



UNITED NATIONS  
ECONOMIC  
AND  
SOCIAL COUNCIL



Distr.  
GENERAL

E/CONF.26/SR.13  
12 September 1958  
ENGLISH  
ORIGINAL: FRENCH

---

UNITED NATIONS CONFERENCE ON INTERNATIONAL  
COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE THIRTEENTH MEETING

Held at Headquarters, New York,  
on Wednesday, 28 May 1958, at 2.45 p.m.

CONTENTS

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, 26/3 and Add.1, 26/4, 26/7; E/CONF.26/L.8 and Corr.1, L.15/Rev.1, L.16, L.17, L.22 to L.25, L.30 to L.36) (continued)

<u>President:</u>	Mr. SCHURMANN	Netherlands
<u>Executive Secretary:</u>	Mr. SCHACHTER	

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, 26/3 and Add.1, 26/4, 26/7; E/CONF.26/L.8 and Corr.1, L.15/Rev.1, L.16, L.17, L.22 to L.25, L.30 to L.36) (continued)

Articles III, IV and V (continued)

Mr. MALOLES (Philippines) said that the amendments proposed by the Netherlands (E/CONF.26/L.17) to replace articles III, IV and V of the draft Convention were very close to the original provisions. Examining the two texts in detail, he pointed out that in article IV, sub-paragraphs (b) and (c) of the Netherlands amendments corresponded to sub-paragraphs (a) and (g) of the original draft, sub-paragraph (d) appeared to combine sub-paragraphs (b) and (c) of the draft, and sub-paragraphs (e) and (f) were the equivalent of sub-paragraphs (h) and (e) of the draft. The Netherlands amendments in fact restated the original provisions in more condensed form, but they also omitted some of the sub-paragraphs drafted by the Committee. Thus, sub-paragraph (d), despite its importance, had for some reason not been included.

In his view, article III should not be deleted. Articles III and IV complemented each other, the former dealing with positive and the second with negative aspects, a distinction which had also been made in articles I and II of the Geneva Convention of 1927.

The Netherlands delegation had not seen fit to incorporate article V, sub-paragraph (b) of the Committee's text in its amendments, although the submission of documentary and other evidence required in that provision was indubitably of importance. That omission was the more surprising as it was doubtful whether the document required by the Netherlands proposal (article V, sub-paragraph 1(b)) was really important. In article V, sub-paragraph 1(a) the words "duly authenticated" should be added after the word "award". It was essential that the supporting document should be of an official character, in order to facilitate the work of the courts and provide greater assurance to the parties.

Mr. MATTEUCCI (Italy) pointed out that the Netherlands amendments (E/CONF.26/L.17), which, it had been said, modified the draft Convention merely in points of detail, contained in fact a very bold innovation. That did not appear very clearly from the text of the amendments, but the explanatory note communicated to the Conference by the Netherlands representative and reproducing the text of his statement of 27 May left no doubt on that point. It was proposed to concentrate judicial control of the recognition and enforcement of arbitral awards in the hands of the competent authorities of the country in which the award was sought to be relied upon. A distinction was made between ordinary proceedings, apparently, those relating to substance, which could be instituted only in the country where the award had been made, and other proceedings which might be called extraordinary and which consisted essentially in an action for the annulment of the award. The Netherlands delegation had made it clear that an action for annulment was an exceptional means of recourse and that in any case article IV listed all the grounds on which it might be based. Extraordinary proceedings should in principle be initiated in the country where enforcement was sought. Such a reform was not unduly radical, but it might prove unacceptable to jurists and to the competent administrative authorities.

In its explanatory note, the Netherlands delegation added that the party opposing enforcement might invoke the grounds referred to in article IV of the draft Convention before the competent court of the country in which enforcement was sought. The court could then decide either to rule immediately on such objections or to await the outcome of proceedings based on the same grounds and brought before the competent authority of the country where the award had been made. In the former case the judge, while noting that an action for annulment had been brought elsewhere, would decide to take cognizance of the dispute himself. There would thus be two parallel proceedings, which might lead to a dispute arising out of two contradictory decisions.

The Netherlands delegation should try to find some means for removing that danger by stating clearly which jurisdiction was to be competent.

(Mr. Matteucci, Italy)

Lastly, it did not seem to have been found necessary to include among the grounds justifying a refusal of enforcement the case where the dispute settled by an arbitral award was also the subject of a judicial decision which had acquired the force of chose jugée in the country where the award was sought to be relied upon. That might happen where a court seized of the dispute was unaware of the existence of an arbitral award and where its judgement became final before information concerning the award reached the court. It might be advisable to include a reference to such a situation in the Convention.

