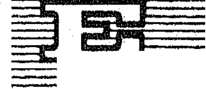

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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE ELEVENTH MEETING

Held at Headquarters, New York,
on Tuesday, 27 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/Rev.1, E/2822 and Add.1-6; E/CONF.26/2, 26/3 and Add.1, 26/4, 26/7; E/CONF.26/L.6-L.31) (continued)

Article II (concluded)

Mr. LIMA (El Salvador) pointed out that in order to be effective, the Convention should be ratified by as many States as possible and should accordingly be acceptable to countries with different legal systems. The present text of article II was open to criticism on precisely that ground. It did not take into account the fact that procedure for the enforcement of foreign arbitral awards was frequently divided into two stages. The first involved an act by which a State authorized the enforcement of a foreign award in its territory - that was the *exequatur* - and the second consisted of the effective enforcement of the award within that territory. There were two different operations, which were combined under the legislation of some countries, but separate under the legislation of others. Under Salvadorean law, for instance, the *exequatur* was granted by the Supreme Court of Justice, whereas the decision to institute enforcement proceedings was taken by the court of the defendant's place of domicile. In order to enable any considerable number of States to apply the Convention, different rules must be laid down for the two stages of the procedure. That, however, had not yet been done.

He would accordingly suggest dividing article II into two paragraphs. The first would deal with the *exequatur* procedure properly so-called. It would indicate that the same rules could not be applied to foreign as to domestic awards, a fact which was evident from the inclusion of articles III and IV, relating to the conditions under which courts would recognize foreign awards. The paragraph might also stipulate that the fees and charges demandable in the case of foreign awards should not be excessive. The second paragraph would deal with the rules of procedure for the enforcement of foreign arbitral awards. A recommendation might be made that the same rules should be applicable to both domestic and other awards.

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(Mr. Lima, El Salvador)

At all events, it was essential to draw a distinction between the *exequatur* and the enforcement of foreign awards. No such distinction was made in the United Kingdom amendment (E/CONF.26/L.11) so that it was not clear to which of the two stages the required equality of procedure between foreign and domestic awards was to apply. The Conference should study the question with both aspects of the procedure in mind.

Mr. RAMOS (Argentina) said that the United Kingdom amendment (E/CONF.26/L.11) appeared to imply that the rules for the recognition and enforcement of arbitral awards differed according to whether the awards were domestic or foreign. But that did not seem to be the case. In each country there were rules concerning the *exequatur* and the enforcement of arbitral awards and those were the rules which should be applied, with the understanding that they did not always draw a clear distinction between the two stages in the procedure.

Article II could therefore be maintained in its existing form, but a reference to fees and charges might be added, as was done in the United Kingdom text. The word "*suivies*" following the phrase "*règles de procèdure*" might be deleted from the French text and the following phrase might be inserted: "and with the rules governing the fees and charges demandable". That would avoid the dangers to which the somewhat vague wording of the United Kingdom amendment might give rise.

Mr. HERMENT (Belgium) noted that the representative of El Salvador had raised a fresh question, that of enforcement measures. It did not, however, seem desirable to include such measures in the Convention as, from the moment an award had received the *exequatur*, it became a domestic award and was enforced in conformity with the domestic legislation relating to enforcement measures.

It was not the purpose of the Belgian proposal to make foreign and domestic awards subject to the same *exequatur* rules. It presupposed the maintenance of articles III and IV. It was in fact merely a question of formalities. For instance, in a country like Belgium, where application for an *exequatur* in respect of a domestic award had to be made to the president of a court of law, it should not be necessary to require representation by counsel or other legal practitioner in the case of a foreign award.

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In reply to a question from Mr. MALOLES (Philippines), the PRESIDENT explained that the word "exequatur" did not appear in the text either of the draft Convention or of the amendments under consideration; it would accordingly be pointless for the Conference to go into the definition of the term.

