (1) and (2) (continued)*

1. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to transmit the text of paragraphs (1) and (2) to the drafting committee with a request that it incorporate in them the following ideas: that the parties should be free to decide whether an oral hearing should take place or not; that if not expressly prohibited by the parties, either party had a right to an oral hearing upon request; that if the parties took no decision on the matter and neither applied for an oral hearing, the arbitral tribunal could decide how the proceedings were to be conducted.

2. *It was so agreed.*

3. The CHAIRMAN noted that a number of delegations had endorsed the view expressed by the Tanzanian representative (A/CN.9/SR.323, para. 55), that even if the parties had agreed at one stage not to hold oral hearings, they should be entitled to request the arbitral tribunal to hold them at a later stage. He thought the wording of article 19 (3) might be used to give effect to that view in extreme or marginal cases.

*Article 24 (3)*

4. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his delegation's written suggestion in A/CN.9/263 (p. 37, para. 9) for clarifying the meaning of the words "for inspection purposes". He hoped the drafting committee would give it serious consideration.

5. The CHAIRMAN said that, with that comment in mind, he would take it that article 24 (3) was approved.

6. *It was so agreed.*

*Article 24 (4)*

7. Mr. GRAHAM (Observer for Canada) drew attention to the words "or other document" and said it was unclear what documents they covered. He presumed that the intention was to enable the parties to see any texts the arbitral tribunal used in making its decision, including official publications, dictionaries, glossaries and weather reports; if so, that should be made clear.

8. Mr. LAVINA (Philippines) said that he shared the view expressed by the Observer for Canada and also had reservations about the reference to an "expert report".

9. Sir Michael MUSTILL (United Kingdom) said that the purpose of the text should be to ensure, first, that the arbitral tribunal did not rely on documents upon which the parties had not had an opportunity to comment and that, secondly, such documents were transmitted to them before the tribunal

made its decision. The words "may rely" were ambiguous and should be amended to make it clear that documents must be transmitted to the parties before the decision was taken.

10. Mr. KADI (Algeria) said it was unclear whether the words "other document" covered recordings and films.

11. Mr. HOLTZMANN (United States of America) said that, while the first sentence of the paragraph was based on article 15 (3) of the UNCITRAL Arbitration Rules, the second went beyond them. The words "or other document" might be construed as requiring arbitrators to communicate results of their library research to the parties before making an award, for example. The text should not preclude tribunals from doing what they normally did in making decisions: consulting statistics, dictionaries, and so on. He would prefer the second sentence to be deleted altogether, but if it was retained, the words "or other document" should be excised. The reference to "expert report" might be dealt with when the Commission considered article 26.

12. Mr. VOLKEN (Observer for Switzerland) inquired whether, if the words "or other document" were deleted, a party would be able to provide the arbitral tribunal with documents which contained professional secrets which it did not wish the other party to see.

13. Mr. HOLTZMANN (United States of America) said that under the first sentence, all documents supplied to the arbitral tribunal by one party must be communicated to the other party. It was up to the party concerned and the arbitral tribunal to find some means of permitting professional secrecy to be respected. The deletion of the second sentence would not affect the preservation of professional secrecy, however.

14. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that he advocated leaving the text unaltered; it would have no dangerous consequences, and the parties needed to know on what basis the arbitral tribunal took its decision.

15. The CHAIRMAN said that there was no dispute about the general principle set out in the first sentence and it was clear that it did not cover reports of experts appointed by the tribunal. The problems with the second sentence could be resolved by requesting the drafting committee to delete the phrase "or other documents" unless they could characterize, in any way other than the first sentence did, the materials which might be used by the arbitral tribunal. The main principle, however, was that even if that phrase was deleted, the parties must be given an opportunity to study all documents upon which the arbitral tribunal might rely in making its decision.

16. Mr. ROEHRICH (France) said that he fully endorsed the Chairman's last comment and thought that it could usefully be incorporated in the text.

17. The CHAIRMAN said that he thought it would be sufficient to reflect it in the summary record. If he heard no

objection, he would take it that the Commission agreed with the procedure he had proposed.

