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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE FOURTH MEETING

Held at Headquarters, New York,
on Thursday, 22 May 1958, at 10.45 a.m.

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President:	Mr. SCHURMANN	Netherlands
Executive Secretary:	Mr. SCHACHTER	

CONSIDERATION OF THE DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (E/2704 and Corr.1; E/CONF.26/2, E/CONF.26/3 and Add.1, E/CONF.26/7) (continued)

Mr. ADAMIYAT (Iran) said that the development of foreign trade required the adoption of procedures for rapid settlement of commercial disputes by arbitration and prompt enforcement of arbitral awards. Naturally, in case of a dispute, the parties to a contract were free to bring the matter before a court, but the fear of being involved in a lawsuit might stop businessmen from engaging in some commercial transactions. By furnishing another means of settling disputes arbitration promoted world trade. Moreover, the conclusion of a multilateral convention on the subject would further the unification of private international law. For all those reasons, his Government supported in principle the adoption of such an instrument.

Arbitration was one of the basic elements of the Iranian legal system - in particular of commercial law - and foreign arbitral awards were enforced in Iran. The 1955 Treaty between the United States and Iran made broad provision for arbitration as a means of settling disputes between the nationals of the two countries. In that connexion, article 3 of the Treaty was of special interest. Moreover, arbitral clauses were usually included in contracts between the Iranian Government and foreign firms relating to the country's economic development programmes.

The 1923 Geneva Protocol and the 1927 Convention no longer met the requirements of international trade; a new convention was necessary. The Ad Hoc Committee's draft (E/2704 and Corr.1) represented a marked improvement on those two texts. His Government accepted the principles on which it was based, but thought that minor changes would have to be made for the sake of clarity.

At a time when such emphasis was laid on State sovereignty, the Committee had been right to maintain the principle of reciprocity. There was no doubt that Governments would not accede to the Convention unless the principle was stated explicitly. Moreover, the Convention should be limited to arbitral awards arising out of commercial disputes, as recommended by the International Chamber of Commerce in its preliminary draft. Such a provision would meet the objections of States which drew a distinction between commercial and civil disputes. It should

(Mr. Adamiyat, Iran)

be stated in the Convention that it applied only to arbitral awards which concerned persons subject to the jurisdiction of one of the Contracting States.

It should be borne in mind that the purpose of arbitration was to settle disputes quickly and efficiently, while safeguarding the rights of the parties. Consequently, certain conditions as regards form and substance had to be met - one of them being respect for the public policy of the country where the recognition or enforcement of the award was sought. The system established in the draft Convention called for an examination both of the procedure followed in the country where the award had been made and of the law of the country where enforcement of the award was sought. That method was satisfactory and should be used if it was desired to unify the various rules on the enforcement of foreign arbitral awards. Care should naturally be taken not to set vague or superfluous conditions. To that end, certain changes would have to be made in the text.

Mr. BEASAROVIC (Yugoslavia) remarked that the recognition and enforcement of foreign arbitral awards were among the most complex problems known in the doctrine and jurisprudence of private international law, owing mainly to the diversity of domestic laws on the subject. Noting that, at the present stage of international commerical arbitration, some provisions of the 1927 Geneva Convention were out of date, he stressed that in the interests of international collaboration in general, and economic and commercial co-operation in particular, a new convention must be prepared, in conformity with the United Nations Charter.

While the preliminary draft of the International Chamber of Commerce had great merit, it could not be adopted in toto in the present circumstances. For that reason, the 1955 Ad Hoc Committee, while taking into account universally recognized principles relating to international jurisdiction and State sovereignty, had had to look for solutions best suited to the present needs of foreign trade and commercial arbitration. It had therefore endeavoured to reach a compromise between certain provisions of the 1927 Convention and the ICC's text. Thus, in the case of article IV, sub-paragraph (g), the Committee had rejected the ICC's proposal, under which the enforcing judge was not required to examine whether the arbitration agreement was lawful in the country of arbitration. Inasmuch as true international arbitration - arbitration not subject to domestic

(Mr. Beasarovic, Yugoslavia)

laws and the control of national judges - did not yet exist, the Yugoslav Government could not but favour the solution chosen by the experts serving on the Committee. The Committee had also sought to achieve a compromise with respect to territorial reciprocity and personal reciprocity. Yugoslavia had already communicated its reservations concerning the first point (E/2822/Add.6); with regard to the second, it preferred the formula contained in the 1927 Convention, which would avoid inequalities.

