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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE FOURTEENTH MEETING

Held at Headquarters, New York,
on Thursday, 29 May 1958, at 11.45 a.m.

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President:	Mr. SCHURMANN	Netherlands
Executive Secretary:	Mr. SCHACHTER	

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CONSIDERATION OF THE DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (E/2704 and Corr.1, E/2822; E/CONF.26/L.17, L.31, L.33/Rev.1, L.34, L.38 and L.40) (continued)

Articles III, IV and V (continued)

Mr. BULOW (Federal Republic of Germany), explaining why his delegation had submitted amendments (E/CONF.26/L.34) to articles III, IV and V of the draft Convention (E/2704 and Corr.1), said that the substance of article IV of the draft Convention had been reproduced, albeit in a different order, in articles IV and V as set out in the amendment. It would be noted that the provision in article IV (a) of the draft Convention had been omitted in the amendment because, as the French representative had explained at the previous meeting, enforcement of an award would be refused on the grounds that it was contrary to public policy. The provision was superfluous because the question of public policy was dealt with in a separate paragraph. Article IV (b) of the draft Convention had merely been transferred to article 5 (a) of the amendment. In other words, the grounds stated in the paragraph would be taken into consideration by the competent authority only at the request of the party against whom the award was invoked and only if that party furnished proof. The wording of article IV (c) of the draft Convention remained as article IV (a) of the amendment. The first part of article IV (d) was reproduced as article IV (b) of the amendment but the second part was omitted for the reasons stated in the Belgian Government's comments set out in Annex I of the Report of the Secretary-General (E/2822). Article IV (e) was included in article V (b) of the amendment, the words "in the country in which it was made" having been replaced by a general reference to the applicable law. Article IV (f) was not included in the amendment, its deletion having been requested by several delegations. Article IV (g) was included in article V (c) of the amendment with certain changes of a legal nature. Article IV (h) was to be found in article IV (c) of the amendment with certain drafting changes.

As his delegation had proposed the deletion of article III of the draft Convention, particularly paragraph (b), it had endeavoured to provide adequate safeguards for the party against whom enforcement of the award was sought and, at the same time, to respect the rights of the party seeking enforcement of the award.

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(Mr. Bulow, Federal Republic of Germany)

The new article V ter of the amendment was not very different from article V of the draft Convention, although some provisions had been added which did not affect the principle involved.

Article V quater of the amendment was based on article 28 of a uniform law on arbitration drafted by the International Institute for Unification of Private law. While the substance had not been discussed by the Conference, the provision was likely to facilitate enforcement of an arbitral award.

Article V quinter of the amendment took into consideration specific provisions of German procedural law in respect of settlements.

While maintaining his delegation's amendments, he said that an attempt was being made to bring them into line with the Netherlands amendments (E/CONF.26/L.17). He was confident that an acceptable draft could be prepared for adoption by the Conference.

Mr. ADAMIYAT (Iran) said that the legal system established by the Netherlands amendments was based on the principle that an award constituted a prima facie right and must be enforced after an examination prescribed by article IV. Only under conditions stipulated in that article could its recognition and enforcement be refused by the judicial authorities of the country where enforcement was sought. Admittedly, each legal system must insist upon the observance of the fundamental principles of domestic law in regard to the enforcement of arbitral awards. In general the conditions set out in article IV of the Netherlands draft met the legitimate requirements necessary for the recognition and enforcement of foreign arbitral awards. In fact, they were basically similar to those stated in the draft Convention, although a noticeable improvement was the omission of article IV (f) which was unduly vague and open to misinterpretation. However, in comparing article IV (e) of the Netherlands amendment with article IV (h) of the draft Convention, he considered the wording of the draft Convention preferable. The words "clearly incompatible with public policy or with fundamental principles of the law (ordre public)" had that clarity which was necessary for any formulation of law. That clause was based on the Geneva Convention of 1927 and should be retained in the new Convention. In fact, its omission might make the Convention less attractive to the States which had originally supported the conclusion of a new Convention.