Mr. KESTLER FARNES (Guatemala) drew attention to the difference between the exequatur of foreign arbitral awards and their enforcement. That distinction was not clearly drawn in the United Kingdom amendment (E/CONF.26/L.11), which appeared to refer only to enforcement procedure and implied that, in the case of Guatemala for instance, that procedure might not be the procedure provided for by Guatemalan law. In Guatemala procedural law was a matter of public policy ar the application of a foreign law would be inconceivable. In those circumstances, although the United Kingdom text had the advantage of referring to the problem of the fees and charges demandable, his delegation would be unable to support it. His delegation would, on the other hand, be prepared to vote for article III of the draft Convention, on the understanding that that article referred to the enforcement of awards and not to the exequatur.

Mr. WORTLEY (United Kingdom) said that delegations seemed to agree that enforcement should be governed by domestic procedure and that higher fees and charges should not be demanded for foreign than for domestic awards. The main difference of opinion was on the advisability of providing for an exequatur procedure in which the local judge reviewed the content of the award. In order to expedite the work of the Conference, his delegation might be prepared to accept the amendment proposed by Israel (E/CONF.26/L.21), if the phrase "in accordance with rules of procedure substantially similar to those applying to the enforcement of domestic arbitral awards" was replaced by the following formula, based partly on paragraph 8 of the note by the Secretary-General (E/CONF.26/2): "In accordance with rules of procedure not substantially more onerous than those applied to domestic awards". An amendment along those lines would give the local judge a right of review, while ensuring that the exequatur procedure would not involve a second trial of the award, an essential precaution, if arbitration was not to be killed.

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The PRESIDENT put to the vote the Belgian proposal that the same rules of procedure should be applied to foreign as to domestic arbitral awards.

The Belgian proposal was rejected by 23 votes to 3, with 8 abstentions.

Mr. HOLLEAUX (France) thought it would be premature for the Conference to take an immediate decision on article II and the relevant amendments. It would be preferable for the Working Group to study the matter first.

The PRESIDENT proposed that article II of the draft Convention should be referred to Working Group No. 1, which should be asked to prepare a new text in the light of the amendments, suggestions and comments made during the discussion.

It was so decided.

Articles III, IV and V

Mr. SANDERS (Netherlands) said that the Netherlands amendments (E/CONF.26/L.17) to articles III, IV and V of the draft Convention formed a single whole.

The first effect of those amendments would be to eliminate the double exequatur resulting from article III (b); such an exequatur was an unnecessary complication, as it involved the requirement that an arbitral award should be operative in a country in which its enforcement had not been requested. The amendments also eliminated the requirement that the enforcement of the award should not have been suspended, as that requirement made it possible for the losing party to prevent enforcement for many years by instituting proceedings for the annulment of the award in the country in which it had been made.

The Netherlands amendments, however, provided some protection for the losing party in the form of the stipulation in article IV (f) (E/CONF.26/L.17) that enforcement might be refused so long as the award was still open to ordinary means of recourse.

The judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made. To require him to await the outcome of such proceedings would be to permit the losing party to delay enforcement for

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(Mr. Sanders, Netherlands)

a very long period. It was far better to leave the decision to the judge of the country of enforcement; by taking what was in fact a very slight risk, it would be possible to end the dilatory practice which had hitherto hindered the development of international arbitration.

The Netherlands amendments were also designed to draw a clearer distinction than had been made in the draft Convention between grounds for refusal and questions of proof, by deleting from the first part of article IV the phrase "if the competent authority in the country where the recognition of enforcement is sought is satisfied", and by transferring that provision to article V where it should logically be placed.

A desire to make the Convention more easily comprehensible to those engaged in international trade had also led the Netherlands delegation to propose a new and more logical list of grounds for refusing recognition, a list which had been prepared on the basis of the valuable note by the Secretary-General (E/CONF.26/2, paragraph 17). His delegation had eliminated article IV (f) (vague and indefinite award) as leaving too much room for uncertainty.

