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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE NINTH MEETING

Held at Headquarters, New York,
on Monday, 26 May 1958, at 2.45 p.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 and Add.1 to 6; E/CONF.26/2, 26/3 and Add.1, 26/4, 26/7; E/CONF.26/L.7, L.8, L.12, L.14, L.16) (continued)

Article I, paragraph 1

The PRESIDENT pointed out that two amendments had been submitted to the paragraph, one by Yugoslavia (E/CONF.26/L.12) and the other by Pakistan (E/CONF.26/L.16, paragraph 1). The former proposed the inclusion in the draft Convention of a provision in the Geneva Convention, which the Committee had found vague and ambiguous (E/2704 and Corr.1, paragraph 25).

Mr. COHN (Israel) said that if the Conference accepted the unanimous opinion of the working group and decided to delete from the Committee's draft the words "and arising out of differences between persons whether physical or legal", the Yugoslav proposal would lose its purpose. The Conference should therefore first decide on those words. The Israel delegation would vote for their deletion and consequently also against the Yugoslav amendment. Nevertheless, if the words in question were to appear in another article of the Convention, his delegation would not necessarily oppose the addition proposed by Yugoslavia.

The PRESIDENT thought that discussion of the Yugoslav amendment should be deferred until the working group had submitted its text. The same applied to the Pakistan amendment.

Article I, paragraph 2

Mr. WORTLEY (United Kingdom) said that the United Kingdom amendment (E/CONF.26/L.7) sought only to make the text consistent with the provisions of article IX of the draft. Discussion of the amendment might therefore be deferred until the Conference had decided on article IX.

Provisions concerning the validity of arbitral agreements

Mr. MACHOWSKI (Poland) submitted his delegation's amendment to article I (E/CONF.26/7, paragraph 2), which required each Contracting State to recognize the validity of arbitration clauses. The principal purpose of the Polish amendment was to make international transactions more secure. The recognition of the validity of arbitration clauses would prevent commercial companies from evading

(Mr. Machowski, Poland)

arbitrations to which they had agreed. The Polish proposal was prompted by the same consideration as the Swedish one (E/CONF.26/L.8, paragraph 1). His delegation appreciated the Swedish proposal, but preferred its own text; the latter went into greater detail and was based on the Geneva Protocol, which had been signed by more than thirty States and applied for many years.

Mr. BULOW (Federal Republic of Germany) thought that the discussion provoked by the Polish and Swedish amendments proposing the inclusion of a clause on the recognition of arbitral agreements had already shown that the notion was somewhat outside the scope of the draft Convention. Those amendments had the great advantage, however, of seeking to preclude recourse to courts of law and his delegation would therefore not object to a clause of that nature.

There could be no question of merely repeating the corresponding clause of the 1923 Protocol because the decisive factors in the two instruments were basically different. On the other hand, the clause proposed by Sweden (E/CONF.26/L.8, paragraph 1) could not be left as it stood, but must be connected in some way with arbitral procedure. The Swedish proposal might therefore be amplified with the words "so far as the arbitral award which would be made in accordance with such agreement would be recognized and enforced under this Convention".

Another very desirable improvement would be the inclusion of a definition of the words "in writing", which appeared in the Swedish text. Obviously there could be no recognition of a purely verbal agreement, but neither could there be a requirement of writing in the strict sense, i.e. a requirement that both parties should sign the same document. Such a requirement would be at variance with the needs and usages of international trade. The difficulty could be resolved by adding to the article proposed by Sweden the paragraph proposed by his delegation in document E/CONF.26/L.19.

Mr. HERMENT (Belgium) doubted whether it would be advisable to introduce a provision of that nature, which went beyond the subject-matter of the draft Convention. It would in any case be useless, as it would overlap with article III, sub-paragraph (a) of the draft and might lead to some confusion, for it required States to recognize the validity of arbitration clauses "on any matter susceptible of arbitration" without indicating which country would rule on the question of susceptibility.

(Mr. Herment, Belgium)

The best course would be to leave the 1923 Protocol undisturbed and to provide that every State which ratified the Convention would be deemed to have adhered to the Protocol by that very act.

Mr. WORTLEY (United Kingdom) thought that the Polish amendment (E/CONF.26/7, paragraph 2) amounted to a mere reaffirmation of the Geneva Protocol and was less liberal than the draft under discussion. The draft represented a step forward because it did not require a territorial link.