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Mr. HERMENT (Belgium), referring to the principle of the double *exequatur*, said that it had been embodied in treaties of arbitration which his Government had concluded or was in the process of concluding with a number of Governments. Moreover, that principle had been contained in the 1927 Geneva Convention. Hence, his delegation felt strongly in the matter.

Having compared the amendments to article IV submitted by the Federal Republic of Germany (E/CONF.26/L.34) with the working paper presented by France, the Federal Republic of Germany and the Netherlands (E/CONF.26/L.40), he considered that the former provided a better basis of discussion because it made a clear distinction between refusal of recognition and enforcement of an award by the competent authority of its own motion and such refusal at the request of the party against whom the award was invoked.

Mr. COHN (Israel) considered the new working paper a promising document. However, as the delegations which had originally submitted amendments had not withdrawn them, he wished to state that, in his view, the amendments submitted by the Federal Republic of Germany were a distinct improvement on the others. Nevertheless, he had some reservations with respect to the provision set out in Article V *quinter*, which he considered somewhat outside the scope of the Convention. Settlements should be incorporated in awards. If that was accepted, the provision was superfluous. If not, settlements should be governed by rules other than those of the Convention.

He further noted that the Federal Republic of Germany proposed the deletion of article III of the draft Convention but had failed to include in any of its amendments a provision to the effect that enforcement of an arbitral award should be refused if there had been no valid submission of a difference to arbitration.

The main point he wished to make, which applied to both the Federal Republic of Germany's amendments and the new working paper, concerned the question of the applicable law. The representatives of France and Italy, among others, had argued that the law under which a submission to arbitration should be held valid should not be specified in the Convention, leaving the question of the applicable law to be determined by the competent authority of the country in which the award was sought to be relied upon. He felt, on the contrary, that the applicable law should be

(Mr. Cohn, Israel)

clearly stipulated in the Convention. In that connexion, his amendment (E/CONF.26/L.31) to the effect that a submission to arbitration should be held valid if valid either under the law of the State where it was made or under the law of the State where the award was sought to be enforced was a provision which he considered essential. He therefore insisted on its inclusion in the Convention.

He agreed with the Iranian representative that a mere reference to "public policy" in article IV (c) of the German amendment was inadequate. The meaning should be clarified. In that connexion, he preferred the text in article IV (h) of the draft Convention. He would add a further requirement, as indicated in point 3 of his delegation's amendment (E/CONF.26/L.31). Under that amendment, the enforcement of or compliance with the award would involve the violation of any law of the State where the enforcement was sought.

Mr. KORAL (Turkey) welcomed the German amendments (E/CONF.26/L.34) and particularly the three-Power working paper (E/CONF.26/L.40), which in many ways reflected his own views. However, article IV (a) did not specify that the submission to arbitration must be in writing. He failed to see how the court from which enforcement was sought would be able in the absence of a written document to carry out the tasks indicated in article IV (b) and (c) of the same paper. A written document was doubly necessary, for the court would often be dealing with an award which had not become final and operative in the country in which it was made. Finally, article IV (c) should be so amended as not to leave the impression that the parties could agree on the composition of the arbitral authority and on the arbitral procedure independently of any law.

Mr. BECKER (United States of America) said that there was a danger that in carrying out its detailed consideration of articles III, IV and V, the Conference might lose sight of some of the broad principles on which arbitration was based. Much of the discussion had centred on the question of the so-called double *exequatur*. Some of the proposals tended to minimize judicial supervision of the arbitral procedure. In the view of his delegation, judicial supervision was of the utmost importance, for it alone could ensure that justice was done.