Lastly, the provisions of the Convention should be so drafted as not to prevent accession on the part of any State. Certainly more States would accede to the Convention if it were to apply only to arbitral awards which had become final and operative after its entry into force.

Mr. BULOW (Federal Republic of Germany) said that it was the unanimous opinion of States and interested organizations that it had become necessary to revise the 1927 Geneva Convention, as proposed by the ICC. It would therefore be extremely helpful to standardize and simplify the rules governing the enforcement of arbitral awards.

It was customary to distinguish between awards of a purely internal nature and others which were generally described as foreign. The Committee's draft excluded awards of the former category. The Government of the Federal Republic of Germany approved of that exclusion, which made it possible to avoid any interference with national laws on arbitral procedure governing purely internal awards.

It was still necessary to find some criterion for defining the awards to which the Convention was to apply. That raised the whole question of determining factors, particularly as regards article I of the draft, which was the most important in that respect. If it was agreed that the place where the award was made should not be considered a determining factor - an opinion which he shared with the French representative - whether an award was to be regarded as national or foreign could be made dependent on the nationality of the parties, the subject of the dispute, or the rules of procedure applied. The last seemed to constitute the most appropriate determining factor. The nature, and hence the nationality, of an arbitral award would then be derived from the rules of

(Mr. Bulow, Federal Republic of Germany)

procedure under which it had been made. Moreover, it should be noted that those rules depended to a large extent, at least in German law, on the will of the parties and, failing that, on the arbitral body itself; they were, however, governed to some extent by the procedure provided by the national legislation.

It would be desirable for the Conference to examine certain problems such as the responsibility of the State whose rules of procedure had been applied and that of the State to whose courts an application for exequatur had been submitted; in that connexion, the problem of the burden of proof was of particular importance. The Conference might also consider whether it was necessary to require a second or even a third exequatur for an award which had already been declared to be operative in the territory of one of the Contracting Parties. In addition, it might study the question of compromis.

After remarking that his delegation approved of the principles set forth in articles III and IV of the draft Convention, he stated that the adoption of that text would mark a considerable step forward in international commercial arbitration.

Mr. PSCOLKA (Czechoslovakia) recalled that his Government had been in favour of holding the Conference. He regretted, however, that participation in the Conference had been limited by a political formula which artificially excluded a number of important trading nations. That was a harmful practice, especially from the point of view of economic and commercial co-operation. The development of normal business relations was essential to peaceful collaboration between nations and to strengthening international confidence; Czechoslovakia, for its part, maintained trade relations with all countries of the world. It believed that international trade could be increased on a basis of equality, mutual benefit, non-discrimination and respect for contractual obligations. One of the best ways to promote such respect was to conclude a Convention, which would be open for signature to all States, on the settlement of disputes by arbitration.

Czechoslovakia was a party to the 1923 Protocol and the 1927 Convention; its Chamber of Commerce had an arbitral tribunal, an established institution possessing great experience, which was playing an increasingly important part in

(Mr. Pscolka, Czechoslovakia)

the nations' commercial life. Czechoslovak business organizations frequently employed the services of foreign arbitral bodies, and arbitral awards rendered both in the country and abroad were scrupulously enforced.

The Committee's draft constituted a good working foundation. Nevertheless, it called for certain comments. Thus, it appeared from the Committee's report (E/2704 and Corr.1, paragraph 25) that the expression "arbitral awards" included both awards made by arbitral bodies appointed for each case and awards made by permanent arbitral bodies. It would be desirable to make that clear in the actual text of the Convention. With respect to the reasons which might justify refusal to recognize or enforce awards, it would be useful, in order to safeguard the rights of the losing party, to adopt a provision based on article 3 of the Geneva Convention. It would also be helpful, for psychological reasons, if the arbitrator was obliged to state the reasons for the award.