Mr. LIMA (El Salvador) said that while at the eleventh meeting he had attempted a general analysis of the articles under discussion he would now examine more specifically the text of article III of the Netherlands amendments.

The first paragraph of that text provided that the parties should have validly agreed to settle their differences by means of arbitration. There was nothing to indicate which jurisdiction was competent to rule on the validity of the special agreement or the arbitral clause. In his delegation's view, it would be inadmissible for the courts of the country where enforcement was sought to reverse a decision taken in that matter by a court of the country where the award had been made. With regard to the enforcement of arbitral awards, two great legal systems might be distinguished, one of which admitted the possibility of judicial control in the country where enforcement was sought, while the other repudiated that possibility. If the Conference decided to retain article III, its text would have to meet the requirements of both systems.

Another question was where the validity of the arbitral clause should be dealt with. Should article III be retained, should the substance of its provisions be incorporated in article IV, or should a new article be drafted? The Ad Hoc Committee had certainly had good reasons for drafting two separate articles. It was not a question of article III, as had been suggested, setting forth positive conditions and article IV negative conditions. The character of a provision was reversible and depended merely on the way it was drafted. The intention had probably been to set forth absolute conditions of public policy in article III, conditions on which the courts might if necessary decide ex officio, while article IV was to state the objections which the defendant was free to invoke

/...

(Mr. Lima, El Salvador)

if he wished. That seemed to be in line with the idea underlying the German amendments (E/CONF.26/L.34) in which the distinctions between the two categories of conditions had been very clearly drawn.

The last question arising was that of the contents of article III or of any other text adopted to replace it. The general conditions for the validity of the submission to arbitration were no different from the conditions for the validity of contracts. To determine which law applied, it would be necessary, if the Convention gave no indication in the matter, to apply the rules of private international law governing conflicts of legislation applicable to contracts, and a distinction would have to be made between the different grounds for nullity (faulty consent, incapacity of the parties, illegal purpose, lack of grounds) which might lead to a great many different solutions. As his delegation saw it, the essential problem was to determine the competent jurisdiction. That was the problem the Conference would have to solve if it wanted to adopt a clear text and avoid the possibility of disputes such as had been mentioned by the Italian representative.

Mr. HERMENT (Belgium) said that while associating himself with the congratulations extended to the Netherlands delegation he would like to comment briefly on the amendments it had submitted (E/CONF.26/L.17).

First, in the French text of the amendments, the words "par écrit" and "de manière valable" should be separated by a comma (article IV, sub-paragraph (a)). Secondly, it should be made clear exactly by whom the arbitral agreement was to be held valid. The text under review, it should be recalled, would not apply exclusively to commercial arbitration, and it was therefore essential to state clearly what law was applicable; otherwise there would be nothing to prevent the parties to a contract from going abroad, submitting questions to arbitration which could not be so submitted in their own country and subsequently returning to their country to seek the enforcement of their foreign award.

It had been said that there was very little difference between the text proposed by the Netherlands and that of the draft Convention. The truth was that

/...

(Mr. Herment, Belgium)

there was a fundamental difference of principle. In the Ad Hoc Committee's draft, it was the claimant's duty to show that the conditions laid down in article III had been met. If necessary, a judge might ex officio refuse enforcement of an award on the ground that those conditions were not fulfilled. The Netherlands amendments conferred upon a foreign judge extensive powers virtually enabling him to re-examine the substance of the case. They credited him with a knowledge of another country's law which he generally did not possess. In short, the Netherlands amendments would enable the losing party at the very last moment to invoke objections which it might very well have raised at an earlier stage. To take an extreme case, the losing party might raise before the judge in the country of enforcement pleas which had been rejected by the competent judge of the country where the award had been made. The possibility of permitting a double exequatur had been rejected, yet such a procedure would save time. The judge of the country in which the award was relied upon would not have to settle questions already decided by the judge of the country where the award had been made and would have to deal only with points coming within the scope of his own law.

In his view, a double exequatur would be extremely useful if the Convention under review was really to introduce a simple and rapid procedure for the enforcement of arbitral awards.

Mr. HOLLEAUX (France), referring to article III of the draft Convention and the Netherlands amendments (E/CONF.26/L.17), said that sub-paragraph (a) of the draft and the first paragraph of the amendments raised difficult problems of proof. For reasons he had already outlined he did not regard written proof in commercial matters necessary; in that particular, it would be wiser to adhere more closely to the Geneva Convention than the Netherlands had done. His delegation was therefore prepared to propose that the requirement of written proof should be dropped. It would, however, willingly withdraw the proposal if the Conference should decide to delete article III, as had been proposed by Israel (E/CONF.26/L.31, paragraph 1) and the Federal Republic of Germany (E/CONF.26/L.34, paragraph 1).

