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COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

SUMMARY RECORD OF THE SIXTH MEETING

Held at Headquarters, New York
on Friday, 4 March 1955, at 2.40 p.m.

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PRESENT:

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

Observer from an inter-governmental organization:

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| Mr. HAZARD | International Institute for the Unification of Private Law |
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Representative of a non-governmental organization:

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| <u>Category A:</u> | Mrs. LUSARDI | International Chamber of Commerce |
| <u>Secretariat:</u> | 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; E/AC.42/L.1 to 9)
(continued)

Article IV (c) of the preliminary draft prepared by the International Chamber of Commerce

Mr. WORTLEY (United Kingdom) considered that article IV (c), which reproduced article 2 (b), of the Geneva Convention verbatim, raised no difficulty. The only question was to what extent the provision concerning legal incapacity could be applied to juridical persons.

Mr. MEHTA (India) thought that the clause obviously referred only to natural persons.

Mr. NISOT (Belgium) said that the only purpose of his delegation's amendment (E/AC.42/L.3, items (c) and (d)) was to divide the provisions proposed by ICC into two paragraphs, in order to devote one separate paragraph to the rights of the defence and another to the representation of parties under a legal incapacity.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) did not object to the Belgian representative's proposal that a separate paragraph should be reserved for the representation of parties under a legal incapacity. His delegation proposed (E/AC.42/L.2, item 5) that the party against whom the award was made should be protected not only by insisting that he should be notified of the arbitral procedure in good time, but also by stipulating that he must be notified in due form of the appointment of an arbitrator.

In reply to a question from Mr. MEHTA (India), Mr. NIKOLAEV (Union of Soviet Socialist Republics) explained that the party involved would be considered as having been notified of the arbitral procedure in due form if he had been notified in writing.

On the suggestion of Mr. WORTLEY (United Kingdom), Mr. NIKOLAEV (Union of Soviet Socialist Republics) agreed that, in order to avoid any ambiguity, the words "notified in ... due form" may be replaced by the words "notified ... in writing".

Mr. DENNEMARK (Sweden) felt that the part of the Belgian amendment referring to the rights of the defence was too vague. He preferred the Soviet amendment, although it did not specify which right was applicable to the case. If, as he thought, the legislation of the country in which arbitration took place was meant, the paragraph would be merely a repetition of article III (b).

Mr. NIKOLAEV (Union of Soviet Socialist Republics) confirmed that the paragraph could only refer to the legislation of the country in which arbitration took place.

Mr. NISOT (Belgium) felt that that was not necessarily so. The rights of the defence must also be respected in the court of the country in which it was sought to use the award. Hence a general provision like that proposed by his delegation was necessary.

Mr. DENNEMARK (Sweden) and Mr. MEHTA (India) thought that article IV (c) should refer only to the rights of the defence before the award was made. They therefore objected to the inclusion of a general clause, which would not be clear and would offer another opportunity of avoiding enforcement of the award.

Mr. OSMAN (Egypt) pointed out that paragraph (a) already guaranteed that the rights of the defence would be respected. If those rights were not respected, the defendant could charge that the award was contrary to public policy. It did not seem advisable, therefore, to devote a separate paragraph to the case, which was already covered by the notion of public policy.

Mr. MEHTA (India) suggested, in order to avoid the general wording proposed by the Belgian delegation while extending the protection provided for in article IV (c), that the words "to enable him to present his case" should be replaced by the words "was not given sufficient opportunity to present his case".

Mr. TRUJILLO (Ecuador) recalled that, in every country, the legislation on procedure provided that the award could be annulled if the rights of the defence had been contravened; therefore article IV (e) of the ICC preliminary draft was sufficient to cover the case referred to in the Belgian amendment which was actually only a repetition of that provision and which might jeopardize the arbitration.

Mr. NISOT (Belgium) feared that the provision India proposed might not let the courts review every award made abroad.

In reply to the CHAIRMAN, he stated that he maintained his amendment and was surprised at the opposition to his general wording in favour of the rights of the defence.

Mr. WORTLEY (United Kingdom) preferred the text of the 1927 Convention, which the Soviet Union had more or less reproduced in its amendment and on which ICC had based its preliminary draft.