He regretted that the draft would deprive Non-Self-Governing Territories and dependent territories of the benefits of the Convention, to the detriment of their trade and contrary to the interests of their trading partners. Nor did it seem advisable to include a provision which made a distinction between unitary and federal States - care should be taken not to violate the principle of the equality of States and not to encroach on the sovereignty of the Contracting Parties.

The Czechoslovak Government was convinced that the Committee's draft could be improved so that it would meet the needs of international trade. It earnestly hoped that the Convention would be acceptable to as many States as possible and that it would apply to the countries of Latin America, Asia, Africa and Eastern Europe, thus acquiring the universal scope that the Geneva Convention had never had.

Mr. LYCHOWSKI (Poland) thought that the present division of the world into two great economic and social systems made it particularly important to conclude an international convention on arbitration. Trade between countries belonging to those two systems had increased rapidly during the past few years, and a concomitant increase was to be expected in the number of disputes. International disputes were often caused by the fact that the parties to a contract did not interpret its clauses in the same way. Such differences of interpretation

(Mr. Lychowski, Poland)

occurred even when the parties possessed long commercial experience and were nationals of countries with similar legal systems. The danger of misunderstandings was obviously still greater when the parties were nationals of countries belonging to different systems. The Economic Commission for Europe, which deserved praise for its efforts to improve relations between East and West, had very correctly pointed out, a few years ago, that the development of those relations might easily be hampered not so much by political or economic factors as by a feeling of insecurity. A firm might hesitate, in fact, to do business with a person belonging to a very different economic and social system the rules of which were unknown to it. Fear of exposing itself, to a long and expensive judicial procedure in the event of a dispute might prevent it from entering into trade relations. The future Convention, whhich would be prepared by plenipotentiaries of countries representing both systems, would not only help those who were already engaged in the trade between the East and West, but would also allay the fears of those who had hitherto refrained from such trading. It would promote the growth of trade between the two groups of countries and in that way might be of paramount importance for the economic future of the world.

Mr. SANDERS (Netherlands) thought that consideration should be given to the point of view of those whose interests were to be served by the future Convention, namely, those who were engaged in international trade. The Committee's draft (E/2704 and Corr.1) possessed one great disadvantage which was already inherent in the Geneva Convention: the double exequatur. It required that an arbitral award should have become operative in the country where it had been made (article III, paragraph (b)). The Netherlands delegation did not see why an award should have to be operative in a country where it did not have to be enforced. Thus, the Rome draft, and more recently the draft of the Council of Europe, had provided for only one exequatur.

International arbitration could be simplified and developed still further by limiting as much as possible the grounds on which a country could refuse to recognize or enforce an award and by concentrating judicial control in the country of enforcement. Indeed, the Committee's draft, like the Geneva Convention, had the disadvantage of giving the losing party an opportunity to prevent .

(Mr. Sanders, Netherlands)

enforcement by filing a motion to annul the award in the country where it had been rendered. In that connexion, he referred to the written comments of the Netherlands Government (E/CONF.26/3/Add.1).

Mr. KORAL (Turkey) said he was prepared to support the Committee's draft as it called for no great changes. Members of the Conference should not try to pattern the Convention after their own national laws. Indeed, it would be better to seek to adapt national law to the Convention, as Germany had done after the conclusion of the 1927 Geneva Convention. In addition, too much stress should not be laid on the principle of reciprocity, as the disadvantages resulting from the renunciation of that principle would diminish as the number of signatory countries increased.

He agreed with the French representative that the Conference should define certain principles of private international law if the Convention was to work. For instance, a definition of a foreign award would make it possible to know where and when the Convention would be applied. It would also be important to decide which law should apply to arbitration. The choice might fall on the law of the place where arbitration occurred, as in the Committee's draft, or else on the law mutually agreed upon by the parties, a solution which had been mentioned by the French representative. The main thing was not to attempt to apply two different laws at the same time, as did the Geneva Protocol, as such a system would allow the current difficulties to continue and would complicate the task of judges.