(Mr. Holleaux, France)

The same provision also raised, however, the difficult question of the validity of arbitral agreements. He was not sure whether the problem should be examined by the Conference and whether it would not be wiser to leave the courts responsible for ruling on the awards to settle that point, too. If the Conference should deal with the question, it would not have to lay down which law should govern arbitral agreements. At the most, it might refer simply to the "law applicable" as was done in the Geneva Convention.

If the Conference decided to adopt a provision on the validity of arbitral agreements, it would find itself dealing with the validity of contracts, which was one of the most controversial questions of international private law. Whether it sought to reconcile existing differences or to impose special rules regarding contracts containing arbitral clauses, it would have to undertake a long and difficult labour, the outcome of which would be uncertain. Article III, sub-paragraph (a), thus raised thorny problems with which the Convention had, and should have, nothing to do.

In the Netherlands draft (E/CONF.26/L.17), sub-paragraph (b) had been dropped from article III. The sub-paragraph had often been questioned, because, going further than the Geneva Convention, it required that the award should have become both final and operative in the country in which it had been made, before it could be recognized or enforced. The text might have given the impression that the Convention was laying down a requirement of a double exequatur, even when there was no practical reason to ask first for an exequatur in the country where the award had been made. A double exequatur would be considered catastrophic by practising jurists, because it would greatly lengthen the proceedings and entail considerable expense.

In actual fact, the text of sub-paragraph (b) did not seem to involve such a danger because the term "operative award" was apparently intended to designate merely an award binding on the parties. It was not an enforceable (executoire) award in the technical sense of French law. The word "operative" would certainly have been rendered more accurately by the French word "obligatoire". It would therefore be sufficient simply to lay down the requirement that the award should

(Mr. Holleaux, France)

have become "final". That was done in the Netherlands draft in article IV, sub-paragraph (f), which also supplied an adequate definition of what constituted an award that had not become final. Inasmuch, therefore, as the only really useful element in article III had become incorporated in article IV, article III might safely be deleted, as had wisely been suggested by the Federal Republic of Germany (E/CONF.26/L.34, paragraph 1). It would seem possible to combine the Netherlands and German texts, provided that the Netherlands definition of an award that had not become final was retained.

Mr. BEASAROVIC (Yugoslavia) recalled that the Conference had been convened to study the problem of the recognition and enforcement of foreign arbitral awards on the basis of the draft prepared by the Committee. Solutions based on that text must therefore be found. It was to be feared that if in the case of articles III, IV and V the Conference took the amendments put forward by the Netherlands (E/CONF.26/L.17) as its starting point, a number of countries would find it difficult to sign the Convention.

Yet the Netherlands amendment contained interesting ideas, and gave some reassurance to those delegations which feared that article III (b) of the Committee's draft might involve the necessity of a double exequatur. That difficulty could be overcome by removing sub-paragraph (b) of article III and incorporating it in article IV (e), which was the point of the amendments put forward by Yugoslavia (E/CONF.26/L.35). Amendment on those lines would, moreover, result in the onus of proof being shared more equally between the complainant and the defendant. The Netherlands, furthermore, had itself made proposals to that effect in its observations of 8 April 1958 (E/CONF.26/3/Add.1, para. 7).

Mr. ADAMIYAT (Iran) considered that article III as proposed by the Netherlands (E/CONF.26/L.17) dealt with the normal way in which parties could come to an arbitral agreement. In so far as the arbitral agreement concluded was genuine, it would be valid for the purpose of the Convention, no matter what form it took. Thus the Netherlands draft established fundamental prerequisite conditions. The provision should therefore be kept, and his delegation would support it.



Mr. WORTLEY (United Kingdom) thought that the proposal made by various delegations for incorporating article III (b) in article IV might well provide a means of solving the difficulty with which the Conference was faced. The article should not be deleted altogether, as it dealt with points which had to be proved beforehand. The definition of the words "in writing" as given in the Netherlands amendment (E/CONF.26/L.17) was inadequate. It would surely be better not to clarify. If article III, or at least part of it, was to be retained, the notion that the enforcement of an award must not have been suspended in the country where it was made, should also be kept.

The final text of the Convention should be ready by the end of the following week and delegations would then have to have time to contact their governments. Work should therefore be speeded up as much as possible, and a time-limit should now be fixed for submission of amendments; if necessary a working group might also be set up.

