UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/CONF.26/SR.7
12 September 1958

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

# SUMMARY RECORD OF THE SEVENTH MEETING

Held at Headquarters, New York,
on Friday, 23 May 1958, at 2.45 p.m.

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President: Mr. SCHURMANN Netherlands

Executive Secretary: 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.6 to 13) (continued)

Mr. ROGNLIEN (Norway) supported the principles put forward by the Italian delegation for discussion (E/CONF.26/L.13), although he favoured some slight changes in the wording. For example, in the first sentence the words "in accordance with" were too restrictive and he would prefer the words "on the basis of".

The Italian paper combined the principles of the eight-Power amendment (E/CONF.26/L.6) and the Turkish amendment (E/CONF.26/L.9), and introduced some modifications which should make it acceptable to the common-law countries, for as a result of those modifications their domestic procedures would not be affected in any way. The strict territorial basis favoured by those countries was considered inadequate by other countries including his own.

Mr. PSCOLKA (Czechoslovakia) said that his delegation realized that draft article I, paragraph 1, had certain shortcomings. For example, that article would permit the application of the Convention to arbitral awards made abroad between nationals of the same State. However, neither the eight-Power amendment nor the Turkish amendment remedied that deficiency. On the other hand, those amendments, while attempting to make the scope of the Convention clearer in some ways, made it more obscure in others. His delegation considered that the territorial principle was the simplest and clearest approach, and should be maintained.

Again, an attempt to define the expression "foreign arbitral award" in positive terms was bound to be unacceptable to one group of States or another. The Convention should do nothing that would isolate the award from the municipal law of the country in which it was to be relied upon.

His delegation could therefore support draft article I, paragraph 1, as it stood. The draft article represented a balanced compromise, which enlarged the application of the Convention by abstaining from the principle of strict reciprocity embodied in the General Convention. At the same time, the provision in article I, paragraph 2, enabling States to enter a reservation in respect of reciprocity would make the Convention acceptable to those States which might otherwise be discouraged from ratifying it.

(Mr. Pscolka, Czechoslovakia)

His delegation did not object to the fact that article I did not expressly limit the application of the Convention to commercial disputes, inasmuch as his country did not have a separate commercial code.

As to the suggestions of the Austrian Government concerning the term "legal person" (E/2822, part B), although his delegation considered them superfluous it would not object to an express provision to the effect that the Convention was also applicable in cases in which corporate bodies under public law, in their capacity as entities having rights and duties under private law, had entered into an arbitration agreement. Similarly, if the majority desired it, his delegation would not object to an express reference to "trading corporations", provided that it was made clear that trading corporations were not in a category different from that covered by the term "legal person".

He noted that the Committee on the Enforcement of International Arbitral Awards had considered it unnecessary to specify in the draft Convention that the expression "arbitral awards" included awards made by permanent arbitral bodies. The system of institutional arbitration was well established in countries with a planned economy. In other countries permanent courts of arbitration had been working with considerable success, and he had no doubt that the practice would continue to spread. However, as there were some countries in which institutional arbitration was not known, it might be well to add an appropriate provision to draft article I, paragraph 1. For that purpose, his delegation was presenting an amendment (E/CONF.26/L.10) based on the report of the authors of the draft Convention (E/2704, para.25).

Mr. HERMENT (Belgium) announced that for the reasons he had mentioned in his earlier statements, his delegation could not subscribe to the principles set out in the paper of the Italian delegation (E/CONF.26/L.13). Moreover, the reservations suggested in the paper did not adequately provide for existing national differences.

Mr. LIMA (El Salvador) felt that a further exchange of views in plenary session should be helpful to the working party that would deal with article I. It would be a mistake to refer the article to a working party before a trend had developed in the Conference as a whole. Moreover, an acceptable solution of the questions raised by article I would facilitate agreement on several other articles of the Convention.

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(Mr. Lima, El Salvador)

From the statements made at the morning meeting, he took it that some of the sponsors of the eight-Power amendment (E/CONF.26/L.6) were prepared to accept in principle the Turkish proposal (E/CONF.26/L.9), which would define the scope of the Convention in terms of the procedural law under which the award was made.

He had listened with interest to the observation of the Colombian representative that an award made under a foreign procedural law in a country whose law specifically permitted such a procedure would be an award made under that country's own procedural law, and might therefore not be covered by the Convention. That possibility did not disturb him, for it would then have to be considered a domestic award, enforceable as an internal matter, and the Convention's purpose, that of recognition and enforcement, would have been achieved.

