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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE TWENTY-FOURTH MEETING

Held at Headquarters, New York,
on Tuesday, 10 June 1958, at 10.15 a.m.

CONTENTS

President: Mr. SCHURMANN Netherlands

Executive Secretary: Mr. SCHACHTER

ADOPTION AND SIGNATURE OF THE FINAL ACT AND CONVENTION (E/CONF.26/8 and 9; E/CONF.26/L.63) (continued)

The PRESIDENT suggested that the Conference should continue its examination, article by article, of the text of the Convention approved by the Drafting Committee (E/CONF.26/8). At the end of that examination, the Conference could vote on any articles for which a separate vote was requested and, thereafter, on the Convention as a whole.

Article V (continued)

The PRESIDENT noted that at its last meeting the Conference had completed the examination of paragraph 1 and had adopted an amended text of sub-paragraphs (a), (b) and (e) (E/CONF.26/L.63). He invited comments on paragraph 2.

Mr. MATTEUCCI (Italy) stated with reference to article V, paragraph 2 (b) that his Government intended, when depositing its instrument of ratification, to make known to what extent and under what conditions its own nationals might benefit from the provisions of articles III, IV and V of the Convention without violating public policy.

Mr. SANDERS (Netherlands) said that he was not entirely happy with the wording that had been adopted in sub-paragraphs (a) and (e) of paragraph 1. He took it that sub-paragraph (a) would include not only agreements in express terms but also tacit agreements, and he felt that that should have been made clear. Again, there was no mention at all of the question of the legal incapacity of one of the parties, which had been included in article IV of the 1955 Ad Hoc Committee's draft (E/2704 and Corr.1). In sub-paragraph (e), the clarification of the term "competent authority" which had been adopted at the last meeting could be improved upon. He therefore proposed under rule 21 of the rules of procedure that the Conference should reconsider its decisions with respect to sub-paragraphs (a) and (e) of paragraph 1.

Mr. BAKHTOV (Union of Soviet Socialist Republics) and Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) opposed reconsideration.

Mr. WORTLEY (United Kingdom) favoured it.

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The PRESIDENT put the Netherlands motion to the vote.

The result of the vote was 15 votes in favour and 9 against, with 6 abstentions.

The Netherlands motion was not adopted, having failed to obtain the required two-thirds majority.

Article VI

Mr. BAKHTOV (Union of Soviet Socialist Republics) observed that in article V (1) (e) the Conference had clarified the meaning of the term "competent authority". He proposed the insertion, in article VI, of the words "referred to in article V (1) (e) above" after the words "competent authority".

Mr. WORTLEY (United Kingdom) opposed the USSR proposal.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) pointed out that the USSR amendment related to a consequential change in the interests of uniform terminology.

The USSR amendment was adopted by 16 votes to 6, with 5 abstentions.

Article VII

Mr. ROGNLIEN (Norway) said that arbitral awards could not remain valid for an indefinite period of time, but were subject to the statute of limitations. Norway would not recognize or enforce an award more than ten years old.

Mr. HERMENT (Belgium) proposed the replacement, in paragraph 1, of the words "the right" by the words "any right he may have", in order to make it clear that the right described was not a right acquired under the Convention but a right enjoyed wholly apart from the Convention.

Mr. SCHACHTER (Secretariat) explained that the provision of article VII was not in any way intended to extend the application of bilateral or other treaties, but was only meant to make it clear that any particular rights which nationals of some countries might have acquired under a special treaty regime applicable to them would not be affected by the Convention.

The Belgian amendment was adopted.

Mr. MACHOWSKI (Poland) drew attention, with respect to paragraph 2, to an amendment submitted by his delegation (E/CONF.26/7, paragraph 6). Now that the Conference had decided to include the draft additional protocol in the text of the Convention, the reference to the Geneva Protocol of 1923 was again in order. He proposed the insertion, at the beginning of paragraph 2, of the words "The Geneva Protocol on Arbitration Clauses of 1923 and".

The Polish amendment was adopted by 21 votes to none, with 9 abstentions.

Mr. WORTLEY (United Kingdom) pointed out that some Contracting States would not become bound by the Convention in respect of all their territories simultaneously. He proposed the replacement of the words "on their becoming bound", in paragraph 2, by the words "in so far as they become bound".

Mr. COHN (Israel) thought that it would be better to retain the words "on their becoming bound" and to meet the point of the United Kingdom representative by inserting immediately thereafter the words "and to the extent that they become bound".

Mr. WORTLEY (United Kingdom) accepted the Israel amendment to his amendment.

Mr. RCGNLIEN (Norway) objected to the proposal. It would complicate matters for the other Contracting States, for it would mean that the older international instruments would remain partially in force.