The proper place for the exercise of judicial supervision would appear to be the country in which the arbitration took place. That country had arbitration laws

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(Mr. Becker, United States)

and procedural rules governing arbitration. Whatever the motives of the parties might be in choosing to conduct their arbitration in a particular country, by that voluntary act of selection they brought the arbitration within the purview of that country's laws. In particular, the parties were entitled to a review of the award by the country's courts. The successful party should not be permitted to rush an award into enforcement in another country before the losing party had had sufficient opportunity to avail itself of its right to a judicial review. It was equally important that the losing party should exercise that right without undue delay. Fortunately, the time limits in many countries, including the United States, were reasonably short. Furthermore, parties seeking a convenient place for arbitration were naturally inclined to choose countries with favourable arbitration laws, with reasonable time limits for review and with no tradition of judicial obstruction.

In view of those considerations, he asked whether the courts of the country where the arbitration took place were not the most competent to review the award made under its laws and whether it was really preferable to place the burden of scrutinizing the award on the courts of the country where the award was relied upon and where the conflict-of-laws rules would have to be applied. Since arbitration proceedings were generally held in the very countries most friendly to arbitration and most likely to certify the awards, and since the issue of an exequatur by the courts of the country in which an award was made normally facilitated the process of recognition and enforcement in the country in which it was relied upon, he wondered how practical the problem of the double exequatur really was.

A second basic question before the Conference was that of the autonomy of the parties in selecting the law governing their contract. In that connexion, he wished to point out that although United States courts had often spoken favourably of party choice of law, their actual decisions had been considerably less convincing in that regard. The legal literature would seem to show that there were no sound objections to permitting contracting parties to select the law governing the validity of their contract if (1) the chosen law had some meaningful connexion with the contract, (2) the choice of law was freely arrived at on the basis of equal bargaining power, and (3) compelling considerations of public policy, particularly as embodied in protective statutes, did not dictate the application of the lex fori.

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(Mr. Becker, United State

Thus, the scope of the autonomy of the parties was in reality drastically reduced. Most of the cases which came before the courts either failed to meet one of the mentioned conditions or the law stipulated merely coincided with that which would have normally been applicable under the conflicts-of-laws rules.

Mr. ROGNLIEN (Norway) noted that the phrase "to the extent that such agreement was lawful in the country where the arbitration took place", in article IV (g) of the Ad Hoc Committee's draft, had disappeared from the corresponding article, article IV (c) of the Netherlands amendments (E/CONF.26/L.17) and of the three-Power paper (E/CONF.26/L.40). He preferred the original version, for there were some mandatory rules of law that could not be ignored, for example, those governing the question of the relationship of an arbitrator to one of the contracting parties, which might not be covered by the arbitral agreement.

Mr. URABE (Japan) said that his delegation had no difficulty in accepting the deletion of article III of the Ad Hoc Committee's draft Convention if the substance of that article was included in other articles of the Convention. Howeve: he wondered whether all the representatives had full powers to accept so fundamenta a change in the structure of the draft Convention.

He suggested the insertion in article IV (a) of the three-Power working paper (E/CONF.26/L.40) of the words "in writing, including an exchange of letters or cables," between the words "arbitration clause" and the words "valid under the law."

He had listened with interest to the French representative's argument that the exception in article IV (b) of the Netherlands amendments (E/CONF.26/L.17) was covered by the clause relating to public policy, and he noted that the substance of that exception had been omitted from the three-Power draft (E/CONF.26/L.40). The omission tended to encourage a broad interpretation of public policy. He recalled the Swiss representative's citation of a case in which the Swiss Federal Court had reversed a decision of the Zurich Cantonal Court, which had refused the enforcement of a Czechoslovak award on grounds of public policy. In his view, to permit too wide an interpretation of public policy would be to defeat the purpose of the Convention. He therefore urged the retention of the exception in question.

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(Mr. Urabe, Japan)

In article IV (f) of the three-Power paper, it was not enough to refer only to annulment. There should also be a reference to suspension, specifying certain time limits. Otherwise, the losing party would be denied some of its judicial protection, in the sense that the award might be enforced before it had had an opportunity to avail itself of the existing legal remedies.

Mr. MATTEUCCI (Italy) drew attention to his amendment (E/CONF.26/L.38), which embodied a universally accepted principle. He supported the Norwegian representative's suggestion that article IV (g) of the Ad Hoc Committee's draft Convention should be retained.