Mr. KORAL (Turkey) said that if the Swedish proposal (E/CONF.26/L.8) were adopted, the title of the Convention would have to be changed to show that the subject matter was recognition and enforcement not only of arbitral awards but also of arbitration agreements or clauses. Furthermore, the apparent aim of the Swedish proposal was not to resolve conflicts of laws but to establish a uniform law. It recognized the validity of any arbitral agreement (or arbitration clause) in the domestic and international spheres alike. In order to come within the context of private international law, the text would have to be limited to international arbitration clauses and agreements. Consequently, the Swedish proposal was not acceptable in its present form.

Mr. PSCOLKA (Czechoslovakia) said that he did not oppose the idea which had prompted the Swedish and Polish proposals. The Swedish text, however, was an abridgement of article I of the 1923 Protocol, one of the principal aims of which was to ensure recognition of the validity of arbitration clauses and thus to cover not only existing disputes but also future ones.

The Conference might perhaps suggest to the representatives of Poland and Sweden that they should endeavour to devise a joint proposal for consideration by the working group.

Mr. de SYDOW (Sweden) said that the Swedish proposal merely reaffirmed the essential features of article I of the 1923 Protocol. His delegation was prepared, however, to accept the French proposal that the Convention should repeat the exact words of that document. It attached little importance to the actual wording of the text which it was submitting as the only important point was that

(Mr. de Sydow, Sweden)

Contracting States should undertake to recognize arbitration clauses. The Swedish delegation was also prepared to accept the Czechoslovak suggestion, but thought that several other delegations preferred the text of the 1923 Protocol and that it might thus be unnecessary to devise a new text.

Mr. MINOLI (Italy) observed that the Swedish proposal (E/CONF.26/L.8) had the advantage of being wider in scope than the 1923 Protocol.

Mr. COHN (Israel) said that he had no objection to the Swedish proposal in principle but agreed with the representatives of the Federal Republic of Germany and Turkey that, if the enforcement of arbitral awards was to be assured, some link should be established between those awards and the arbitration agreements. Neither the Swedish nor the Polish text took that consideration into account. That was why his delegation had proposed a definition of the expression "arbitral award" (E/CONF.26/L.18).

The Swedish proposal raised two questions. In the first place, the Conference would have to agree whether the arbitration agreement had to be in writing. The representative of the Federal Republic of Germany seemed unwilling to forego the guarantee which that condition afforded. The second question arose in connexion with the words "on any matter susceptible of arbitration", which several representatives wished to see deleted. His delegation shared that view and thought that some of the provisions of article IV of the draft Convention might in themselves preclude the use of that phrase.

Mr. LIMA (El Salvador) welcomed the fact that the representatives of the Federal Republic of Germany, Belgium and Turkey shared his doubts regarding the Swedish and Polish amendments. Those amendments were outside the scope of the Convention, which was designed solely to oblige States to recognize and enforce foreign arbitral awards.

International arbitration consisted of several processes. First, the consideration of the validity of the arbitration clause and the submission of the dispute to the arbitrator who made the award. Secondly, the enforcement of the award in a country other than the one where the award had been made. If the Conference decided, as it was probably not competent to do, that the country of

(Mr. Lima, El Salvador)

enforcement could rule on the validity of the arbitration clause, it would have to concede that that country could go into the substance of the problem. As far as procedure was concerned, however, legal systems were divided into two general categories. Some regarded arbitral procedure as closely linked with judicial procedure, while in others such links, if they existed at all, were extremely loose. The validity of the arbitration clause should therefore be determined not by the country of enforcement but by the State under the law of which that clause had been drawn up. Clearly, therefore, the question of the validity of the arbitration clause was outside the Conference's competence.

Mr. ROGNLIEN (Norway) supported the Swedish amendment (E/CONF.26/L.8, paragraph 1). All contracting States should recognize that arbitral agreements were in principle valid.

Mr. BAKHTOV (Union of Soviet Socialist Republics) considered the amendments submitted by Sweden (E/CONF.26/L.8) and Poland (E/CONF 26/7) to be acceptable in principle. It would be as well if the sponsors of the two amendments could, as had been suggested by the representative of Czechoslovakia, agree upon a single text.