The revised amendment of the United Kingdom representative was adopted by 17 votes to 8, with 7 abstentions.

Article VIII

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) asked that paragraph 1 should be put to the vote in two parts, the first part ending with the words "of any other State".

Mr. POINTET (Switzerland) objected to the motion. The same request had been made at the twentieth meeting and had been rejected.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) observed that there had been no objection to a vote in parts on article III, although that article had been voted on before.

The PRESIDENT said that under rule 26 of the rules of procedure he would have to put the Byelorussian motion to the vote.

The Byelorussian motion was rejected by 20 votes to 9, with 4 abstentions.

Articles IX, X and XI

Mr. ROGNLIEN (Norway) said that the words in article XI (2) "to the extent that it is bound to apply this Convention" were rather vague. He proposed the addition of the following phrase: "and in particular not as to awards made in a constituent state or a province to which the State is not bound to apply the Convention".

The Norwegian amendment was rejected by 6 votes to 1, with 22 abstentions.

Mr. MALOLES (Philippines) said that it would have been better if the words "as well as its constituent states or provinces" had been inserted after the words "non-unitary State" in paragraph 2. Much of the enforcement proceedings in federal and non-unitary States would be under the laws of their constituent parts.

The PRESIDENT observed that the paragraph dealt with international action, and the constituent parts of States could not take international action.

Mr. URQUIA (El Salvador, Mr. HERMENT (Belgium) and Mr. MAURTUA (Peru) asked whether paragraph 2 did not mean that an arbitral award could not be relied upon by the party seeking enforcement except to the extent that the Convention was observed in the federal or non-unitary State in which the award was given.

The PRESIDENT explained that paragraph 2 referred to States rather than to any parties to awards because it was the State which would invoke the Convention if it felt that one of its nationals had been denied his rights under the Convention.

Articles XII and XIII

Mr. ROGNLIEN (Norway) proposed the insertion in article XIII, paragraph 3, after the word "instituted", of the words "in the denouncing State".

Mr. URQUIA (El Salvador) thought that the additional words would only confuse the text as the provision had to apply not merely to the denouncing State but to all Contracting States.

Mr. MAURTUA (Peru) observed that, regardless of the provisions of article XIII, paragraph 3, the enforcing authority would have to determine what was the will of the parties in each particular case. In order to facilitate that task, the parties to an arbitration agreement should make express provision for the possibility of denunciation.

The Norwegian proposal was rejected by 8 votes to 7, with 18 abstentions.

Articles XIV and XV

Mr. URQUIA (El Salvador) suggested that article XIV (e) should read "denunciations and notifications in accordance with article XIII", in order to bring the terminology into line with the article referred to.

It was so decided.

Mr. MALOLES (Philippines) thought that article XIV (c) should speak not merely of declarations but also of reservations.

The PRESIDENT explained that such reservations as were permitted would in fact be made by declaration and consequently no further amplification was needed.

It was so decided.

Other amendments

Mr. ROGNLIEN (Norway) reintroduced his delegation's earlier proposal for a general reciprocity clause (E/CONF.26/L.28, without the words appearing in brackets). Some provision had already been made for reciprocity in the first sentence of article I, paragraph 3, and in article XI, paragraph 2, but no corresponding words had been inserted in the second sentence of article I, paragraph 3, in article X or in article XIII, paragraph 2. A general clause, contained in a separate article inserted immediately after article XIII, would remedy all those defects.

Mr. de SYDOW (Sweden) thought that the general clause proposed by the Norwegian representative was unnecessary. Due provision for reciprocity had already been made in all the contexts where it had some significance.

The Norwegian proposal was adopted by 13 votes to 5, with 16 abstentions.

Mr. COHN (Israel) said that the newly adopted general reciprocity clause rendered article XI, paragraph 2, wholly superfluous. He therefore proposed its deletion.

Mr. MALOLES (Philippines) observed that article XI, paragraph 2, served a somewhat special purpose, as it referred to the constituent parts of a federal or non-unitary State.

The Israel proposal was adopted by 16 votes to 4, with 13 abstentions.

Mr. SANDERS (Netherlands) proposed that article V, paragraph 1 (a) should read:

"The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;"

The first part of the amendment, a wholly new formula, would in no way prejudge the question of the capacity of the parties, which could be determined only according to the law governing their personal status and not the law applicable to the award. Apart from that, the proposed new sub-paragraph merely repeated the provision already adopted, with only such minor drafting changes as seemed to make the text both clearer and more concise.

Mr. WORTLEY (United Kingdom) supported the Netherlands amendment.

Mr. BAKHTOV (Union of Soviet Socialist Republics) felt that there was no reason for changing the text already adopted.