18. *It was so agreed.*

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

19. The CHAIRMAN observed that there were three problems that had to be resolved. The first was the issue of misconduct, which was addressed by a proposal from the United Kingdom in A/CN.9/XVIII/CRP.10; the second was the territorial scope of application of the article; and the third was how the article was to be aligned with the wording of article 19 (3).

20. Mr. MTANGO (United Republic of Tanzania) said that it must be made clear that considerations other than those set out in article 34 (2) could be grounds for setting aside an award. His delegation proposed the insertion of a reference to other justifiable grounds.

21. Sir Michael MUSTILL (United Kingdom), introducing his delegation's proposal (A/CN.9/XVIII/CRP.10), said that a problem had arisen in the Commission because the words "public policy" were an inaccurate rendering of the term "*ordre public*", which conveyed a wider notion of procedural injustice. It was necessary to find an expression which would be meaningful to jurists throughout the entire world but not so general as to permit totally unrestricted access to the courts, with the attendant possibility of interminable delays.

22. His delegation proposed two alternative solutions to the problem. Alternative 1 referred to "natural justice" and was the best, in his opinion. Many common law countries were well acquainted with the notion and it had the advantage of not requiring retranslation into French, as it was an acceptable rendering of "*ordre public*". However, because the notion of natural justice might be meaningless in some legal systems, he had sought a formulation that was more explicit yet less linked to a particular legal system. Taking article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States as his inspiration, he had used, in alternative 2, the expression "fundamental rule of procedure". But that might be construed as referring to a number of things, for example, something established by the Model Law, a standard set of rules of an arbitration institution, or a local code of civil procedure, whereas it was intended to denote a fundamental underlying rule of procedure common to all legal systems. He therefore put alternative 2 forward, with the word "rule" replaced by either "principles" or "standards".

23. Mr. BOGGIANO (Observer for Argentina) said that while he agreed that the reference to "*ordre public*" had to be expanded to comprehend procedural aspects, both of the United Kingdom's proposals would be ambiguous in Spanish. He therefore suggested that the article should refer to "due process", which was a concept accepted in both civil law and common law. The language used in article 19 (3), "shall be given a full opportunity of presenting his case", might also be a means of conveying the concept of natural justice.

24. Mr. LOEFMARCK (Sweden) said that his delegation could accept alternative 2, with the word "principles" replacing the word "rule". Referring to alternative 1, he said that the concept of natural justice had long ago been abandoned in Sweden and it was difficult for him to see it as being covered by the expression "*ordre public*".

25. Mr. MOELLER (Observer for Finland) said that he understood the concerns which motivated the United Kingdom proposal even though his delegation saw no need for such a provision. The concept of natural justice mentioned in alternative 1 was unknown in his country; with regard to alternative 2, he would prefer it with the word "principles".

26. Mr. BONELL (Italy) said that in its written comments (A/CN.9/263, p. 47, para. 8) his delegation had proposed including in the grounds for attacking an award the grounds provided in the Italian Code of Civil Procedure for review of an arbitral award. Very similar grounds had been discussed by the United Kingdom in its general observations on court intervention on the grounds of procedural injustice (A/CN.9/263/Add.2, pp. 8-10). In his view, however, the proposal by the United Kingdom in document A/CN.9/XVIII/CRP.10 did not cover the matter fully.

27. His delegation would like to suggest an alternative solution. Article 25 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration contained roughly what was in article 34 of the Model Law, plus, in paragraph (3), the very important provision that an award could also be set aside if it was obtained by fraud, if it was based on evidence that had been declared false by a judicial decision having the force of *res judicata* or on evidence recognized as false, or if, after it had been made, there was discovered a document or other piece of evidence which would have had a decisive influence on the award and which had been withheld through the act of the other party. A second important point was that article 28 of that Convention set a period of five years for a setting-aside application based on one of those additional grounds. Clearly, an appropriate period in such cases should extend far beyond three months, even if not for as much as five years. His main concern, however, was that the United Kingdom proposal seemed to cover only some of the grounds he had mentioned, even in its widest interpretation. If, at so late a stage, the Commission was not in a position to take up his delegation's suggestion, he hoped it would be appropriately reflected in the report.