In regard to article V, the Netherlands delegation proposed that the burden of proof should be shared in such a way as to make it less onerous for the party seeking recognition or enforcement.

Mr. URABE (Japan) submitted his amendments to articles III and IV (E/CONF.26/L.15/Rev.1). Like the Netherlands delegation, the Japanese delegation had attempted to steer a middle course - to prevent delaying manoeuvres by the losing party, while deviating as little as possible from the Committee's text. It proposed that judicial control should be retained by the country where the award had been made, but that that control should be limited; in that respect the Japanese solution was close to the third alternative suggested in the note by the Secretary-General (E/CONF.26/2, paragraph 16).

The Japanese delegation was of the opinion that article III (b) should be deleted for the reason already given by other delegations (in order to avoid dilatory manoeuvres).

The text of article IV (e) proposed in the Japanese amendment had been so drafted as to be adaptable to different legal systems.

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(Mr. Urabe, Japan)

If the majority of delegations were of the same opinion, the Japanese delegation was ready to agree that suspension of the enforcement of the award in the country in which was made, even on grounds other than procedural irregularities, should be eliminated from the list of grounds for refusal.

Mr. MATTEUCCI (Italy) congratulated the Netherlands delegation on its amendments (E/CONF.26/L.17), which had the merit of being more logical and of simplifying the conditions and proof required for the recognition of foreign arbitral awards. The amendments might well be adopted as a basis for discussion. The Italian delegation accepted them in principle, subject to a few minor modifications.

Mr. HOLLEAUX (France) also took a favourable view of the Netherlands amendments. Those amendments marked a considerable advance, in that they presented a clearer and better organized text and considerably simplified the formalities.

It was, however, worth considering whether written proof was not an excessive requirement; it should be remembered that the document under discussion was a Convention on commercial arbitration, a matter in which the rules of proof had become much less rigid, even in legislation such as that of France, which had remained somewhat formalist in character. Could the Conference not adopt a more liberal attitude in commercial matters? The arbitration clause was often no more than a mere reference tacitly accepted by the other party. It was perhaps going a little too far to require written proof. The Conference might refrain from laying down any rules of proof and rely on the standards of the country of enforcement or of the country in which the arbitration agreement had been concluded. If, however, the Conference wished to lay down such rules, it might refer to the Latin concept of *prima facie* proof. That, it seemed to him was the most that could be required.

Article IV (b) of the Netherlands text would permit the judge of the country in which the award was sought to be relied on to refuse enforcement when the subject matter of the award was not capable of settlement by arbitration under the domestic law of that country. The judge would thus be tempted to give international application to rules which were of exclusively domestic validity. The exception of incompatibility with public policy was quite sufficient to cover the rare cases in which the enforcement of an arbitral award might conflict with that policy.

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Mr. WORTLEY (United Kingdom) also thought that the Netherlands proposals might be adopted as a basis for the discussions of the Conference. He had submitted an amendment to article IV of the draft Convention (E/CONF.26/L.24) and shared the Japanese point of view on that article.

In regard to article IV (d) of the Netherlands text, it should be possible for one party to waive notification.

He believed that a drafting committee might begin a study of articles III, IV and V.

Mr. LIMA (El Salvador) felt that articles III, IV and V were probably the most important in the draft Convention. Their precise nature should therefore be considered and more particularly the specific differences between articles III and IV. A separate examination of the two sub-paragraphs of article III showed that by the terms of sub-paragraph (a) the agreement between the parties (arbitration or arbitral clause) had to be in writing. That was not a mere statement of principle; a basic condition was in fact laid down. The arbitrators or, if necessary, a judicial body - depending on whether it was held that an interlocutory question of that kind could be settled by the arbitrators themselves or ought to be referred to a judicial body - had to decide whether the condition laid down in sub-paragraph (a) had been fulfilled. In any case, that decision would be taken in the country in which the award had been made.