He objected to the use, in article V bis (1) of the three-Power paper (E/CONF.26/L.40), of the expression "ordinary procedure of recourse". It would not have the same meaning in the different legal systems. In his country, for example, an application for annulment was the sole legal remedy. As to paragraph 2 of the same article, it was not clear to him what action the judicial authority of the country in which the award was relied upon was expected to take. If it, too, had the right, in effect, to annul the award, it might annul an award which was later not annulled by the courts of the country in which the award was made. In his view the judicial authority should be free to determine whether or not the application for annulment had been made in good faith and decide the question of enforcement accordingly.

Mr. HOLLEAUX (France) emphasized that the three-Power working paper (E/CONF.17/L.40) did not replace the Netherlands or German amendments (E/CONF.26/17 and L.34). It represented the effort of three delegations to find common ground by mutual concessions and should facilitate agreement when the articles concerned were considered by the working party.

With reference to the Israel representative's amendment which would relate the validity of the arbitral agreement to the law of either of the countries concerned, he pointed out that the Convention was called upon to pronounce itself on the law applicable to the procedure of recognition and enforcement of the award but not on the law applicable to the arbitral agreement. The adoption of the Israel amendment would raise very serious problems, which were really outside the scope of the Convention, and would make it impossible for his country to ratify the Convention.

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(Mr. Holleaux, France)

The omission noted by the Norwegian and Italian representatives in article IV (c) of the three-Power paper was not accidental. Article IV (g) of the Ad Hoc Committee's draft recognized the autonomy of the parties only to destroy it immediately. Since the beginning of the present century, his country's jurisprudence was based on the concept of the autonomy of the parties, in particular with respect to the choice of the law governing the arbitral procedure and the award. France would not be able to sign or ratify a Convention which went against that concept.

Mr. MAURTUA (Peru) pointed out that article IV (b) of the three-Power paper, article IV (a) of the Netherlands amendments and article IV (d) of the Ad Hoc Committee's draft all provided for the recognition and enforcement of parts of an award if the award contained decisions which were both within and beyond the scope of the submission to arbitration. However, those provisions were completely silent on the question whether such a separation of the elements of an award was expressly permitted by the submission to arbitration. Moreover, there was no indication of the law under which the enforcing court would determine which parts of the award were valid.

He was not satisfied with the limitation of the exception in article IV (e) of the three-Power paper to incompatibility with public policy. Incompatibility with fundamental principles of the law was an adequate ground for refusing enforcement, and he favoured the retention of the wording in paragraph IV (h) of the Ad Hoc Committee's draft, with the deletion of the word "clearly".

Mr. GEORGIEV (Bulgaria) felt that the scope of the Convention would be restricted if its provisions were adapted to the legislation of States in which private and commercial law was highly developed.

He agreed with the representatives of Turkey and Japan that a clause to the effect that an agreement to submit a difference to arbitration must be in writing should be included in the Convention. Such a provision would strengthen the validity of a submission to arbitration.

He further agreed with the Israel representative's views on the question of the applicable law and with the statements made by some delegations with respect to the term "ordinary means of recourse" in article IV (f) of the Netherlands amendment (E/CONF.26/L.17). Means of recourse were not the same in every country.

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(Mr. Georgiev, Bulgaria)

On the question of "public policy", he considered the provision in the German amendment and the three-Power working paper an improvement over the draft Convention in which the use of the term was open to misinterpretation.

The PRESIDENT declared the preliminary debate on articles III, IV and V closed and proposed that a working group should be established to consider the articles and the amendments thereto in the light of the views expressed in the Conference. The working group would consist of the representatives of Czechoslovakia, El Salvador, the Federal Republic of Germany, Guatemala, Italy, Japan, the Netherlands, Pakistan, Sweden, Switzerland, Tunisia, the Union of Soviet Socialist Republics and the United Kingdom.

It was so decided.

The meeting rose at 1.25 p.m.