28. Mr. ROEHRICH (France) said that his delegation had originally been in favour of the text of the Working Group. It appreciated the problem faced by the United Kingdom and other delegations, however, and was therefore ready to accept the second proposed alternative, with the word "principle" substituted for the word "rule". It would have difficulty in accepting the Italian delegation's suggestion at the present stage of the discussion. If the United Kingdom proposal was accepted, he took it that that would exhaust the list of grounds to be specified for setting aside an award. He felt that the link between article 34 and article 19 (3) of the Model Law was a technical rather than a substantive question. It was important to ensure that there were no contradictions between their provisions.

29. Mr. DUCHEK (Austria) said that his delegation favoured the idea of bringing the notion of procedural "*ordre public*" into the article and was grateful to the United Kingdom delegation for attempting to do that. Since Austria was a civil law country, his delegation would prefer the second alternative, but with the word "principle". The anxieties of the Italian delegation constituted an important question, which should be discussed separately.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation was well aware of the difficulties which the representative of the United Kingdom was trying to solve. In some countries the notion of natural justice was not used, in others that of "*ordre public*" or "public policy"; and there

were some countries where neither notion was used as a legislative technique. In international conventions, however, the use of the terms "*ordre public*" and "public policy" had proved quite satisfactory to the international community, even though it was extremely difficult to define them. He felt that the problems in the present case were covered by the reference to public policy in paragraph (2) (b) (ii). If an expression such as "fundamental principles of procedure" was adopted, it would not seem certain whether it referred to the rules contained in the Model Law or to rules laid down in national codes of civil procedure.

31. If the list of grounds for setting aside an award specified in article 52 of the Washington Convention on the Settlement of Investment Disputes was compared with the list in article 34 of the draft Model Law, it would be seen that the Model Law grounds were much broader. Given the very varied conceptual approaches to the issue of court control over arbitral proceedings and awards, the standards set in the Model Law constituted a more or less acceptable compromise; the expansion, by some sort of general provision, of the list of grounds for setting aside an award which the Model Law already contained would upset that balance and offer the possibility of too broad and varied an interpretation of the article in different countries. His delegation accordingly felt that the draft was satisfactory as it stood. If a majority favoured adding a provision referring to fundamental principles of procedure, it would have to be determined what procedure was meant. For example, article 25 (2) (g) of the Uniform Law annexed to the 1966 European Convention referred to "disregard of any other obligatory rule of the arbitral procedure", thus not to procedure in general but specifically to arbitral procedure. The Commission did not have in mind, in framing the Model Law, the assimilation of judicial and arbitral procedures.

32. Mr. HOLTZMANN (United States of America) said that his delegation too was grateful to the representative of the United Kingdom for his efforts to solve a difficult problem. Unfortunately, though, it found the first alternative unacceptable, because the term "natural justice" was known in the United States as a philosophical norm but it was not found in its legislation. The second alternative also constituted a problem for his delegation. For example, the reference to fundamental rules or principles of procedure might not cover corruption on the part of a member of the tribunal, for that was mentioned separately in the 1965 Washington Convention. There was some question, therefore, as to what that reference meant.

33. Perhaps the rules really at issue in the United Kingdom proposal were those embedded in the so-called Magna Carta of arbitral proceedings, article 19 (3) of the Model Law. His delegation agreed with the Observer for Argentina that article 19 (3) seemed to express the principle of natural justice, but could not support his proposal to use the term "due process" in article 34, since it would be subject to varying interpretations according to the jurisdiction concerned. The United States associated itself fully with the comments of the Soviet Union. In so far as it was necessary to have a test of public policy, that test was included in paragraph (2) (b) (ii), which in his delegation's view contemplated such things as corruption on the part of the arbitrators. Since concerns of public policy were already provided for in article 34 and would cover such things as forgery and bribery, and since the principles of procedure could not be better expressed than they were in article 19 (3), it would perhaps be best to leave paragraph (2) (a) (ii) as it stood but include in it a specific reference to article 19 (3). His delegation would, moreover, strongly advocate making 19 (3) a separate article and placing it in a prominent position.