Sub-paragraph (b) stipulated that the award must have become final and operative and, in particular, that its enforcement had not been suspended. The terms used must be closely defined. In El Salvador a final award meant an award on the substance of the case, as opposed, for instance, to an interlocutory award. That did not in any sense preclude an appeal or prohibit recourse to ordinary and extraordinary remedies (including the procedure of amparo, in Latin America). Similarly, still in reference to the position in El Salvador, an award could not be suspended unless an appeal had been lodged. Finally an operative award was an award the enforcement of which could be demanded. It had been said that article III, sub-paragraph (b) of the draft Convention could be interpreted as imposing a double exequatur. In point of fact, there was no

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(Mr. Lima, El Salvador)

exequatur. It was not open to question that an award, irrespective of the country in which it was made, could not be enforced until a stage had been reached where it could not be questioned; it was of course for the country where the award had been made to decide whether that stage had been reached. The question of *exequatur* did not, strictly speaking, arise except when a country was called upon to accept a foreign award.

Thus it would seem that it was sub-paragraph (a) of article III, and not sub-paragraph (b) which ought to be deleted, because it referred to a question arising prior to the enforcement of the award and therefore did not properly belong in the draft Convention. On the other hand, sub-paragraph (b) was essential, as it was impossible, on the pretext of satisfying the needs of the business world, to take measures to secure the enforcement of vague or indefinite awards.

If it was felt desirable, sub-paragraph (b) of article III could be transferred to article IV, which would have the effect of reversing the burden of proof. But even if that solution were accepted, it would still be necessary to insist that the award had become operative in the country in which it had been made.

His delegation reserved its right to make a further statement.

Mr. POINTET (Switzerland) congratulated the Netherlands delegation on the valuable amendments it had submitted (E/CONF.26/L.17). He, too, thought that article IV, sub-paragraph (f) of the draft Convention should be deleted since, as the representative of France had pointed out, it would give rise to further disputes. Similarly, sub-paragraph (g) was not acceptable in its present form, and Switzerland would support the Japanese amendment proposing the deletion of a part of it (E/CONF.26/L.15/Rev.1, paragraph 4). On the question of proof, he shared the views of the representative of France, since in Switzerland also the agreement of the parties could be proved even if there was no written agreement. He accepted the proposal made by the delegation of the Netherlands in regard to article III, sub-paragraph (b), that the burden of proof should be placed on the other party.

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(Mr. Pointet, Switzerland)

He shared the concern which had led the delegation of the Netherlands to propose its amendment to article IV, sub-paragraph (f). The new Convention had to go much further than the 1927 Convention - that was the whole purpose of the Conference - and in particular the requirement of a double exequatur had to be eliminated. But the amendment submitted by the Netherlands did not go far enough; it would not prevent the losing party from having recourse to delaying tactics. Therefore, his delegation was submitting an amendment (E/CONF.26/L.30), which omitted any reference to the recourse open to the parties in the country where the award had been made. Indeed, the least that could be required of the losing party was that it should not wait to lodge an appeal against the award until the other party was requesting its enforcement.

Mr. COHN (Israel) explained why his delegation had submitted amendments (E/CONF.26/L.31) to the Netherlands amendments (E/CONF.26/L.17) to articles III IV and V of the draft Convention. He believed that the convention should provide only for minimum requirements common to the procedures of all countries. As in some countries the law might not require the production of the arbitral agreement, there was no reason why an international convention should be more exacting. As to the countries in which there was a legal requirement that the claimant should prove the existence of the arbitral agreement, article III added nothing to the obligations of the parties, which in any case were bound to respect domestic procedural law. That article therefore appeared redundant and his delegation proposed its deletion.

It was, however, possible that a party against which an arbitral award had been made might deny that it had ever agreed to arbitration or might feel that the award went beyond the scope of the arbitral agreement. That was a case which would have to be taken into consideration in practice. Provision for such a situation could be made in article IV, as an exception; the amendment submitted by the Netherlands (E/CONF.26/L.17, article IV, sub-paragraph (a)), would then have to be recast.

