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SUMMARY RECORD OF THE TENTH MEETING

Held at Headquarters, New York,
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<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/CONF.26/2; E/CONF.26/L.11 and L.21)
(continued)

Article II

The PRESIDENT invited the Conference to consider article II of the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (E/2704 and Corr.1) and the amendment thereto submitted by the United Kingdom (E/CONF.26/L.11).

Mr. COHN (Israel) observed that under the United Kingdom amendment an arbitral award would be recognized as binding and would be enforced in accordance with rules of procedure "not more complicated" than those used for the enforcement of any other award of the territory where the award was relied upon. He was not clear as to the meaning of "complicated" in that context.

Mr. WORTLEY (United Kingdom) said that the purpose of the amendment was to ensure that no additional restrictions were imposed which might impede the free enforcement of the arbitral award, for instance in countries in which the Convention, in order to be given effect, would have to be translated into legislation. In the United Kingdom, for example, a treaty had no direct effect internally and could become effective only as an Act of Parliament.

Mr. SANDERS (Netherlands) suggested that the words "an arbitral" should be used instead of "any other" in the fourth line of the United Kingdom amendment. Moreover, the words "excessive nor" in the penultimate line should be deleted.

Mr. WORTLEY (United Kingdom) accepted the suggestions.

Mr. de SYDOW (Sweden) felt that the objective which the United Kingdom amendment sought to achieve might be stated more simply by specifying that an arbitral award would be recognized as binding and would be enforced in accordance with the provisions of the Convention.

Mr. COHN (Israel) submitted his amendment (E/CONF.26/L.21) to the United Kingdom amendment. That amendment was inaccurately described in document E/CONF.26/L.21 as an amendment to article II of the draft Convention. It was, in fact, merely a rewording of the United Kingdom amendment.

Sir Claude COREA (Ceylon) suggested that the words "(excessive nor)" should also be deleted from the Israel amendment.

Mr. HOLLEAUX (France) supported the suggestion. He felt that, on the whole, the Israel amendment was an improvement on the original United Kingdom text

Mr. BECKER (United States of America) said that, in his delegation's view, the United Kingdom amendment would establish a rule of national treatment with respect to two features of the arbitral process: the procedural rules to govern the enforcement of foreign awards, and the costs and fees to be assessed.

He believed that the principle of national treatment embodied in the United Kingdom proposal deserved serious consideration in any situation in the arbitral process in which discrimination based on nationality was possible. That was clearly the case with respect to the subject matter of the proposal.

The essence of the rule of national treatment was non-discrimination. Since it established a relative rather than an absolute standard, it made due allowance for the variations which normally occurred between the procedural systems and schedules of costs of different countries. Thus, the rule would not introduce an undesirable rigidity. On the other hand, as the United States had found from experience with the commercial arbitration provisions of its bilateral treaties of friendship, commerce and navigation, national treatment assured the desired result with a minimum of legal or technical complexity. In fact, the rule of national treatment might offer a workable solution for some of the other problems which the Conference had been discussing, should it fail to arrive at generally acceptable provisions in absolute terms.

Mr. PSCOLKA (Czechoslovakia) felt that the United Kingdom amendment might create difficulties for States in which the rules of procedure governing the enforcement of foreign arbitral awards were different from those which applied to domestic awards. There was no reason why a party which sought enforcement of an arbitral award in a country should not have to comply with that country's requirements concerning the validation of the award.

He reserved his delegation's position with regard to the words "or is extended" in the second line of the United Kingdom amendment pending a decision by the Conference with respect to article IX.

Mr. LIMA (El Salvador) and Mr. HOLLEAUX (France) raised a question concerning the Spanish and French translation of the words "In the territories of" at the beginning of article II of the draft Convention.

Sir Claude COREA (Ceylon) suggested that the words "the territories of" should be deleted from the United Kingdom amendment since the question of applicability was covered by article IX. The amendment should begin with the words "In any Contracting State....". Moreover, in the Israel amendment the words "substantially similar to.." should be replaced by "not different from".

Mr. COHN (Israel) disagreed. It was not intended that the rules of procedure governing the enforcement of foreign arbitral awards should be identical with those applied to domestic awards, but merely that they should not be more complicated. That was why he had used the expression "substantially similar to".

In the light of the discussion held, he suggested that the Conference should merely vote on the principles in question and leave the matter of drafting to the drafting committee.

Mr. PSCOLKA (Czechoslovakia) stressed that he had referred to possible differences between the procedures applicable to foreign awards and to domestic ones only in order to ascertain whether any of the participating States would in fact experience serious difficulties in that respect. In Czechoslovakia, the two procedures were somewhat different, but both were simple and inexpensive and compliance with the spirit of the United Kingdom amendment would present no problem.

Mr. HERMENT (Belgium) said that the rules of procedure governing the two types of award should be not only comparable but identical. The articles should therefore state explicitly that once it had been established that a foreign award met the requirements of the Convention, the régime applicable to its enforcement, including the issue of the enforcement order, would be the one governing domestic awards.

Mr. GEORGIEV (Bulgaria) thought that the United Kingdom amendment might complicate the procedure rather than simplify it. The principle envisaged was unexceptionable, and in Bulgaria could be carried into effect without difficulty, but its inclusion in the Convention might raise serious problems in States where strict compliance could not be ensured without some major legislative revision. The risk of confusion was intensified by the vagueness of some of the terminology, as when the text implied that even a slight departure from the applicable scale of fees and charges would be regarded as serious. Consequently, he hoped that the principle contemplated by the sponsors would be stated in some other manner than as a formal provision in the Convention proper.