Mr. KORAL (Turkey) was apprehensive lest the Conference depart too much from the Committee's draft and thus make it more difficult for Turkey to support it, since his country had never been party to a Convention of that nature before and naturally did not want to be involved without full knowledge of the facts. He felt there was need to establish the principle that the arbitral agreement should be drawn up in written form. The condition as to the final nature of the award should come in article III. The word "validly" in article III of the Netherlands amendment (E/CONF.26/L.17) should be transferred to article IV, and the meaning should be made clearer. The concept of an international award, i.e. an award not conditioned by any national legislation, but based solely on the will of the parties, deserved thorough discussion, since it was a departure from traditional principles.

Article V, paragraph 3, of the Netherlands text might be more appropriately placed at the beginning of the article as it led on from article IV.

The CHAIRMAN pointed out that article III of the Netherlands proposal established two conditions, i.e. the parties had to have agreed "validly", and "in writing".

Mr. ROGNLIEN (Norway) supported the second Japanese amendment (E/CONF.26/L.15/Rev.1) on article IV (e) of the draft Convention (corresponding to article IV (f) of the Netherlands proposal); it would solve the difficulty pointed out by the Italian representative.

Mr. KAISER (Pakistan) considered article III (a) and (b) of the draft Convention quite acceptable in the Committee's version. The word "complete" might very usefully be inserted between the words "become" and "final" in article III (b). It would ensure that no point had been omitted during the proceedings or in regard to the award itself.

His delegation proposed two amendments to article IV: deletion of the word "only" in the first sentence and the addition of a new clause stating when enforcement could be refused, i.e. when the competent authorities of the country found that the award had been improperly obtained or was otherwise invalid. There seemed to be a need to provide the defendant with means of opposing enforcement when the award was vitiated by a flaw recognized by domestic law, such as fraud.

The Pakistan delegation's amendments would be equally applicable to the Netherlands text if the Conference decided to adopt it.

Mr. RAMOS (Argentina) agreed with the Italian representative that the Netherlands proposal (E/CONF.26/L.17) contained noteworthy innovations and also felt that the proposal made by the German Federal Republic (E/CONF.26/L.34) was very valuable.

Since the large number of amendments submitted might cause some confusion in the discussion, he called on the Secretariat to follow up the comparison of drafts before the Conference, as given previously in document E/CONF.26/L.33.

Mr. SANDERS (Netherlands), replying to the Turkish representative, said that the Netherlands draft contained nothing revolutionary and followed the Committee's draft (annexed to document E/2704) as closely as possible. His delegation proposed deletion of article III (b) for the reasons given by the French representative. Furthermore, it had sought in the draft to make a clearer distinction between substance and procedure.

In reply to the representatives of the United Kingdom and Argentina, he said he would be very glad to collaborate with his colleagues in combining all amendments which lent themselves to fusion.

Mr. KANAKARATNE (Ceylon) felt there was little difference between either the Netherlands draft (E/CONF.26/L.17) or that of the German Federal Republic (E/CONF.26/L.34) and the Committee's draft. The viewpoints of the United Kingdom (E/CONF.26/L.22) and Switzerland (E/CONF.26/L.30) also seemed to be close to that of the Netherlands.

He supported the Netherlands amendments; in particular he was in favour of deleting article III (b), and he found the wording proposed for article IV (f) excellent. His delegation failed to understand why the Netherlands amendments had led to such a long discussion and thought that the differences of opinion were mainly concerned with points of detail. He supported the suggestion made by the United Kingdom representative that the work should be speeded up, and he was convinced that the Conference could complete its mission satisfactorily.

Mr. URABE (Japan) thought that the amendment to articles III, IV and V could be referred to the working group and that the Conference could begin consideration of article VI and those which followed.

Mr. VAN HOOGSTRAATEN (Hague Conference on Private International Law) drew the attention of the Conference to the fact that it was not customary in international commerce to have documents signed by the two parties, even in very important transactions. An agreement which required a clause in writing would not meet present-day needs and would not be acceptable in international commerce.

The CHAIRMAN pointed out that as the time left was very short, the Conference might perhaps provisionally close the discussion on articles III, IV and V and leave it to the working group to submit one or more drafts on 2 June.

Mr. MATTEUCCI (Italy) favoured that course. A number of delegations, including his own, would have to report to their Governments on the essential points, i.e. on the first five articles, and could not sign the Convention without the approval of their Governments.

Mr. COHN (Israel) pointed out that the discussion of the articles was not finished. No one had commented on the German Federal Republic's draft (E/CONF.26/L.34) and its author had not stated to what extent he was prepared to accept the Netherlands proposal (E/CONF.26/L.17). Other questions concerning

E/CONF.26/SR.13

English

Page 12

(Mr. Cohn, Israel)

articles IV and V had not been discussed; hence the Conference might perhaps complete discussion of articles III, IV and V on the morning of Thursday, 29 May.

The CHAIRMAN approved the Israel representative's proposal.

It was so decided.

The meeting rose at 5.20 p.m.