34. Mr. GRAHAM (Observer for Canada) said that his delegation would prefer the first of the United Kingdom's alternatives. He felt that the term "natural justice" was properly conveyed in French as "*ordre public*" and offered an acceptable solution to the problem of catering for differing concepts while maintaining a term that was well recognized in international law. In judicial proceedings in Quebec, the two terms were used as being more or less equivalent: "*justice naturelle*" corresponded to "*ordre public*". His delegation would, however, be prepared to accept the second alternative if "principle" was substituted for "rule". There was no need to refer explicitly to corruption, as the 1965 Washington Convention did, since that would be covered by the reference to public policy in paragraph (2) (b) (ii). His delegation favoured an addition in paragraph (2) (a) (ii) on the lines proposed by the United Kingdom.

35. Mr. SAWADA (Japan) said his delegation would have difficulty in accepting the Italian delegation's suggestion, particularly in regard to the use of new evidence in the setting-aside procedure. It could, however, accept the United Kingdom proposal and would prefer the second alternative, with the use of the word "principle" or "standard", or possibly the expression "fundamental procedural requirement".

36. Mr. GRIFFITH (Australia) said that while his delegation found the term "natural justice" perfectly acceptable, it appreciated the difficulties it presented for other delegations. The second United Kingdom alternative would probably cover the necessary situations, including—and he hoped that would be generally agreed, if not explicitly stated—such obvious cases as awards attained through corruption or false evidence and the other situations listed in the United Kingdom's written comments (A/CN.9/263/Add.2, p. 9, para. 32). If not, it might be clearer to use a phrase such as "serious departure from a fundamental principle of justice"; that would obviously embrace cases of fraud, which might not be covered by a narrow interpretation of the term "procedure".

37. On another point, it could well be that, in the interest of finality, the parties to an arbitration agreement might not wish to place themselves under the jurisdiction of the court. The Model Law should therefore make provision for them to contract out of judicial supervision, both for setting aside and for enforcement, if they so wished. The words "unless otherwise agreed by the parties" should therefore be added to the relevant provisions.

38. Mr. OLIVENCIA (Spain) said that although he understood the reasons for the United Kingdom's proposal, he preferred the existing text of paragraph (2) (a) (ii). If it was to be inserted at all, alternative 1 would be more appropriate in paragraph (2) (a) (iv), which dealt with the arbitral proceedings, than in paragraph (2) (a) (ii); however, it was too abstract and made reference to a concept alien not only to the Spanish legal system but apparently to many others. *Ordre public* was a concept more generally acceptable than natural justice and already appeared in paragraph (2) (b) (ii), but with reference to "the award"; there was some doubt, therefore, as to whether the ground of conflict with *ordre public* could be invoked in regard to all the steps of the arbitral proceedings during which irregularities might have occurred. It was desirable to make specific mention somewhere in paragraph (2) (a) of procedure inconsistent either with the law or with *ordre public*.

39. Mr. HERRMANN (International Trade Law Branch) said that all the known cases under the 1958 New York Convention in which the violation of the public policy clause had been

invoked had concerned violations of procedure. There was a clear understanding that the reference to the award in subparagraph (b) (ii) covered impropriety, such as corruption and fraud, in the manner in which the award had been reached. Such matters were not regarded as minor procedural defects.

40. Mr. LAVINA (Philippines) said that he was unable to accept the United Kingdom's proposal, particularly in regard to alternative 1. Although the Philippine legal system included elements of civil law, common law and Muslim law, the term "natural justice" was not employed. He associated himself with the comments of the Soviet Union representative.