As regards the validity of arbitral agreements, he thought that any agreement which was in conformity with the law of the country in which it had been made or with the law of the State where the enforcement of the award was requested should be treated as valid; and that such a rule should be spelt out *expressis verbis*, instead of leaving the choice of law vague and obscure under a formula such as "the law applicable".

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Mr. MALOLES (Philippines) noted that the representatives of the Netherlands, El Salvador and Israel had maintained respectively that sub-paragraph (b) of article III was superfluous; that, on the contrary, it was sub-paragraph (a) which was useless; and that article III as a whole could be deleted. In the circumstances, it might be well to leave it to a drafting committee to revise articles III and IV, who could take as their starting point the ad hoc committee's report. It should further be noted that in the draft Convention each of the two articles had a specific function: article III defined which awards were enforceable, and article IV the grounds on which the enforcement of the award could be refused. The two articles would have to be taken as the starting point if further confusion were to be avoided.

Mr. MINOLI (Italy), noting the views of the representative of Israel on the form which the arbitral agreement should take, believed that the Convention should do no more than state that the parties must have agreed to settle their differences by arbitration. Such a wording would be best suited to the needs of international commerce.

Mr. RENOUF (Australia) said that the experience which his country had had showed that sub-paragraph (f) of article IV of the draft Convention should be retained.

Mr. KORAL (Turkey) felt it would be useful for the author of each amendment to explain very clearly his reasons for submitting it and for the Conference to consider the provisions one by one. He felt that articles III and IV should be kept separate. Article III laid down positive conditions which were of fundamental importance and which were easy to verify, whereas article IV laid down negative conditions, for a study of which it was sometimes necessary to go to the very heart of the question. Since the conditions set out in article IV were negative, the burden of proof sometimes fell on the defendant.

He further observed that the proposed amendment showed a tendency to provide for every eventuality; that was going too far and made the task of the Conference unnecessarily complicated.

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Mr. VAN HOOGSTRATEN (Hague Conference on Private International Law), recalling the statement made by the representative of Israel, was afraid that if provisions relating to the validity of the arbitral clause were introduced in sub-paragraph (a) of article IV, further difficulties would be encountered; if the validity of the arbitral clause were open to challenge, it was to be feared that the validity of the contract containing that clause could also be questioned.

As to whether the agreement between the parties should or should not be in writing, he pointed out that article 2 of the draft Convention on the jurisdiction of the selected forum in the case of international sale of goods provided that "when an oral sale includes designation of the forum, such designation is valid only if it has been expressed or confirmed by a declaration in writing by one of the parties or by a broker, without having been contested".

Further, the discussion of the provisions of article II of the ad hoc committee's draft on the rules of procedure applicable seemed to have given rise to some confusion. Cases could be envisaged in which it was the debtor and not the creditor who relied upon the award made in the foreign country. The exequatur procedure would then be unnecessary and he saw no reason for the non-recognition of the award in favour of the debtor. The working party that drafted the article should bear that situation in mind.

Mr. HAIGHT (International Chamber of Commerce) joined in the tributes which had been paid to the delegation of the Netherlands and was of the opinion that the amendments submitted in document E/CONF.26/L.17 would provide a useful basis for the work of the Conference. He agreed with the representative of Israel that article III might well be deleted and that the conditions relating to the validity of the award could be grouped together in article IV. Regarding the question of proof of the arbitration agreement or arbitral clause, he thought that when there was prima facie proof that the parties had agreed to submit their dispute to arbitration, it should be for the defendant to prove that the contrary was the case or that the agreement between the parties was not legally valid.

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After an exchange of views on the procedure to be followed in the consideration of articles III, IV and V, the PRESIDENT suggested that the Conference should decide at the next meeting whether the amendments submitted by the Netherlands (E/CONF.26/L.17) would serve as a working basis.

It was so agreed.

The meeting rose at 6 p.m.