As to the Italian paper (E/CONF.26/L.13), he drew attention to the tendency in recently concluded international conventions to avoid reservations to articles other than those which gave rise to constitutional difficulties. Moreover, paragraph 1 of the reservations seriously limited the principle set out in the first sentence of part (B) of the same paper, namely that "the parties may choose the law governing the arbitral procedure". His delegation could not accept that limitation of the autonomy of the parties. Finally, the last sentence of part (B) was not in keeping with the purpose of the Convention, which was to overcome the procedural difficulties encountered in the recognition and enforcement of foreign arbitral awards. The Convention should avoid pronouncements on substantive principles which did not contribute to its purpose.

The Turkish amendment was acceptable to his delegation. It could not be interpreted as an attempt to define the difference between foreign and domestic awards. It simply defined the scope of the Convention without prejudice to the question of the nationality of awards.

Mr. MANTEUCCI (Italy) emphasized that he had not proposed any amendments. Document E/CONF.26/L.13 contained a synthesis of certain ideas which had been put forward in the course of the discussion and which might be taken into account by the working party. In reply to some of the observations made with reference to his paper, he pointed out that the first sentence of part (A) was the Turkish proposal. The first sentence of part (B) was an attempt to improve the Geneva Convention by meeting the desire so often expressed by businessmen for the autonomy of the parties.

Admittedly, it was a relative autonomy, limited by the principle set out in paragraph 1 of the reservations. It was understandable that a country might not wish to renounce its jurisdiction over an award, involving only its own nationals, which would be used as a device to escape certain legislation, particularly fiscal legislation. Paragraph 2 of the reservations was merely a modification of article I (2) of the draft Convention.

Mr. MAURTUA (Peru) felt that the Convention should contain strong safeguards against awards which called for something which was unlawful in, or against the public policy of, the country in which it was relied upon. The protection of public policy was not merely a ground for refusing recognition and enforcement. It constituted a severe limitation of the scope of the Convention and should be enunciated in article I instead of article IV (h).

Sir Claude COREA (Ceylon) felt that the matter had been thoroughly discussed in plenary session and should be referred to a working group which would attempt to reconcile procedural and substantive differences. He considered those differences to be more apparent than real. They could be overcome by a clarification or combination of the two concepts - one national and the other territorial - which had found support during the discussion. They were not incompatible. The working group might consider removing the clause "and arising out of differences between persons whether physical or legal" from paragraph 1 and including it in a spearate article on definitions.

(Sir Claude Corea, Ceylon)

In the matter of reservations, while he would prefer the deletion of paragraph 2, he realized that some Governments would not sign the Convention unless the paragraph was included. He would therefore not press for its deletion. Nevertheless he believed that the second sentence of the paragraph should be deleted because it opened the door to lengthy discussion on the question whether an award could be considered as commercial under the national law of the Contracting State concerned.

Mr. SANDERS (Netherlands) felt that in attempting to reconcile the two concepts as suggested by the Ceylonese representative the working group might begin by discussing the territorial concept as set out in the draft Convention. It might then recognize the freedom of the parties to choose the law governing the arbitral procedure themselves. If they did so, the award would be deemed to have been made in the State whose law governed the arbitral procedure. If arbitration was undertaken by a chamber of commerce or some other arbitral association, the award would be deemed to have been made in the State in which that association had its main seat. In the absence of agreement between the parties the arbitral procedure should be governed by the law of the place in which arbitration took place. However, an exception would be made in the case of a country which allowed an award to be made under the procedural law of another country.

The PRESIDENT said that the Conference should decide whether or not to take a preliminary vote on article I and the amendments thereto in order to provide some guidance to the working group. He felt that it would be unwise for the Conference to do so because it was difficult to formulate principles. Moreover, the formulation of principles would limit the scope of the working group which should be granted every latitude to find a new solution or to combine the suggestions made during the plenary discussion.

Mr. COHN (Israel) observed that a number of amendments to article I had not yet been discussed because they related to questions other than those which the Conference had so far considered. He felt that only the questions on which members had already expressed their views should be referred to the working group.

Mr. MATTEUCCI (Italy) agreed. For instance, the first Swedish amendment in document E/CONF.26/L.8 should be dealt with in plenary.

Mr. URABE (Japan) asked whether the working group would confine itself to paragraph 1 of article I or also consider paragraph 2.

The PRESIDENT observed that paragraph 2 did not lend itself to redrafting. Members would either support the paragraph or oppose it. The Conference might deal with it after the working group had submitted its final text on paragraph 1.