41. The CHAIRMAN, speaking as the representative of Hungary, said he feared that any amendment would result in destabilizing a text which was well balanced in respect of judicial control. The Model Law must be viewed as a whole. The validity of the examples cited by the United Kingdom in its written comments (A/CN.9/263/Add.2, p. 9, para. 32) was generally recognized, but all serious defects, including those of procedure, would be covered by the concept of *ordre public* and separate provision for procedural defects was therefore unnecessary. In fact, the wording of the proposal in document A/CN.9/XVIII/CRP.10 covered the United Kingdom's written examples much more loosely than did the concept of *ordre public*. He suggested that paragraph (2) (a) should stay as it was, with appropriate explanations in the report.

42. Mr. VENKATRAMIAH (India) said his delegation had serious doubts as to whether the United Kingdom's first alternative would meet its purpose. His delegation would be prepared to accept alternative 2, provided the word "principle" was substituted for the word "rule" and there was some clarification as to the meaning of the word "fundamental".

43. Mr. VOLKEN (Observer for Switzerland) said that in Swiss legislation the point at issue was covered by the notion of *ordre public procédural*. He felt that the present text was adequate. If something more general was required, appropriate wording might perhaps be found along the lines of the United Kingdom's alternative 2. However, it would be incorrect for paragraph (2) (a) to contain both a list of specific cases and also a general expression covering the same points. If the Commission accepted alternative 2, it must delete the words "or was otherwise unable to present his case" in paragraph (2) (a) (ii).

44. Mr. MTANGO (United Republic of Tanzania) said he had previously felt that the present wording did not cover all cases, but it seemed to be the view of many delegations that all justifiable cases for setting aside the award came under the concept of public policy. If that was so, that broad interpretation should be duly reflected in the report, so that it did not appear that the Commission had considered all possible cases.

45. He agreed with the United States representative that article 19 (3) should appear as a separate article in an appropriate place in the Model Law.

46. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that Greek law provided for setting aside an award if it was contrary to *ordre public*, a concept which would cover most of the examples cited by the United Kingdom in its written comments (A/CN.9/263/Add.2, p. 9, para. 32). Her delegation would therefore have supported the inclusion of at least some of those examples in the list of grounds for setting aside mentioned in paragraph (2) (a), particularly the case where fresh evidence was disclosed. As

far as the United Kingdom alternatives were concerned, her delegation would have great difficulty in accepting the idea of natural justice as equivalent to *ordre public*; she understood natural justice to be a much broader, abstract concept, generally used in contradistinction to positive or applied law. She would therefore prefer alternative 2.

47. Mr. RAMADAN (Egypt) said that if *ordre public* was interpreted in a broad sense there would be no need to amend paragraph 2 (a) (ii), which he was in favour of keeping as it was, with appropriate explanatory paragraphs in the report. A possible course might be to amend subparagraph (a) (ii) to read "... or if there has been a serious departure from the fundamental principles of arbitral proceedings or the party making the application was otherwise unable to present his case".

48. Mrs. VILUS (Yugoslavia) said that she favoured the existing text, for the reasons given by the Soviet Union representative. She also supported the proposal to make article 19 (3) a separate article, as in that form it would have an impact on other articles.

49. Mr. TANG Houzhi (China) said that, of the various possible options for paragraph (2) (a) (ii), his delegation would prefer either the existing text as it was, or the existing text with the words "or was otherwise unable to present his case" replaced by language from article 19 (3). The question of public policy being a very complicated one, he suggested that in paragraph (2) (b) (ii) the words "the public policy of this State" should be replaced by the words "the fundamental principles of law of this State".

50. Mr. BARRERA GRAF (Mexico) said that he preferred the existing text of paragraph (2) (a) (ii). The problem which had given rise to the Commission's request to the United Kingdom delegation to submit an amendment to that provision actually lay in the use of the expression "public policy" in paragraph (2) (b) (ii). *Ordre public* was a notion broad enough to include the examples cited by the United Kingdom in its written comments and some of those mentioned by the Italian representative. It was unnecessary to specify in the text itself whether "public policy" corresponded precisely to "*ordre public*". If article 34 was accompanied by explanatory comments, they should deal with the points which delegations considered were not covered by the list in paragraph (2) (a). As a second choice, his delegation could accept the United Kingdom's alternative 2, with the word "rule" replaced by the word "principle".