The CHAIRMAN proposed that the Drafting Sub-Committee should draft a paragraph divided into three parts. The first part would reproduce the phrase proposed by the Soviet Union (E/AC.42/L.2, paragraph 5); the second part would refer to cases where the defendant had not had sufficient time or opportunity to defend himself; and the third part would deal with the question of parties under a legal incapacity. In addition, mention would be made of the Belgian position in the report.

It was so agreed.

Mr. OSMAL (Egypt) pointed out that the objection raised to the English text of the preliminary draft ("against whom it sought to use the sentence...") did not appear to apply to the French text ("contre laquelle la sentence est invoquee..."). He preferred the latter.

Mr. WORTLEY (United Kingdom) thought that the Drafting Sub-Committee could try to concord the two texts.

Article IV (d)

The CHAIRMAN noted that article IV (d) resembled article 2 (c) of the 1927 Convention and recalled that India had submitted an amendment thereto (E/AC.42/L.5, item 2).

Mr. MEHTA (India) explained that the arbitrators, who were not necessarily lawyers, might sometimes decide on matters outside their jurisdiction. The judicial body responsible for enforcing the award must be given the right to divide it into its various elements so that the valid elements could be enforced. Of course, if such division was impossible, the award would be rejected as a whole. The Indian amendment embraced a concept known to Indian and English law.

Mr. WORTLEY (United Kingdom) did not oppose the amendment, although he preferred the text of the 1927 Convention.

Mr. TRUJILLO (Ecuador) and Mr. NISOT (Belgium) did not feel that a court could thus divide a foreign juridical instrument. An award constituted a whole and its elements were indivisible. It would be dangerous to separate them.

Mr. MEHTA (India) quoted the work on arbitration by Mr. Russel in support of his argument.

Mr. TRUJILLO (Ecuador) remarked that, under Ecuadorian law, such procedure was not permissible and asked that his observation should be recorded in the report.

Mr. NISOT (Belgium) stressed that arbitral awards came under private law and that such judicial action would transform them into mixed decisions.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) did not object to the Indian amendment in so far as it was possible to isolate the different elements on which the arbitrator based his award, but would not press for its adoption.

The CHAIRMAN noted that opinion was divided on the Indian amendment and recalled that the United Kingdom representative preferred the text of the 1927 Convention. Accordingly he proposed that the paragraph should be referred to the Drafting Sub-Committee.

It was so decided.

Article IV (e)

Mr. WORTLEY (United Kingdom) recalled the examples given by the Swedish representative and proposed that the following words should be added to the paragraph: "in which the proceedings took place or in which the award was made".

Mr. NIKOLAEV (Union of Soviet Socialist Republics) felt that the explanation was unnecessary. General terms should be used in conventions, such as the one which appeared in the ICC preliminary draft.

Mr. DENNEMARK (Sweden) mentioned as an example parties agreeing to submit disputes to an arbitrator who was a national of a third country. In that case the proceedings might take place in one country and the award be made in another. That had in fact happened.

Mr. WORTLEY (United Kingdom) did not press his proposal, but asked that it should be mentioned in the report.

The CHAIRMAN recalled that India had proposed (E/AC.42/L.5, paragraph 3) that a new sub-paragraph (f) should be added to article IV.

Mr. MEHTA (India) said that his amendment was based on the provisions of Indian and English law which provided for the frequent cases in which the parties themselves did not understand the terms of the award because they were so ambiguous or vague.

In reply to the Swedish representative he explained that article IV of the ICC preliminary draft provided for the recognition and enforcement of awards made abroad, except for certain specified cases. That was why he felt that provisions should be made for vague or ambiguous awards.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) could not accept the Indian proposal, which he felt was contrary to the very aims of the proposed convention. An effort should be made to simplify the enforcement of arbitral awards made abroad. An award which was inapplicable because of its ambiguity presented no problem because no court could enforce it.

Mr. NISOT (Belgium) agreed with the Soviet representative. He further thought that the Indian wording gave too much power to the judge who would be called upon to decide on the recognition or the enforcement of the award. The paragraph seemed to be superfluous.