Mr. BAKHTOV (Union of Soviet Socialist Republics) felt that the working group would have some difficulty with respect to paragraph 1 unless it received some guidance from the Conference. The latter should decide whether the working group should base its discussions on the territorial or national concept. The Soviet delegation considered the territorial principle to be the more acceptable, as the national concept would give undue scope to the activities of national courts. It therefore believed that the working group should take, as its basis of discussion, article I, paragraph 1, as set out in the draft Convention. It should also consider the amendments submitted by various delegations, including the Czechoslovak proposal.

The PRESIDENT felt that it would be premature for the Conference to lay down principles. Moreover, such a decision would restrict the freedom of action of the working group. However, the latter might be told that, if it was unable to reach an agreement on a single draft of paragraph 1, it could submit alternative texts to the Conference.

Mr. KORAL (Turkey) thought that the Conference should not give any directives to the working group because to do so would be tantamount to predetermining the results of its discussions. For instance, if the Conference were to decide on the territorial concept, the working group could hardly improve on the wording of the draft Convention. It should therefore not be precluded from discussing more than one principle.

Mr. HOLLEAUX (France) observed that, at an earlier meeting, he had expressed the view that the Conference should take a decision in principle for the guidance of the working group. However, in the light of the discussion he

(Mr. Holleaux, France)

now felt differently. As the task of the working group would be one of conciliation, it should be fiven full freedom of action in its attempt to reconcile divergent views. He hoped that its schedule would be so arranged as not to conflict with the plenary meetings of the Conference.

Mr. BAKHTOV (Union of Soviet Socialist Republics) said that although the working group would find it difficult to do its work without some guidance from the Conference, he would not press the matter.

The Conference decided that Colombia, Czechoslovakia, France, the Federal Republic of Germany, India, Israel, Italy, Turkey, the Union of Soviet Socialist Republics and the United Kingdom would be represented in the working group.

Mr. COHN (Israel) supported the French representative's view that the meetings of the working group should not coincide with those of the Conference. The group might meet in the morning before the plenary meeting of the Conference.

The PRESIDENT observed that the Conference had only nine working days left and that it might not always be possible to arrange a separate schedule for the working group. However, the working group might meet on Monday, 26 June, at 9.30 a.m. and the Conference at 11 a.m.

He noted that the Czechoslovak amendment to the draft Convention (E/CONF.26/L.10) contained a definition. Some delegations had suggested that a separate article on definitions should be included in the Convention. He proposed that definitions in respect of any one article might be referred to the working group dealing with that particular article. Later, the final drafting committee might decide whether to have a separate definition in each article or to combine all definitions in a separate article.

It was so agreed.

Mr. SYDOW (Sweden) noted that the draft Convention, unlike the Geneva Convention, did not contain any explicit provision concerning the law determining the validity of the arbitral clause. Amendments to remedy the omission had been proposed both by the Polish and his own delegation (E/CONF.26/L.7 and E/CONF.26/L.8). The Swedish delegation felt that the Conference must adopt a provision to the effect that every Contracting State expressly recognized the validity of any agreement under which the parties agreed to submit a dispute to arbitration.

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Mr. MATTEUCCI (Italy) supported the Swedish representative. Such a provision would make it easier to reconcile the Convention with the 1923 Geneva Protocol. However, the Swedish proposal went a little beyond the provision in the Geneva Protocol which referred to international agreements whereas the text proposed by Sweden would cover all agreements. He had no objection to that. The Swedish text was designed to prevent a Contracting State from impeding arbitration. To make that quite clear, he suggested that a sentence should be added specifying that a Contracting State would not discriminate on the basis of the nationality of the arbitral authority.

Mr. BEASAROVIC (Yugoslavia), introducing the Yugoslav amendment to article I, paragraph 1 (A/CONF.26/L.12), said that his Government regretted the absence from the draft of a strict requirement of reciprocity. That defect, which might bring about the paradoxical situation of a Contracting State being required to enforce awards in favour of a national of a non-contracting State, could discourage many Governments from adhering to the Convention. In those circumstances, his delegation believed that there should at least be a stipulation to the effect that the award of which enforcement was sought must have been made in a dispute between persons "subject to the jurisdiction of one of the Contracting States". That phrase appeared in the Geneva Convention of 1927 and the desirability of including it in the new instrument had already been stressed by the Government of Mexico (E/2822).

Mr. ROGNLIEN (Norway), while fully supporting the intention behind the Swedish proposal, hoped that the text could be somewhat clarified to show that it did not imply any waiver of the conditions set forth in articles III and IV. The difficulty might be resolved by stating that every Contracting State would recognize the agreement as valid "in principle".