51. Mr. SCHUMACHER (Federal Republic of Germany) said that, in the case of violations of fundamental principles of procedure, such as conduct constituting corruption and falsification of documents, the time-limit specified in paragraph (3) was inadequate. He wholeheartedly supported the comments made on that point by the Italian representative.

52. Mr. STROHBACH (German Democratic Republic) favoured the existing text. He had difficulties with both of the United Kingdom's alternatives in view of their interpretation and their possible consequences for the structure of articles 34 and 36. Article 34 should give an exhaustive list of reasons for setting aside an award and should not contain an escape clause. Nor could he support the suggestion of the Italian representative. The German Democratic Republic, by acceding to the 1972 Moscow Convention on Arbitration of Civil Law Disputes, had given up the concept of general judicial review of arbitral awards and was not disposed to return to it.

53. Mr. de HOYOS GUTIERREZ (Cuba) said that, for the reasons stated by the Hungarian delegation, he was in favour of article 34 as it stood. Furthermore, the concept of natural justice was alien to civil law systems.

54. Mr. TORNARITIS (Cyprus) observed that although "public policy" did not exactly correspond to "*ordre public*", nevertheless the two expressions often conveyed the same meaning. The notion of natural justice was known in Cyprus, which had a common law system, but it was not known in all countries, although the principles it enshrined were recognized by all. He suggested that either the text of the Model Law or the report should contain an explanation that the notion of conflict with public policy included any contravention of the fundamental principles of natural justice.

55. Mr. JARVIN (Observer for the International Chamber of Commerce) said that his organization was in favour of some addition to the text to deal with serious procedural defects not at present covered by the Model Law. Both the alternatives proposed by the United Kingdom were vague, but he preferred alternative 2, provided it spoke of a fundamental principle of procedure. Arbitral proceedings should not be treated in the same way as judicial proceedings, and that should be made clear by an addition to alternative 2. He would like to go even further: the Commission was in the process of establishing a new concept of setting aside an award in international arbitration. It must therefore ensure that national courts did not apply standards which opened the door to the acceptance of setting-aside grounds based on particular local conditions or requirements. Alternative 2 should be limited to internationally recognized grounds, either by specific wording in the text or by an explanatory comment in the report.

56. Sir Michael MUSTILL (United Kingdom) said that he had understood his mandate to be to draft a form of words which would complement paragraph (2) (b) (ii) and be placed in

paragraph (2) (a), in order to make clear precisely what was meant. He wished to repeat the point made by the Spanish representative: one of the main reasons for uncertainty as to whether paragraph (2) (b) (ii) was sufficient—and that would be particularly so in the United Kingdom—lay in the conjunction of the expression "public policy" and the word "award"; that had been taken as meaning that the question of conflict with public policy might relate solely to the award and not to the procedure leading up to it. He acknowledged the force of the Soviet Union representative's comment on procedural principles. It had never been his intention to suggest that a supervisory court, when considering the acceptability of procedure, should address itself at all to national systems of law. If some amendment was required to make that clear, he would certainly not object to it.

57. The CHAIRMAN said it appeared there was a general desire that paragraph (2) (a) should be an exclusive list of grounds for setting aside an award. Most speakers had stated that their first preference was to leave article 34 as it stood, but many had selected alternative 2 of the United Kingdom's proposal as the second best option, with certain amendments. Some of them had been in favour in any case of taking some action to meet the preoccupations of those holding the same views as the United Kingdom delegation. He would therefore like to propose a solution which reflected the general view as far as the text was concerned but also accommodated the opinion that article 34 should cover elements which at present it did not. He felt that could be done by adding to paragraph (2) (a) the full text of article 19 (3). It was a matter of drafting whether the text of article 19 (3) should appear as a separate subparagraph of article 34 (2) or should be added to the list already drawn. In addition, the commentary should state that most speakers had expressed the view that the term "public policy" covered cases of fraud, corruption and other serious violations of procedure.

*The meeting rose at 5.10 p.m.*