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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE FIFTH MEETING

Held at Headquarters, New York,
on Thursday, 22 May 1958, at 2.50 p.m.

CONTENTS

President: Mr. SCHURMANN Netherlands

Executive Secretary: Mr. SCHACHTER

ORGANIZATION OF THE WORK OF THE CONFERENCE

Establishment of the Credentials Committee

The PRESIDENT suggested that the Credentials Committee, provision for which was made in rule 2 of the rules of procedure, should consist of the following members: Australia, Belgium, Ceylon, Colombia, Italy, Peru, Tunisia, the Union of Soviet Socialist Republics and the United States of America. The Committee would meet on 3 June.

It was so decided.

Establishment of a committee to undertake preliminary consideration of other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes

The PRESIDENT suggested that membership in the committee which would undertake the preliminary consideration of item 5 of the agenda should be open to any delegation desiring to participate.

Mr. HERMENT (Belgium) said that the Conference should not consider item 5 until it had completed its work on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Many delegations did not have enough members to be represented at meetings of both the Conference and the committee simultaneously.

The PRESIDENT said that the committee would merely do the preparatory work on item 5. Unless that was done, the Conference might not have time to consider the item.

Mr. WORTLEY (United Kingdom) pointed out that the main task of the Conference was to prepare the final draft of the Convention. While he did not object to the establishment of a committee to consider item 5, he hoped that it would not meet at the same time as the Conference.

The PRESIDENT suggested that the Conference should establish the committee but should not decide now on the date of its first meeting. That might be left to a later stage when the Conference had a clearer idea of the progress made in its consideration of item 4.

Mr. PAZHITOV (Union of Soviet Socialist Republics) thought that the Conference should agree to turn to item 5 only after it had completed its principal task.

Mr. COHN (Israel) said that the question of the appointment of a committee to consider item 5 should be discussed only after working groups had been appointed to deal with the individual articles of the Convention. The smaller delegations might find it very difficult to concentrate on more than one item at a time.

Mr. GEORGIEV (Bulgaria) agreed that the immediate appointment of a committee would tend to discriminate against the smaller delegations. Each delegation should be afforded the fullest opportunity to state its views on the various points of the draft.

Mr. KORAL (Turkey) said that the importance of item 5 should not be underestimated. Even when the Convention had been elaborated, the question of the enforcement and recognition of arbitral awards would not be fully resolved until there was greater agreement on the procedural aspects of the matter. Consequently, the opportunity of formulating certain recommendations on the wider issue of arbitration proper should not be let slip, particularly as the standing of the experts present at the Conference would lend weight to any such recommendations.

Mr. HERMENT (Belgium) and Mr. GEORGIEV (Bulgaria) favoured the appointment of a Committee provided that no final decision was taken until it became clear that consideration of item 5 would not impede the Conference's principal work.

The President's suggestion was adopted.

CONSIDERATION OF THE DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (E/2704 and Corr.1, E/2822 and Add.1 to 6; E/CONF.26/2, 3 and Add.1, 26/4, 26/7; E/CONF.26/L.6 and L.9) (continued)

General Debate (continued)

Mr. DAPHTARY (India) said that his Government had examined the text of the draft Convention and had already signified its general approval of the

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(Mr. Lahiry, India)

draft as constituting a significant advance on the Geneva Convention on the Execution of Foreign Arbitral Awards. As India had in recent years embarked upon extensive economic development schemes, the Government, official agencies and businessmen were acutely conscious of the importance of the arbitral procedure as a convenient and speedy method of resolving commercial disputes. The formulation of international arbitral law being a matter of comparatively recent interest in India, there were no questions of pride or prejudice which would hinder the Indian delegation from falling in with whatever steps were calculated, best and most speedily, to bring about a successful conclusion to what essentially was a matter of promoting better relations in international trade. It would adopt and support any suggestions, from whatever source, which tended to consolidate the positions so far reached so as to provide a definite point from which the next advance could be initiated and maintained.

As commerce knew no boundaries and was not for long shut out by political barriers, the Conference might well consider whether the code of arbitral procedure, when finally determined upon, should not be available to all countries which had trade relations with one another.