Mr. DAPHTARY (India), referring to the comments made by the representative of El Salvador regarding means of determining the validity both of the arbitration agreement and arbitration clauses, drew the attention of members to article III (b). If awards must become final and operative before enforcement in the country where they were made, it naturally followed that they could be contested in that country and consequently that the validity of the arbitration clause could at any time be called in doubt. The Convention was applicable only to awards which had passed beyond that stage. As a result, it seemed that the amendments to article I submitted by Sweden and Poland were superfluous, if article III was maintained in its present form.

Mr. MAURTUA (Peru) unlike the representative of El Salvador considered a clause recognizing the validity both of the arbitration agreement and the arbitration clause to be essential as they were the very basis of arbitration.

(Mr. Maurtua, Peru)

such a clause was the only way of ensuring respect for the wishes of the parties and real reciprocity between contracting States. In addition, as the parties would probably decide to submit to arbitration only those disputes which had some chance of being solved in that way, a large number of objections concerning what matters could or could not be decided by arbitration would automatically be removed. He did, however, agree with the representative of Israel that the clause in question might appear as an annex where it would constitute a sort of arbitration protocol.

Mr. KESTLER FARNES (Guatemala) said that at the seventh meeting he had already expressed doubts regarding the value of the Swedish and Polish amendments. Those doubts had now been strengthened. The Conference's terms of reference included the task of elaborating a Convention on the recognition and enforcement of arbitral awards and not on the recognition of the validity either of agreements to submit to arbitration or of arbitration clauses. The representative of India had rightly recalled that under article III (b), the State on whose territory enforcement was requested could require that the award should comply with certain conditions, for instance, that it should be final and operative. Such a provision was a matter of public policy and not every State could renounce its prerogatives in that respect. However, that did not mean that the State on whose territory the award was to be enforced had the right to determine the validity both of the arbitration agreement and of the arbitration clause which had served as a basis for the award concerned.

In conclusion, while it might be true that the drafts submitted by Sweden and Poland might encourage and facilitate arbitration, they were concerned with matters outside the limited scope of the draft Convention, and his delegation would therefore be unable to support them.

Mr. HOLLEAUX (France) said he no longer held the views he had expressed at the seventh meeting. After due reflection and after hearing a number of statements, in particular that of the Belgian representative, he felt obliged to

(Mr. Holleaux, France)

recall that the Conference was dealing with a draft Convention on the recognition and enforcement of arbitral awards, and that the subject of the 1923 Protocol had differed considerably. It might be true that for States like France which had ratified the Protocol the inclusion of certain of its provisions in the Convention would raise no problems. That, however, was not true for other States. Furthermore, the essential point was that by adopting such provisions the plenipotentiaries would be going beyond the scope of the draft Convention and would thus be misinterpreting the instructions and consequently the powers which they had received from their Governments.

The draft Convention gave consideration to awards which had already been made; it took for granted that arbitration procedure had passed through all its stages. It was true, as the representative of India had pointed out, that the question of the validity of the arbitration agreement might arise indirectly. It was equally true that article III (a) required a special arbitration agreement or an arbitral clause. It was none the less true that the Convention would come into operation only when an award came to be enforced. That indeed was the essential aim of the Convention.

In those circumstances, the Conference would be avoiding tedious discussion and probably argument at a later stage if it confined itself to inviting States to adhere to the 1923 Protocol as well as to the Convention, as the representative of Belgium had suggested. It should furthermore be noted that the 1923 Protocol was not an essential basis for the application of the new Convention as its aim was above all to avoid misinterpretation by one of the freely accepting Parties of the agreement to submit to arbitration.

Mr. MACHOWSKI (Poland) said that his delegation was ready to co-operate with the Swedish delegation to draft a single text as had been suggested by the representative of Czechoslovakia.

Mr. MALOLES (Philippines) said that the Conference had probably proceeded with too much haste by adopting at the previous meeting the definition of an arbitral award proposed by Czechoslovakia which made no mention of an arbitration agreement or of arbitration clauses. Furthermore, it would have been advisable to specify clearly that the arbitral award must be made in such conditions as to ensure impartiality. The Philippine delegation was prepared, with the approval of the Conference, to submit a resolution which would ensure that arbitral procedure would be entirely impartial.