Mr. MEHTA (India) thought from his own experience of the law that a court might find itself in a difficult situation if the convention did not make any provision for such cases. He maintained his amendment.

Mr. DENNEMARK (Sweden) agreed with the Belgian and Soviet representatives.

The CHAIRMAN, speaking as representative of Australia, supported the Indian amendment.

Mr. NISOT (Belgium) pointed out that those who had considered the Belgian amendment to paragraph (c) unnecessary should not be surprised if the same reason was invoked to reject the Indian text.

Mr. WORTLEY (United Kingdom) proposed that the report should say that the Committee had considered the Indian amendment but had felt that it was not important enough to be included in the text of the convention.

Mr. MEHTA (India) said that his instructions compelled him to press his amendment.

Mr. NISOT (Belgium) thought that delegations could not expect an international convention to include all the provisions of their national legislations.

Mr. WORTLEY (United Kingdom) pointed out that the Australian and United Kingdom delegations had supported the Indian amendment.

Mr. OSMAN (Egypt) also thought that the Indian amendment would be useful.

Mrs. LUSARDI (International Chamber of Commerce) thought that the Indian amendment might make it possible to evade enforcement of arbitral awards.

The CHAIRMAN noted that opinion in the Committee was divided on the amendment and proposed that it should be referred to the Drafting Sub-Committee.

Mr. TRUJILLO (Ecuador), although in favour of the Indian amendment, supported the Chairman's proposal, which would give members of the Committee time to study the question further.

The Chairman's proposal was adopted.

The CHAIRMAN invited the Committee to consider the fourth USSR amendment (E/AC.42/L.2), which it had deferred. The amendment had originally related to article III but now applied to article IV.

Mr. DENNEMARK (Sweden) accepted the Soviet amendment in principle. However, he doubted the advisability of the words "passée en force de chose jugée" in the French text, as that concept was not always clear in relation to arbitral awards.

Mr. WORTLEY (United Kingdom) expressed surprise that the ICC preliminary draft had not included a provision like that in article I, (d) of the 1927 Convention.

Mr. NISOT (Belgium) pointed out that his delegation had proposed an amendment (E/AC.42/L.3, (point g)) on the same question. He proposed that it should be considered by the Drafting Sub-Committee together with the Soviet amendment.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) supported that proposal.

It was so decided.

Mr. MEHTA (India) asked the Committee to postpone examination of his delegation's fourth amendment (E/AC.42/L.5).

It was so decided.

The CHAIRMAN invited the Committee to consider the Swedish proposal (E/AC.42/L.9).

Mr. DENNEMARK (Sweden) explained that his proposal simply reproduced the French text of article I (e) of the 1927 Geneva Convention. There was a similar provision in the Arbitration Convention between the USSR and Sweden.

Mr. WORTLEY (United Kingdom) observed that the words "principles of the law" did not correspond to any specific concept in English law. It should, however, be possible to agree on a satisfactory wording.

Mr. TRUJILLO (Ecuador) pointed out that that was an example of the confusion resulting from the use of different languages. In that connexion, his delegation hoped that it could be provided with a Spanish text of documents drawn up by the Drafting Sub-Committee. He also asked the Swedish representative to give some explanation of his proposal.

The CHAIRMAN said that the Drafting Sub-Committee's documents would be drawn up in Spanish.

Mr. DENNEMARK (Sweden) pointed out that the words "contrary to public policy" were narrower than the words "contrary to national legislation" and meant "contrary to the basic principles on which national legislation was based".

Mr. OSMAN (Egypt) proposed that the Swedish proposal should be amended by the words "contrary to public policy or to the basic principles of the country in which it is sought to be relied upon".

Mr. TRUJILLO (Ecuador) did not think that the Swedish representative's explanation was satisfactory. There was no difference between "public policy" and "the principles of the law".

Mr. DENNEMARK (Sweden) pointed out that the two expressions were used in article 423 of the 1928 Code Bustamente.

Mr. TRUJILLO (Ecuador) recalled that his country had in fact made a reservation on that point.

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The CHAIRMAN proposed that the Swedish proposal should be referred to the Drafting Sub-Committee.

It was so decided.

The meeting rose at 4.55 p.m.