Mr. BAKHTOV (Union of Soviet Socialist Republics) said that the Soviet Union attached considerable significance to the expansion and strengthening of international trade relations, which helped to promote world peace and co-operation among States irrespective of their social and economic systems. The Soviet Government had proposed that measures to expand international trade relations should be one of the questions considered at a summit conference. In its view, trade should be free of restriction, discrimination or artificial barriers.

After giving a detailed description of his country's extensive trade relations with the rest of the world and noting that the United States being the only major country with which it did not have such relations, he said that commercial disputes involving Soviet foreign trade organs were rare and that provision had been made for their settlement by arbitration, a procedure which was both speedy and inexpensive for the parties concerned. Such a provision had been included in its trade agreements with twenty countries, in which the question of the recognition and enforcement of arbitral awards was specifically covered.

(Mr. Bakhtov, USSR)

The Soviet delegation was therefore eager to examine the draft Convention in a spirit of mutual co-operation and understanding. The draft was not a perfect instrument, for various limitations hampered its effectiveness. For instance, it was open only to States Members of the United Nations and its specialized agencies. Article 4, too, was unduly restrictive.

The Soviet delegation was confident that the Conference would succeed in drafting a text which would be in conformity with the main objectives of the draft Convention, thus contributing to the successful development of international trade relations. Notwithstanding its shortcomings, the draft before the Conference could be used as a basis of discussions. The Soviet delegation would submit specific proposals at a later stage.

Mr. RAMOS (Argentina) said that his Government attached particular importance to arbitration as a means of settling international commercial disputes. In view of the expansion of world trade, the Geneva Protocol of 1923 and the Geneva Convention of 1927 were no longer adequate. The Conference now had before it a draft Convention which sought to reconcile the requirements of the trading community with those of public policy. Such an attempt had already been made by the Inter-American Council of Jurists which had drafted a standard law on arbitration for inter-American trade and had submitted it to the Governments concerned. The effectiveness of a law depended upon the extent to which it reflected reality. The Argentine delegation therefore agreed with the Italian representative that the Conference should proceed with caution.

Subject to the comments it would make later with respect to specific articles, the Argentine Government was favourably impressed by the draft Convention. Moreover, it attached considerable importance to item 5 of the agenda.

His delegation wished to thank the International Chamber of Commerce, the Economic and Social Council and the Secretariat for their efforts which had led to the convening of the Conference, and the Ad Hoc Committee for having drafted the text now under consideration.

Mr. SAVCHENKO (Ukrainian Soviet Socialist Republic) welcomed the Conference since his Government sought to maintain normal trade relations with

(Mr. Savchenko, Ukrainian SSR)

other countries as a means of strengthening economic co-operation, contributing to improved international relations, and providing a better life for the peoples of the world. As a major European producer of goods, the Ukrainian SSR was particularly interested in the development and flow of international trade. In that connexion, it considered the draft Convention an important step in the normalization of international trade relations. However, the draft would be effective only if some of the restrictions in it (for example in articles IV, VII and IX) were removed. The Ukrainian delegation would submit concrete proposals at a later stage. It wished the Conference every success and pledged its full co-operation.

Consideration of the draft Convention article by article

Mr. LIMA (El Salvador) observed that under operative paragraph 1 (a) (i) of Economic and Social Council resolution 604 (XXI) the Conference, in concluding a convention on the recognition and enforcement of foreign arbitral awards on the basis of the draft Convention prepared by the Ad Hoc Committee on the Enforcement of International Arbitral Awards, was required to take into account the comments and suggestions made by Governments and non-governmental organizations, as well as the discussion at the twenty-first session of the Council. He wished to know whether the Conference would take those comments and suggestions into account if they were not formally presented as amendments to the draft Convention. In his view, the Conference should consider them only if they were presented as amendments.

The PRESIDENT suggested that the best course would be for the Conference to consider an article and the amendments submitted to it. Upon completion of its preliminary consideration, the article would be referred to a working group which would take into account the factors mentioned in the Economic and Social Council's resolution. The working group would refer back to the Conference one or more texts of the article for final consideration and adoption. No vote would be taken during the preliminary consideration by the Conference or in the working group; the article would be voted on only when the working group referred the article back to the Conference for adoption.