The Netherlands amendment was adopted by 15 votes to 7, with 11 abstentions.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) said that the new text of article V, paragraph 1 (a), in fact departed from the text previously adopted to a far greater degree than the Netherlands representative had stated. The Conference would therefore be well advised to reconsider it.

After some further discussion, Mr. ROGNLIEN (Norway) moved, in accordance with rule 21 of the rules of procedure, that the Conference should reconsider its decision on the Netherlands amendment.

The PRESIDENT put the Norwegian motion to the vote.

The result of the vote was 7 in favour and 14 against, with 15 abstentions.

The Norwegian motion was not adopted, having failed to obtain the required two-thirds majority.

Mr. COHN (Israel) proposed that the Conference should reconsider its earlier decision and delete from article II, paragraph 3, the words "of its own motion". If those words were retained, the court would have no discretion whatsoever and would have to refer the parties to arbitration even if they both wished to litigate. Arbitration agreements would thus be indissoluble, regardless of the wish of the parties.

Mr. URABE (Japan) thought that courts should be required to act of their own motion only in very exceptional circumstances. Provision for such action had already been made in article V, paragraph 2, but it seemed doubtful whether that paragraph could ever apply to the arbitration agreement itself. The words "of its own motion" should therefore be deleted, as parties wishing to rescind an arbitration agreement by mutual consent should be allowed to do so.

Mr. WORTLEY (United Kingdom) said that he had originally proposed the insertion of the words in the belief that they could have no adverse effects. Since that time, however, his Government had come to the conclusion that the retention of the phrase "of its own motion" would weaken the Convention and that greater freedom should be left to the parties. Consequently, his delegation would support the Israel proposal.

Mr. KESTLER FARNES (Guatemala) thought that article II, paragraph 3, which required a court to proceed with an action if it found of its own motion that the arbitration agreement was null and void, seemed somewhat inconsistent with article V, paragraph 1 (e), under which the nullity of an award had to be expressly invoked by the respondent.

Mr. BAKHTOV (Union of Soviet Socialist Republics) said that his delegation would also support the deletion proposed by the Israel representative, although in principle he deplored the reconsideration of decisions already taken.

Mr. GEORGIEV (Bulgaria) said that the parties to an arbitration agreement should be permitted to renounce it by mutual consent in the same manner as any other contract.

Mr. URQUIA (El Salvador) agreed that the words under discussion struck at the very roots of contractual freedom. The paramount consideration in arbitration was the will of the two parties, and if they both decided in favour of judicial solution the court should be under an absolute obligation to proceed. Furthermore, the words could never have any real practical significance as the parties could simply conceal the fact that an arbitration agreement had been concluded.

Mr. MATTEUCCI (Italy) moved the closure of the debate on the Israel motion for the reconsideration of the Conference's previous decision on article II, paragraph 3, and on the proposal for the deletion from the text of the words "of its own motion".

The PRESIDENT put to the vote the Israel motion for the reconsideration of the text of article II, paragraph 3.

The result of the vote was 27 votes in favour, none against, and 5 abstentions.

The Israel motion was adopted, having obtained the required two-thirds majority.

The Israel proposal that the words "of its own motion" should be deleted was adopted unanimously.

Adoption of the Convention

Mr. BAKHTOV (Union of Soviet Socialist Republics) stated that his delegation was opposed to article VIII because it limited the States which could accede to the Convention. It was also opposed to the provision in article X permitting States to decide for themselves whether or not the Convention should extend to the territories for whose international relations they were responsible, and to article XI, which placed unitary States on an unequal footing with federal and non-unitary States. Those provisions, on which he requested a separate vote, reduced the value of the Convention; nevertheless, the USSR delegation on the whole approved of the work of the Conference, and would vote for the Convention as drafted by the Conference.

The PRESIDENT put to the vote those articles and parts of articles on which separate votes had been requested.

Article I, paragraph 3 was adopted by 29 votes to 1, with 5 abstentions.

Article II, paragraph 3 was adopted by 29 votes to 2, with 4 abstentions.

Article II as a whole was adopted by 27 votes to 2, with 5 abstentions.

The beginning of article V, paragraph 1 (a), up to and including the words "is not valid", was adopted by 24 votes to 5, with 5 abstentions.

Article V as a whole was adopted by 31 votes to 2, with 4 abstentions.

Article VIII was adopted by 27 votes to 8, with 1 abstention.

Article X was adopted by 28 votes to 8, with 1 abstention.

Article XI was adopted by 27 votes to 8, with 1 abstention.

The PRESIDENT put to the vote the Convention as a whole, as amended.

The Convention as a whole, as amended, was adopted by 35 votes to none, with 4 abstentions.

