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COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

First Session

SUMMARY RECORD OF THE SECOND MEETING

Held at Headquarters, New York,
on Wednesday, 2 March 1955, at 10.45 a.m.

CONTENTS

Consideration of the question of the enforcement of international
arbitral awards, and, in particular, of the Preliminary Draft
Convention on the Enforcement of International Arbitral Awards
prepared by the International Chamber of Commerce (E/C.2/373 and Add.1,
E/AC.42/1 and E/AC.42/2)(continued)

PRESENT:

<u>Chairman:</u>	Mr. LOMES	Australia
<u>Members:</u>	Mr. NISOT	Belgium
	Mr. CRUJILLO	Ecuador
	Mr. MEHTA	India
	Mr. DENNEMARK	Sweden
	Mr. NIKOLAEV	Union of Soviet Socialist Republics
	Mr. WORTLEY	United Kingdom of Great Britain and Northern Ireland

Representative of a specialized agency:

Mr. WILLIAMS International Monetary Fund

Representatives of non-governmental organizations:

Category A: Mr. ROSENTHAL International Chamber of Commerce

Category B and Register:

Mr. KOPPERS International Law Association

Secretariat:

Mr. SCHACHTER Director, General Legal Division

Mr. CONTINI Secretary of the Committee

CONSIDERATION OF THE QUESTION OF THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS AND, IN PARTICULAR, OF THE PRELIMINARY DRAFT CONVENTION ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS PREPARED BY THE INTERNATIONAL CHAMBER OF COMMERCE (E/C.2/373 and Add.1, E/AC.42/1 and E/AC.42/2)(continued)

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that his delegation agreed that the satisfactory solution of the question before the Committee would facilitate the enforcement of arbitral awards relating to disputes arising in international commerce and so would promote the development of international trade. It also agreed that the preliminary draft convention prepared by the International Chamber of Commerce could be accepted as the basis for discussion.

With respect to that draft, he agreed with the Belgian representative that the title "Convention on the Enforcement of International Arbitral Awards" was hardly appropriate. The proposed convention was to deal with the enforcement in one country of arbitral awards made in another, and it seemed to him that the title of the Convention on the Execution of Foreign Arbitral Awards (1927) would meet the point made by the representative of Belgium and should be retained.

The implication in article I that the convention would apply not only to arbitral awards in commercial disputes but also generally to those made in disputes involving legal relationships arising on the territories of different States was not in conformity with the purposes of the convention. The application of the convention should be limited to the enforcement of arbitral awards in disputes arising out of commercial dealings, and any provision suggesting that it had a larger scope should therefore not be included.

In the Soviet Union, the Foreign Trade Arbitral Commission and the Maritime Arbitral Commission were permanent arbitral bodies established in 1932 and 1930 respectively in the All-Union Chamber of Commerce. The speaker described the composition and functions of the two commissions, and observed that they operated on principles confirmed by the Government of the USSR and according to rules of procedure confirmed by the Presidium of the All-Union Chamber of Commerce, and always gave the reasons for decisions in detail. Over a period of more than twenty years the Commissions had settled disputes involving institutions and

(Mr. Nikolaev, USSR)

firms of various countries, including the United Kingdom, Belgium, Egypt, Sweden, the United States of America, France, the Netherlands, Poland, Bulgaria, Germany, Afghanistan, Greece, Iran, Italy, Canada, Mongolia, Norway, Turkey and Switzerland.

The USSR delegation took it that article I of the draft convention would apply both to awards made by arbitrators appointed to settle particular disputes and to those made by permanent arbitral bodies, but it would be advisable to make that point explicit in the text.

The USSR had concluded bilateral agreements on the enforcement of arbitral awards with Poland, Romania, Hungary, Czechoslovakia, Bulgaria, Norway, Sweden, Finland and Switzerland. Such agreements took the form of separate articles in USSR commercial treaties with those countries. Under those agreements the contracting parties assumed the obligation to enforce arbitral awards made in commercial disputes between persons or institutions of the contracting parties if such arbitration was stipulated in the particular transaction or in a separate agreement governing the particular transaction.

He cited as an example the Exchange of Goods and Payments Agreement of 7 September 1940 between the USSR and Sweden, article 14 of which provided for possible arbitral settlement of commercial disputes between the USSR trade delegation in Sweden or Soviet economic organizations, on the one hand, and Swedish institutions, firms or persons, on the other. Under article 15, the parties were bound to recognize as valid, and to enforce, arbitral awards made in such disputes. Enforcement could not be refused except on certain specified grounds. Article 15 further provided for similar enforcement of arbitral awards relating to transactions outside the scope of the Agreement if the awards were based on an arbitration agreement or clause that was valid under the laws of the country where the arbitration was to take place.