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In reply to a question by Mr. GEORGIEV (Bulgaria), the PRESIDENT said that no individual article would be referred to a working group until it had been exhaustively discussed by the Conference. However, the voting on each article might be deferred until the working group dealing with it had submitted a revised text.

Mr. HOLLEAUX (France) thought that, before any article was referred to a working group, the Conference should take certain decisions on the principles involved. Otherwise, the working groups would be confronted with many unanswered points. The votes cast on any general principle would not, of course, be binding on delegations when it came to the final vote on the article concerned.

The PRESIDENT said that the procedure suggested by the French representative might often prove very helpful. It would be better, however, not to take any hard and fast decision but to wait and see what method might be most appropriate in each specific context.

Mr. MAURTUA (Peru) hoped that a clear distinction would be maintained between an approval in principle and final approval. The working groups should concern themselves merely with drafting and resubmit each article to the Conference for the final decision.

The PRESIDENT thought that the final Drafting Committee, responsible for the language of the text, should not be the same as any of the earlier working groups. The task of each body would be wholly different.

Mr. PSCOLKA (Czechoslovakia) asked what principles would be followed in selecting the members of the working groups.

The PRESIDENT replied that it would be better not to lay down any strict rules. The composition of each individual group would be influenced by the special interest shown by various delegations in the provision with which that group would be dealing.

Title of the Convention

Mr. POINSOT (Switzerland) recalled that the Swiss Government had already proposed that the title of the Convention should read "Convention on the Recognition and Enforcement of International Arbitral Awards in Private Law" (E/2432). That title would take into account the views of both the International Chamber of Commerce and of the 1955 Committee and would also correspond to the suggestion submitted by the Polish delegation (E/CONF.26/7).

Mr. URABE (Japan) said that the scope of the application of the Convention was one of the most controversial issues before the Conference. In those circumstances, it might be better to defer consideration of the title until agreement had been reached on the substantive provisions.

It was so decided.

Article I

Mr. COHN (Israel) said that the meaning of the eight-Power draft amendment to article I, paragraph 1 (E/CONF.26/L.6), was not readily apparent.

Mr. HOLLEAUX (France) said that the sponsors of the joint draft amendment had been prompted by the belief that the definition of a foreign award contained in article I, paragraph 1, placed undue emphasis on the place in which the award was made. Such an absolute criterion could seriously impede the Conference's formulation of the subsequent articles. The place of the award was often fortuitous or artificial and, unlike the place of a court judgement, which was governed by unequivocal rules, might often prove difficult to determine. In certain extreme cases, for example when arbitral awards were agreed upon by correspondence between the arbitrators, it might prove quite impossible to determine it. Furthermore, as was shown by the ruling of the French Court of Cassation that an arbitration conducted under foreign law in Paris was not a French arbitration, certain legal systems regarded the place where the award was made as only a secondary factor.

(Mr. Holleaux, France)

Mindful of those facts, and believing that the wording of article I, paragraph 1, would tend to prejudice the central question of the applicable law, the sponsors of the joint amendment had tried to devise a formula which was both less categorical and more realistic. The wording of the proposed amendment would safeguard all interests, without in any way anticipating other relevant questions.

Mr. COHN (Israel) said that the joint amendment raised one immediate difficulty: the common law countries regarded no award as "domestic" for, in their systems, the nationality or residence of the parties to an arbitration did not affect either the procedure or the conditions of enforcement. His delegation therefore found the wording of article I, paragraph 1 fully satisfactory as it stood, but perhaps a small working group could devise a compromise formula acceptable to the common law countries and the civil law countries alike.

Mr. ROGNLIEN (Norway) welcomed the joint amendment in principle but thought that it might leave excessive power to the State in which enforcement was sought. A second sentence might be added, reading: "However, no country shall consider an award to be domestic contrary to the agreement of the parties, unless both parties are nationals or residents of that State."

Mr. WORTLEY (United Kingdom) said that, while he appreciated the efforts of the sponsors of the joint amendment to resolve a complex problem, the Israel representative's argument seemed difficult to refute. The common law countries regarded arbitration as a quasi-judicial institution, distinct from mere conciliation in private law and in the law of nations. Good offices could be exercised by correspondence or other informal means, but arbitration required the application of a strict procedure. The sole procedural difference between commercial arbitration and a judicial action was that, in the former, lawyers were sometimes replaced by businessmen. In those circumstances, the wording of article I, paragraph 1, which merely stated an objective and easily applicable criterion, should perhaps be left untouched.