In connexion with the question of reproducing the text of article I of the 1923 Protocol in the Convention, he said that the Protocol had been designed for the needs of a particular era and that if the intention was to draft a Convention which would be of real assistance to international trade in the modern world it was not enough merely to reproduce earlier provisions.

Mr. MINOLI (Italy) considered that the Swedish amendment (E/CONF.26/L.8, para. 1) would broaden the scope of the Convention as it would oblige States to take account both of arbitration agreements and of arbitration clauses on which awards were based. The Conference should decide in principle whether such a broadening of the scope of the Convention seemed desirable.

Mr. SANDERS (Netherlands) laid emphasis on the difference between the aims of the present draft Convention and those of the 1923 Protocol, as the latter forbade the parties to contest the validity of arbitral agreements signed by them or to have recourse to the courts. If the Conference wished to adopt a text similar to article I of the Protocol it must take a decision of principle in that connexion. It would then have to be determined where to insert the addition.

Mr. ZULETA ANGEL (Colombia) was particularly willing to support the principle on which the Swedish proposal was based since Colombian law made specific provision for the validity of arbitration clauses. In addition, Colombia had taken part in the work of the Inter-American Council of Jurists which had drafted a very detailed uniform law on commercial arbitration stipulating

(Mr. Zuleta Angel, Colombia)

the validity of those clauses. The Colombian delegation therefore saw no objection to voting for a provision recognizing in principle the validity of arbitral agreements.

On the other hand there was great force in some of the objections raised against the Swedish amendment, especially in the contention that the Conference was not competent to deal with the matter. On that point, he recalled the terms of Economic and Social Council Resolution 604 (XXI), which required the Conference "to conclude a convention on the recognition and enforcement of foreign arbitral awards"; it was consequently only competent to deal with the procedure to be followed after the award had been made. Under those circumstances, the adoption of the Swedish text would doubtless lead the Conference to depart somewhat from its terms of reference. Moreover, a text of that nature might more fittingly be included in a general law than in a multilateral convention.

The Belgian suggestion, taken up by the representative of France, that the Conference would invite Signatory States to accede to the 1923 Protocol, certainly was within the competence of the Conference. In any event, the Conference might consider examining the substance of the draft submitted by Sweden in connexion with agenda item 5, as there was no denying that the inclusion of arbitral clauses could only result in increasing the effectiveness of arbitration in the settlement of private law disputes.

Taking the objections into account, and notwithstanding the attitude of the Colombian delegation towards the validity of arbitral agreements in principle, the time did not seem ripe for the incorporation of the provisions recommended by the Swedish delegation in the draft.

Mr. KORAL (Turkey) thought that the adoption of a text recognizing the validity of arbitral agreements and arbitral clauses was essential to the proper completion of the Conference's task. Its purpose was not only to render possible the enforcement of arbitral awards but also to encourage private individuals to enter into arbitral agreements. As the draft under consideration did not cover that point, the Swedish proposal made good a serious omission.

(Mr. Koral, Turkey)

Accordingly the amendments submitted by Sweden (E/CONF.26/L.8, para. 1) and Poland (E/CONF.26/7, para. 2) could serve as the basis for an article along the lines of the 1923 Protocol. If that article contained a reciprocity clause and was included in an annexed protocol, his delegation would be fully prepared to accept it.

Mr. POINTET (Switzerland) stated that Switzerland saw no objection to the inclusion of article I of the 1923 Protocol in the instrument to be prepared by the Conference. Not all States were in the same position, but the suggestion advanced by Belgium and France that the difficulty should be settled by inviting States signatories to the Convention to accede to the 1923 Protocol might not prove altogether satisfactory. It would doubtless be better to seek a solution along the lines indicated by the representative of Turkey and to request a drafting committee to prepare a text, combining the amendments of Poland and Sweden and the various proposals made orally, which could be attached to the Convention as an annex. Delegations which were not authorized to sign an article of that nature could then at least sign the Convention proper, and leave the signature of the annex until later.

Sir Claude COREA (Ceylon) was in favour of both the Swedish proposal and the Polish amendment. He would be glad to see the two texts combined, as that would expedite the work of the Conference.