Mr. LJMA (El Salvador) stressed that the primary purpose of article II was to secure recognition of foreign awards. The reference to enforcement was only secondary and the article made no mention of the conditions of execution. The United Kingdom amendment, which dealt specifically with the enforcement procedure, might thus be somewhat out of context. In El Salvador, there was no difference in the manner in which the two types of award were enforced once the exequatur had been obtained. Before that order was issued, however, the procedures were necessarily distinct, for in the case of foreign awards the court had to be satisfied that the requirements stipulated in the relevant international instruments had been satisfied.

Mr. SANDERS (Netherlands) suggested that the final formulation of the principle envisaged in the United Kingdom amendment might be based on the relevant comment contained in the Note of the Secretary-General (E/CONF.26/2, paragraph 8).

Mr. MATTEUCCI (Italy) said that the Belgian representative's proposal for the total assimilation of the procedures applicable to foreign and to domestic awards might lead to legislative complications. The principle of substantial equality contained in the United Kingdom amendment seemed preferable, but might be more appropriately stated as a recommendation in the Final Act than as a stipulation in the Convention proper.

Mr. de SYDOW (Sweden) said that in Sweden the provisions applicable to the two types of award differed considerably. A Swedish award could be rendered enforceable by the chief enforcement officer without preliminary formalities. By contrast, a foreign award had to be submitted first to the Court of Appeal, which ascertained whether the conditions of the international agreements in force had been complied with. Leave to proceed could be requested from the chief enforcement officer only after the court had rendered a favourable opinion.

Mr. HOLLEAUX (France) thought that the apparent purpose of the United Kingdom amendment was to ensure that no State would make the issue of an exequatur subject to formalities more complicated than those prescribed in that State before the entry into force of the Convention. The provisions of articles III and IV would then be applied in each State only to the extent that they did not impose additional formalities. There could be no question, however, of requiring States to dispense with exequatur formalities altogether and to assimilate foreign awards to domestic ones in the manner advocated by the Belgian delegation. A provision to that effect would in fact render articles III and IV meaningless.

Mr. KESTLER FARNES (Guatemala) said that the United Kingdom amendment was prompted by a most praiseworthy desire to ensure simplicity and spare costs in obtaining the order, which considered as being enforceable, or which recognized the foreign award, assimilating it to domestic awards (exequatur), but its wording might be understood to refer to the execution procedure subsequent to that order. His delegation therefore hoped that the text would be so improved as to place less emphasis on enforcement as such and more on the procedure of obtaining recognition of the award's validity.

Mr. HERMENT (Belgium) disagreed with the representative of Guatemala. Article II of the draft Convention was concerned more with the procedure for making the award operative, in other words with the issuing of the exequatur, than with resulting enforcement itself. In reply to the French representative, he explained that the procedures which, under the Belgian proposal, would be identical with those for national awards included not only the modalities of enforcement but also those necessary to secure enforcement, such as the rules governing the presentation of documents.

Mr. COHN (Israel) saw no need for bringing in the question of the exequatur. In his country, that term was applied to the recognition and enforcement of foreign judicial decisions. Unless a foreign arbitral award had been the object of a judgement in the country in which it was made, no exequatur was needed. The term "enforcement" included the issuing of an enforcement order.

The question before the Conference was relatively simple. It could leave the entire procedure of enforcement to the country in which the award was relied upon, as was done by draft article II, or it could indicate, either in the Convention itself or in a separate recommendation as suggested by the representative of Italy, that the procedure of recognition and enforcement of foreign awards should not be more onerous than that of domestic awards.

The PRESIDENT observed that the references made to the exequatur reflected the differences in the terminology and procedures of civil-law and common-law countries.

Mr. WORTLEY (United Kingdom) said that he had no strong objections to any of the proposals and suggestions made during the discussion of his amendment. All his delegation wanted was that a foreign arbitral award which met the conditions of the Convention should be enforceable without unnecessary inconvenience or excessive fees. Otherwise, the purpose of the Convention would be defeated. He felt that the question of article II could be referred to a drafting committee for the preparation of a draft in the light of the discussion.

Mr. ZULETA ANGEL (Colombia) said that in his country foreign arbitral awards, like judicial decisions, became operative without an exequatur. For that reason, he could not support the Belgian proposal.

In countries where an enforcement order was required for the enforcement of domestic arbitral awards, it seemed to him that the procedure for securing an enforcement order in the case of a foreign arbitral award would necessarily be more complicated, in view of the possible need for translations and of the many questions that arose in the examination of foreign proceedings. Therefore, if the United Kingdom amendment referred to the procedure for obtaining enforcement and not simply to the modalities of enforcement, he would not be able to vote for it.

Mr. MALOLES (Philippines) suggested, for the sake of clarity, the insertion of the words "or exequatur" after the words "an arbitral award" in the second line of the United Kingdom amendment.

Mr. KORAL (Turkey) warned against the use of the term "exequatur" in the Convention. The term had been considered by the authors of the Geneva Convention and had not been used. It was not to be found in the text of the present draft Convention. The Conference should bear in mind that it was dealing not only with the question of securing an enforcement order but with the whole procedure of recognition and enforcement.

Mr. BAKHTOV (Union of Soviet Socialist Republics) felt that the discussion of article II had become rather involved. He suggested that a coherent text might be arrived at in a working party.

Mr. POINTEP (Switzerland) considered the Belgian proposal too strict and the United Kingdom amendment too vague. He suggested the use of a phrase such as "in accordance with rules of procedure which are not less favourable than those of a domestic award".

Mr. LIMA (El Salvador) suggested that voting should be deferred to the afternoon meeting in order to give representatives time for reflection.