Mr. BEASAROVIC (Yugoslavia), explaining his vote, said that the Convention was an advance on the Geneva Convention of 1927 and that his Government was in agreement with most of the articles. However, the text was not altogether satisfactory: there was no provision for personal reciprocity

(Mr. Beasarovic, Yugoslavia)

and no clause - such as had been included in the Ad Hoc Committee's draft - providing that the composition of the arbitral authority and the arbitral procedure must be lawful. His delegation had accordingly been compelled to abstain in the vote on the Convention, an action which did not prejudge the attitude of his Government with regard to accession to the Convention.

His delegation had voted for the proposals of the Committee on Other Measures, and would sign the Final Act of the Conference (E/CONF.26/9).

Mr. MACHOWSKI (Poland) stated that he had voted for the Convention as a whole, though he had opposed articles VIII, IX, X and XI for reasons stated in the course of the debate.

Mr. GEORGIEV (Bulgaria), Mr. PSCOLKA (Czechoslovakia), Mr. SAVCHENKO (Ukrainian Soviet Socialist Republic), Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) and Mr. AGOLLI (Albania) associated themselves with that statement.

Mr. MAURTUA (Peru) declared that, under Peruvian legislation, awards made in a foreign country were dealt with in Peru in the same way as Peruvian awards were dealt with in that country; awards made in countries in which Peruvian awards were subject to a review of substance were similarly treated in Peru. Orders by a foreign court relating to the civil status, capacity or family relations of nationals and foreigners domiciled in Peru were not recognized in Peru.

Moreover, the following matters were within the exclusive jurisdiction of Peruvian courts: real property in Peruvian territory, vessels flying the Peruvian flag, civil suits arising out of crimes or offences committed in Peru; inheritance rights of Peruvians or aliens domiciled in Peru.

Furthermore, under Peruvian legislation, matters relating to the State, to civil status, and to the property of the State or of municipalities and other official institutions, were not capable of settlement by arbitration. Lastly, Peru would in no circumstances apply the laws of other States which were contrary to its political institutions, public policy, or public morals.

Mr. KESTLER FARNES (Guatemala) remarked that he had voted against article II because it contained a provision on the validity of arbitrary agreements going beyond the powers of the Conference, for which reason he had also abstained from voting on the Convention as a whole. He had voted for article X, firstly, because it did not contain any provision which might prejudice the status of Trust and Non-Self-Governing Territories, or of their inhabitants, secondly, because as drafted, far from recognizing that administering States had any right of sovereignty over such Territories, it merely stated that they were responsible for the international relations of those Territories, and, thirdly, because by not providing for an automatic extension of the Convention, such as had been read into it by one representative, it guaranteed the inherent right of those peoples to manage their own affairs.

Mr. MALOLES (Philippines) said that his country was not prepared to limit the application of the Convention to purely commercial disputes because its domestic legislation did not distinguish between litigation in commercial and civil matters.

Adoption of the Final Act of the Conference (E/CONF.26/9)

Mr. BAKHTOV (Union of Soviet Socialist Republics) stated that, taking into account the highly specialized character of the Convention, the USSR delegation would sign the Final Act, on the understanding, however, that the statement concerning reservation, in paragraph 14 of the Final Act, should in no way serve as a precedent for any other international conventions, treaties, agreements and other instruments.

Mr. GEORGIEV (Bulgaria) associated himself with those remarks.

After a brief exchange of views, Mr. COHN (Israel moved reconsideration of paragraph 14, on the ground that it might lead to confusion.

The motion for reconsideration was rejected by 18 votes to 11, with 4 abstentions.

Mr. COHN (Israel) said that his delegation would sign the Final Act without prejudice to its attitude on the admissibility of reservations under the general principles of public international law.

Mr. URQUIA (El Salvador) thought that the inclusion in paragraph 14 of a statement which should have been a provision in the Convention itself would lead to practical difficulties.

Mr. KESTLER FARNES (Guatemala) and Mr. HERMENT (Belgium) supported that remark.

Mr. PSCOLKA (Czechoslovakia), Mr. AGOLLI (Albania) and Mr. MACHOWSKI (Poland) said that they would accept paragraph 14 provided that it did not constitute a precedent for other conventions.

Mr. BEALE (United States of America), Mr. RAMOS (Argentina), Mr. MAURTUA (Peru), Mr. BEASAROVIC (Yugoslavia) and Mr. MINOLI (Italy) stated that they would sign the Final Act without prejudice to the provisions of paragraph 14.

Mr. RENOUF (Australia) remarked that, while paragraph 14 did not have binding force, as a provision in the Convention itself would have done, it was nevertheless valuable in that it revealed the intentions of the drafters of the Convention.

The Final Act (E/CONF.26/9) was adopted.

REPORT OF THE CREDENTIALS COMMITTEE (E/CONF.26/10)

The report of the Credentials Committee (E/CONF.26/10) was adopted.

The meeting rose at 1.5 p.m.