With regard to the competence of the Conference, he thought that no useful purpose could be served by a restrictive interpretation of the terms of reference laid down by the Economic and Social Council. The Convention would not achieve its ends if it did not contain some provisions on the validity of arbitral agreements and arbitral clauses. The Convention admittedly had to deal with the "recognition and enforcement" of arbitral awards, but the question of the validity of arbitral agreements from which all arbitral proceedings stemmed, was an inseparable part of the same transaction. Consequently, the Conference could not consider that question as extraneous to the subject and outside its competence. In conclusion, he pointed out that such a clause should be included in the Convention itself.

Mr. URABE (Japan) said that if the Conference thought it necessary to adopt a text based on article 1 of the 1923 Protocol, the text of the article proposed by Sweden (E/CONF.26/L.8, para. 1) would require a slight amendment to bring it into line with that instrument. He presented some amendments to that effect (E/CONF.26/L.20). In his opinion, the article should be included in an annex to the Convention.

Mr. de SYDON (Sweden) agreed with the arguments advanced by the representative of Ceylon. He was quite prepared to co-operate with the Polish delegation in the formulation of a compromise text; he would prefer to see the article in question included in the body of the Convention, where it would carry more weight.

Mr. HERMENT (Belgium) thought that the Conference should decide whether, in principle, its terms of reference authorized consideration of a clause concerning the validity of arbitral agreements.

After a brief exchange of views with Mr. COHN (Israel) and Mr. LIMA (El Salvador), the PRESIDENT requested the Conference to decide whether it was competent to elaborate a clause concerning the validity of arbitral agreements.

It was decided by 25 votes to 9, with 6 abstentions that the Conference was competent in the matter.

Mr. RAMOS (Argentina) thought that the Conference should not deal with a new question which was not very clearly defined. The insertion of the Swedish text (E/CONF.26/L.8, para. 1) in the Convention might lead to lengthy discussions. It would accordingly be more prudent not to depart too far from the text prepared by the Committee (E/2704 and Corr. 1).

Mr. LIMA (El Salvador) while in favour of the principle set forth in the Swedish amendment, was against its inclusion in the Convention. He endorsed the arguments put forward by the representative of Argentina, adding that the incorporation of that notion in the Convention would be premature.

Mr. KESTLER FARNES (Guatemala) said that, in principle, he was in favour of recognition of the validity of arbitral clauses and arbitral agreements. He would nevertheless vote against the Swedish proposal, for it went beyond the limits prescribed for the Convention.

Mr. HERMENT (Belgium) said that he would vote against the Swedish amendment (E/CONF.26/L.8, para. 1) because it was outside the scope of the Convention and might introduce a considerable element of doubt.

Mr. WORTLEY (United Kingdom) pointed out that the Convention presupposed the validity of arbitral clauses and arbitral agreements and contained adequate safeguards on that point in articles III and IV; he would vote against the inclusion of a text affirming the validity of arbitral agreements as a principle.

Mr. BEASAROVIC (Yugoslavia) agreed with the United Kingdom representative and thought that the Conference should devote itself exclusively to the recognition and enforcement of arbitral awards; he would vote against any article concerning the validity of arbitral agreements or arbitral clauses.

Mr. KORAL (Turkey) pointed out that articles III and IV presupposed that an award had already been made. The Swedish amendment seemed pertinent, and he would therefore propose that a clause recognizing the validity of arbitral agreements should be included in an annexed protocol.

After an exchange of views in which Mr. POINTET (Switzerland), Mr. ROGNLIEN (Norway), Mr. MALOLES (Philippines), Sir Claude COREA (Ceylon), Mr. LIMA (El Salvador) and Mr. HERMENT (Belgium) took part, the PRESIDENT requested the Conference to decide whether the text concerning the validity of arbitral agreements should be included in the,Convention or in an annexed protocol.

By 25 votes to 8, with 6 abstentions, the Conference decided that a clause of that nature should be elaborated.

By 19 votes to 13, with 9 abstentions, the Conference decided not to insert that clause in the Convention itself.

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The PRESIDENT proposed that a working group should be requested to prepare a new text.

It was so decided.

The PRESIDENT appointed as members of the working group the representatives of the following States:

Belgium, Federal Republic of Germany, Poland, Sweden, Turkey, Union of Soviet Socialist Republics, United Kingdom.

The meeting rose at 5.50 p.m.