Mr. KORAL (Turkey) agreed with the French representative that the place where an award was made was sometimes difficult to determine and that draft article I (1) did not adequately define a foreign award. He had been impressed by the argument advanced in the general observations submitted by the Federal Republic of Germany (E/2822) that the criterion for determining the nationality of an award should be the municipal procedural law under which the award was made. He was submitting for consideration an amendment embodying that principle (E/CONF.26/L.9).

Mr. LIMA (El Salvador) felt that it would be better if, in the discussion of the individual articles of the draft Convention, delegations defined their general position before dealing with the task of arriving at a suitable text. The purpose of draft article I (1) was to define the scope of the Convention. Clearly, the authors had had one object in view: to exclude awards which were made in the country in which they were relied upon. Perhaps a definition of the scope of the Convention in those terms would be the best solution.

He was afraid that a reference to the nationality of an award, such as that contained in the eight-Power amendment (E/CONF.26/L.6) might lead to new complications. It had been disputed that an arbitral award had nationality.

He was not sure of the status of an award which was made in one country under the municipal procedural law of another country and which was then relied upon in the country in which it was made. If the principle of the autonomy of the parties was accepted, the case would have to be covered by a reference not to the nationality of the award but to the law under which the award was made.

Mr. RAMOS (Argentina) observed that such cases would be relatively rare and he asked whether they would justify abandoning the clear formulation in the draft article, which also avoided difficulties inherent in the eight-Power amendment. That amendment left unanswered the question of what was not a domestic award. Even if the amendment were couched in positive terms, namely "This Convention shall apply to the recognition and enforcement of arbitral awards which are considered as foreign in the country in which they are relied upon", the problem of defining a foreign award would remain.

(Mr. Ramos, Argentina)

He agreed with the representative of Israel that the article should be referred to a working party.

Mr. BECKER (United States of America) supported the view of the United Kingdom representative. In the United States, it was the place of the arbitration which determined whether an award was a foreign award.

Mr. MANTEUCCI (Italy) agreed with the representative of Argentina that the eight-Power amendment was incomplete. Its sponsors were discussing an additional clause which would provide criteria for determining the nationality of an award and which would take into account the law under which the award was made.

He drew attention to the possible need for an article which might precede draft article 1 and which would make it clear that the Convention applied to awards made under arbitral clauses as well as to those made under arbitral agreements.

Mr. KESTLER FARNES (Guatemala) agreed with the representatives of Israel and Argentina that article I should be referred to a working party.

The discussion on article I, the eight-Power amendment (E/CONF.26/L.6) and the Turkish amendment (E/CONF.26/L.9) had shown that there were apparently certain profound differences of opinion, possibly due to fundamental differences between the legal systems which applied the territorial criterion in classifying awards and those which defined a foreign award by reference to the criterion of nationality. There also seemed to be substantial differences of opinion concerning the nature of arbitration proceedings. Some countries required action by the courts, while others did not. In Guatemala, arbitration proceedings were considered to require such action. Again, as a result of the influence of the Bustamante Code, the territorial concept played an important part in the law of most Latin American countries. Draft article I (1) was therefore more acceptable to him than the eight-Power amendment. Lastly, under the legal system of Guatemala, procedural laws were a matter of public policy and, as such, were imperative, territorial and excluded the application of foreign laws. For that reason, paragraph 1 of that article was also more acceptable to him than the Turkish amendment. It was scarcely conceivable that an arbitration tribunal in Guatemala would make an award in accordance with the procedural law of a foreign country.

Mr. HERMENT (Belgium) pointed out with regard to the Turkish amendment that an award made on Belgian territory under the law of a foreign country would nevertheless be considered a Belgian award, and an award made in a foreign country under Belgian law would in Belgium be considered a foreign award.

Mr. BEGAROVIC (Yugoslavia) announced his delegation's support of the eight-Power amendment. It could not support the Turkish amendment.

The meeting rose at 5.15 p.m.