Mr. LIMA (El Salvador) said that his delegation welcomed the spirit of the Swedish and Polish proposals but had certain lingering doubts regarding the actual need for such a provision. In the first place, such a statement of principle seemed somewhat out of place in the body of the Convention, for the

(Mr. Lima, El Salvador)

question of the validity of agreements to submit to arbitration seemed distinct from that of recognition or enforcement. The new article might therefore be better suited for inclusion in a separate subsidiary agreement. Secondly, the text of the new article evoked certain objections of principle. The agreements referred to were contracts, and as such subject to complex and varied rules in each State. Consequently, unless the new article went into far greater detail, its application might give rise to manifold questions in the field of conflict of laws.

Difficulties might also be encountered in the application of the second sentence of article I, paragraph 2. The provision seemed logical, as not every State recognized the possibility of arbitration in non-commercial matters, but serious problems could arise in instances where, for instance, a claim and counter-claim were both upheld and enforcement of each was then sought in a different State. A solution might perhaps be found by adopting another principle and stating that the commercial or non-commercial nature of the contract would be determined by the law under which that contract had been concluded.

Sir Claude COREA (Ceylon) welcomed the Swedish proposal but hoped that its sponsors would delete the words "on any matter susceptible of arbitration". Those words might create openings for doubt or discussion and thus detract from the force of the principle stated.

As regards article I, paragraph 2, he shared the misgivings of the representative of El Salvador and would submit a draft amendment in due course.

Mr. MACHOWSKI (Poland) explained that the proposal contained in the second paragraph of the Polish draft amendments (E/CONF.26/7) had been intended not as an amendment to article I but, like the Swedish text, as a separate provision. He reserved his delegation's right to comment further on the subject of recognition at a later stage.

Mr. HOLLEAUX (France) thought that the fears voiced by the representative of El Salvador were somewhat unjustified. The additional article proposed by Sweden and Poland was, after all, merely a restatement of a provision in the Geneva Protocol of 1923. The application of that provision had never given rise

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to major difficulties and the case-law developed over a period of thirty-five years should afford a sufficient safeguard for the future. In order to preclude even the slightest misunderstanding, however, the article should follow more closely the exact wording of the 1923 Protocol. Furthermore, the Swedish delegation should not insist that the agreement should be "in writing". The entire question whether such agreements had to be executed in writing or could also be proved by other evidence was one of the greatest complexity and would, in any case, have to be faced in the context of article III. Raising the issue prematurely could thus only hinder the progress of the Conference.

Mr. KORAL (Turkey) agreed with the representative of El Salvador that the recognition of the validity of arbitral agreements should be dealt with in an annex rather than in the Convention proper. Moreover, the Swedish text was open to the criticism that it made no allusion whatsoever to the private international law aspect of the matter. The statement contained therein belonged essentially in a domestic code of civil procedure and, unless amplified to show that the agreement referred to was subject, in the first place, to the law of a State other than the one called upon to recognize its validity, could only cause serious confusion. He consequently agreed with the French representative that the text should follow more closely the wording of article I, paragraph 1 of the 1923 Protocol.

Mr. URABE (Japan) recalled his delegation's opinion that the new Convention would in no way affect the validity of existing instruments. If that view was accepted, the Swedish proposal would be largely redundant and could cause only difficulties in the future.

The Yugoslav draft amendment to article I, paragraph 1, had been prompted by an understandable desire not to discourage States from signing the Convention, but if the territorial criterion contained in that paragraph was adopted the additional words might have a needlessly restrictive effect.

As regards article I, paragraph 2, the Japanese delegation favoured the retention of the first sentence as it stood. The objections formulated by the Société Belge d'Etudes et d'Expansion (E/2822, annex II) were in themselves logical, but the provision would serve as an inducement to potential participants.

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(Mr. Urabe, Japan)

Lastly, he hoped that the second sentence of article I, paragraph 2, would be deleted. Many contracts being on the borderline between commercial and civil agreements an artificial demarcation could often operate unfairly. Furthermore, the sentence might impede the enforcement of awards made in consequence of such incidents as collisions, where the arbitral solution was particularly desirable.

Mr. RAO (India) thought that the Swedish proposal would meet a basic requirement. The 1955 Committee had admittedly objected to the inclusion of such a provision, some of the members contending that it was already implicit in the text and others arguing that the subject matter was outside the scope of the Convention. Those objections, however, seemed devoid of substance. It was a basic rule that every implicit stipulation should be stated in express form as soon as the opportunity arose, while the recognition of the validity of the reference to arbitration and the enforcement of the resulting award were all but inseparable. In any event, the Committee's decisions were in no way binding on a conference of plenipotentiaries.

The meeting rose at 5.30 p.m.