In view of the foregoing, the draft should provide that nothing in the convention could affect the operation of bilateral agreements of the contracting parties relating to the enforcement of arbitral awards.

His delegation had submitted to the Secretary of the Committee written amendments along the lines indicated.

Mr. WORTLEY (United Kingdom) said that he would limit his preliminary remarks to two points that had been raised in the Lord Chancellor's Committee when it had examined the ICC draft. In England, as in most countries, arbitration meant a procedure for settling disputes according to law. In some countries, however, it embraced such procedures as amiable composition. The question was whether the ICC draft was concerned exclusively with arbitration as such or whether it extended to forms of conciliation. That should be clarified.

The second point related to the limitation of the effect of the draft convention to commercial disputes. As common law countries had no separate commercial code and no statutory definition of the person described in French as commerçant, difficulties might arise in the application of the convention.

The CHAIRMAN noted the Belgian representative's criticism of the existing title of the draft convention, and the USSR representative's suggestion that the title of the Convention of 1927 would be preferable.

Mr. NISOT (Belgium) said that the title should speak of "recognition and enforcement" rather than of "enforcement" alone. As there seemed to be no objection to the ideas to be included in the title, he proposed that the exact wording should be left until the Committee had completed its work on the text of the draft convention.

It was so decided.

The CHAIRMAN invited the Committee, before discussing the text of the draft convention, to consider several preliminary points. The first was a matter raised by the United Kingdom representative: whether the word "arbitration" should apply only to the arbitral settlement of disputes according to law or should also include conciliation.

Mr. MEHTA (India) remarked that conciliation was a separate method, applicable largely to labour disputes, and that the draft convention should deal only with arbitration in the strict sense, in other words, the settlement of disputes by arbitrators according to law.

Mr. TRUJILLO (Ecuador) said that in Ecuador, as in most Latin American countries, the law allowed the parties to choose between arbitration according to law and arbitration ex aequo et bono. If the draft convention were to apply to all disputes and their settlement, it should cover both forms of arbitration; but if it was decided that it should deal exclusively with commercial disputes, provision should be made for arbitration ex aequo et bono only which offered greater opportunities of reconciling conflicting national laws.

Mr. NISOT (Belgium) pointed out that, under the draft convention, in countries in which arbitration ex aequo et bono was recognized by law, the parties would be free to choose that form of arbitration. He failed to see why the United Kingdom representative should object to a provision giving the parties that latitude, particularly since the same choice was offered by the 1927 Convention, which had been ratified by the United Kingdom.

Mr. WORTLEY (United Kingdom) replied that, whereas in other countries commercial disputes were often settled by the method of amiable composition, in the United Kingdom settlements had to be according to law, so that a court could be applied to for redress of any error of law or misconduct in the arbitration proceedings. In order to make sure that countries with different legal systems understood exactly to what they would be committing themselves, the draft convention should stipulate clearly whether it applied to only one of the forms of arbitration mentioned or offered a choice between the two.

Mr. DENNEMARK (Sweden) thought that, under the draft convention, arbitrators should be permitted to use the method of ex aequo et bono, precisely as they were under the 1927 Convention. In the twenty-eight years of its existence, that Convention had not, to his knowledge, given rise to any difficulty in any of the signatory countries, including his own.

Mr. NISOT (Belgium) said that, if the United Kingdom had any difficulty in enforcing an arbitral award made ex aequo et bono, it could refuse to enforce it under article IV (a) of the draft convention on the grounds that to do so would be contrary to public policy. A similar provision existed in the 1927 Convention.

Mr. WORTLEY (United Kingdom) replied that "public policy" was a much more rigid and more narrowly circumscribed concept than ordre public, so that the provision in question would not constitute an avenue of escape for the Commonwealth countries as it would for most countries of the continent of Europe. Moreover, in the 1927 Convention the clause had been used in a different context.

The CHAIRMAN, speaking as the representative of Australia, supported that view.

Mr. NISOT (Belgium) failed to see why the United Kingdom should refuse to accept a system similar to that provided for in a Convention by which it was still bound.

Mr. DENNEMARK (Sweden) remarked that under the Arbitration Act, 1950, foreign awards were enforceable in the United Kingdom. He wondered whether the United Kingdom would refuse, for example, to enforce an award made according to French law by an arbitrator who had to some extent ruled ex aequo et bono.