Where the Committee's draft was concerned, too much stress should not be laid on the final and operative nature of the award. Articles III and IV already made provision for a sufficient number of checks. The idea of requesting an exequatur of the country in which the award had been made was hardly attractive, as a double exequatur led to a pointless waste of time.

Mr. POINTET (Switzerland) recalled that his Government had already made some general comments (E/2822, annex I). He was pleased to note that the preceding speakers had all stated that they were in favour of a new international ıstrument which should be an improvement on the 1927 Geneva Convention. He o welcomed the initiative taken by the International Chamber of Commerce; the

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(Mr. Pointet, Switzerland)

fact that it had been followed up clearly showed that the States taking part in the Conference were concerned above all with facilitating international trade.

Switzerland would have had no objection to the adoption of the idea of an "international award" put forward by the ICC. The Swiss economy in fact depended upon foreign trade, and the Swiss Government considered that the best means for encouraging such trade was to allow the parties thereto the greatest possible measure of freedom. It seemed, however, that the idea of an "international award" was still too new to be welcomed by a large number of States.

It was nonetheless true that the Ad Hoc Committee's draft represented real progress, although it could be interpreted as requiring a double exequatur. That defect must be set right in order to facilitate the execution of arbitral awards and ensure the spread of arbitration. Only thus could the insecurity mentioned by the Polish representative be eliminated.

Mr. DOMKE (International Law Association and International Association of Legal Science) referred briefly to the activities of the International Law Association in the field of arbitration. By promoting the standardization of rules governing the enforcement of arbitral awards, the Conference would be meeting the needs of the business world and of jurists in all countries.

He was pleased to note that the Conference would not only study the draft Convention before it, but would also examine other measures designed to make arbitration a more efficient means of settlement of private law disputes, such as the adoption of uniform rules of procedure and increased co-ordination of arbitration machinery. On behalf of the International Law Assocation he wished the Conference every success in its work.

Speaking on behalf of the International Association of Legal Science, he recalled that that body had recently organized a Round Table Conference of Lawyers on the legal aspects of trade between planned and free economies. He hoped that the Conference could also look into those problems during its examination of item 3 of the agenda.

Mr. MANTILLA (Inter-American Council of Commerce and Production), speaking on behalf of the organization which he represented and in his capacity as Director-General of the Inter-American Commercial Arbitration Commission, expressed

(Mr. Mantilla, Inter-American Council of Commerce and Production)

pleasure at the convening of the Conference and hoped that its work would be crowned with success.

The consolidated report by the Secretary-General on the activities of inter-governmental and non-governmental organizations in the field of international commercial arbitration (E/CONF.26/4) referred briefly to the work of the Inter-American Commercial Arbitration Commission (paragraphs 17 to 20) and of the Organization of American States which had adopted a draft Uniform Law on Inter-American Commercial Arbitration (paragraphs 40 and 41). The draft Uniform Law provided in particular that arbitral awards should have the same operative force as judgements by domestic or foreign courts (article 18), and listed those cases in which the enforcement of an award might be opposed or an appeal might be brought before the courts (article 19). It was at present still necessary in the majority of American States to apply to the competent court for an exequatur of foreign arbitral awards.

Efforts were being made to extend the practice of inserting an arbitral clause in commercial contracts between nationals of different countries in the American continent and to induce American States to adopt the provisions of the Uniform Law.

He hoped that the Conference would in its work give to the Inter-American system of arbitration the attention it deserved.

After an exchange of views between Mr. KORAL (Turkey) and Mr. PSCOLKA (Czechoslovakia), the PRESIDENT suggested that the Conference should interrupt the general discussion in order to begin the examination of the draft Convention, article by article, starting with article I, at the following meeting.

It was so decided.

The meeting rose at 12.20 p.m.