Mr. WORTLEY (United Kingdom) replied that a final award made in accordance with the law of another country would be enforced in the United Kingdom. Difficulty would arise only if the award was not based on the law of any country, since the institution of amiable composition did not exist in the United Kingdom. Under the draft convention as it stood, the United Kingdom might find itself having to enforce decisions which were not arbitral awards in the strict sense but compromises achieved without reference to any particular system of law and without previous notification to the parties that that method would be used. That would be unacceptable, because the United Kingdom felt that it should be possible to upset an award if it had been made in violation of a point of law. His remarks obviously did not apply to awards voluntarily accepted by both parties, since in that case the question of enforcement did not arise.

The CHAIRMAN said that the Committee could clarify the matter further in the course of its discussion of the text of the draft convention. He invited members to consider whether the draft convention should apply to commercial disputes only.

Mr. WORTLEY (United Kingdom) thought that another question of principle was the scope of the proposed convention. The ICC draft extended to arbitral awards affecting persons who were not nationals of the States parties to the convention. The Convention of 1927, on the other hand, was governed by the principle of reciprocity.

As to the problem involved in the limitation of the convention to awards in commercial disputes, it had been solved in the 1927 Convention by the inclusion of a permissive clause allowing reservations limiting its application to commercial disputes.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) referred to his opening statement and said that his delegation maintained its view in favour of limiting the operation of the convention to commercial disputes.

Mr. DENNEMARK (Sweden) saw no need for the limitation, which might cause difficulties in countries having no commercial code. In only a few countries were commerçants and commercial disputes governed by special legislation. The best solution would be to follow the example of the 1923 Protocol, which provided in the second sentence of its paragraph 1 that each contracting State reserved the right to limit its obligation to contracts considered as commercial under its national law.

Mr. NISOT (Belgium) said that his delegation would prefer the operation of the proposed convention to be limited to commercial disputes, but if the idea did not have the support of the majority, it could accept the Swedish proposal.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) requested the submission of the Swedish proposal in writing before any decision in principle was taken.

The CHAIRMAN invited comments on the Indian representative's suggestion that an annex to the draft convention should contain a standard set of rules governing arbitral procedure which would be applicable in the absence of agreement between the parties.

Mr. NISOT (Belgium) said it was premature to consider a standard set of rules though the Economic and Social Council might be informed that it would be desirable to draft such rules. In the meantime, it should draft the new convention on the basis of the existing rules of arbitral procedure.

The CHAIRMAN suggested that the question of standard rules of arbitral procedure should be mentioned in the Committee's report to the Economic and Social Council.

Mr. MEHTA (India) accepted the suggestion.

It was so agreed.

The CHAIRMAN invited the Committee to consider whether the principle of reciprocity, which was a feature of the 1927 Convention, should be maintained in the new draft convention.

Mr. DENNEMARK (Sweden) observed that the absence of a reciprocity clause might cause some difficulty, although not in the case of Sweden which enforced every foreign arbitral award, irrespective of whether the State in which it was made was a party to the 1927 Convention. The same latitude should be permitted in the draft convention.

Mr. NISOT (Belgium) said that the Belgian practice was similar to the Swedish. A general clause might, however, be included in the draft convention which would permit a Government to reserve its right not to enforce an arbitral award made in a State not party to the convention.

Mr. DENNEMARK (Sweden) felt that a definition of the term "foreign arbitral award" was essential. In Swedish law, the term meant an award made in a foreign country, irrespective of whether the proceedings leading to the award were conducted there.

Mr. WORTLEY (United Kingdom) said that in his country the point had been covered in the Arbitration Act, 1950, by a provision to the effect that a foreign arbitral award was an award not governed by the laws of England (section 40 (b); see also section 35).

Mr. DENNEMARK (Sweden) believed the term should be defined. The definition accepted in Sweden had not given rise to any difficulty over a period of twenty-five years. It was no more open to criticism than any other definition.

The CHAIRMAN observed that the Swedish suggestion did not cover the question of reciprocity.

Mr. DENNEMARK (Sweden) said he supported the Belgian representative's suggestion for a general reservation clause.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that any definition of the term "foreign arbitral award" would involve a measure of risk. The absence of such a definition had not given rise to any difficulty in the application of the 1927 Convention. Hence, a definition in the draft convention was unnecessary.

Mr. DENNEMARK (Sweden) said that the term was indirectly defined in article 1 of the 1927 Convention which stated: "...provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties..." He agreed with the Belgian representative that the words "and between persons who are subject to the jurisdiction of one of the High Contracting Parties" should not be retained.

The CHAIRMAN noted that, while there was general agreement on the question of reciprocity, there seemed to be some objection to a definition of the term "foreign arbitral award". The matter might be taken up again later.

The meeting rose at 1 p.m.