UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

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

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE TWELFTH MEETING

Held at Headquarters, New York,
on Wednesday, 28 May 1958, at 11.45 a.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/CONF.26/7; E/CONF.26/L.8 and Corr.1, L.15/Rev.1, L.16, L.19, L.22, L.31 to 34) (continued)

Articles III, IV and V (continued)

The PRESIDENT recalled the decision, taken at the preceding meeting, to use the Netherlands amendments (E/CONF.26/L.17) as the basis of discussion. He suggested that speakers should address themselves as much as possible to the specific articles and paragraphs of the Netherlands document. He also drew attention to a working paper prepared by the Secretary (E/CONF.26/L.33) which would facilitate reference to all the amendments which had so far been proposed to the articles under discussion.

Mr. KORAL (Turkey) reserved the right to reopen the question of the document which should serve as the basis of discussion.

Mr. KESTLER FARNES (Guatemala) emphasized the organic unity of the three articles under consideration. The Conference should have a clear idea of what it intended to achieve in those articles. Some speakers had warned against a text which would permit lawyers to engage in dilatory tactics, while others had called for simple solutions which would facilitate international trade, but nobody had referred to the philosophy which had inspired the ad hoc Committee's draft text.

It was for the Conference to find a way of reconciling the needs of international trade with the interests of the countries in which the arbitral awards were relied upon. Certain safeguards were necessary, as an arbitral award might have different effects in different countries. For example, in some countries, including his own, it might affect important rights of patrimonial character. In the view of his delegation, articles III, IV and V as drafted by the 1955 ad hoc Committee contained those necessary safeguards.

On the other hand, the texts proposed by the Netherlands (E/CONF.26/L.17), Japan (E/CONF.26/L.15/Rev.1) and Israel (E/CONF.26/L.31) tended to eliminate some of the safeguards his delegation considered fundamental. Article III of the Netherlands draft did not contain the important stipulation, embodied in article III (b) of the ad hoc Committee's draft, that the award must have become final and operative in the country where it was made. It was true that the

(Mr. Kestler Farnes, Guatemala)

Netherlands draft provided in its article IV (f) that recognition and enforcement might be refused if an award had not become final, in the sense that it was still open to ordinary means of recourse. That, however, was not the same thing. The exhaustion of ordinary remedies did not necessarily mean that an award became operative. There might be extraordinary remedies, sometimes at the constitutional level. His delegation thought that reasons of public policy demanded that both ordinary and extraordinary remedies should have been exhausted and that the award should be final and operative in the country in which it had been made before it could be relied upon in another country. That was required for the enforcement of domestic awards, and not to impose similar conditions on foreign awards would be to place them in a privileged class.

For those reasons, his delegation could not support the elimination of article III (b) of the ad hoc Committee's draft.

Mr. HERMENT (Belgium) pointed out that one of the effects of moving the substance of article III (b) to article IV was to place on the defending party the onus of proving facts which, under the ad hoc Committee's draft, would have been examined by the enforcing court of its own motion.

Mr. ROGNLIEN (Norway) congratulated the Netherlands representative on his amendments but felt that further amendment was required. He agreed with the Israel proposal (E/CONF.26/L.31) to combine articles III and IV (a) of the Netherlands amendments, but he could not agree with the Israel representative's treatment of the question of validity. In order to be considered valid, a submission to arbitration had to be valid under the law of the country in which the award was relied upon or under the rules governing the conflict of laws.

However, for the reasons which had been given by the representative of the Hague Conference on Private International Law, he considered it advisable not to indicate how validity should be determined. By using the expression "applicable" law, contained in the Swedish (E/CONF.26/L.8 and Corr.1) and French (E/CONF.26/L.32) amendments, the matter could be left to the competent authority of the country in which the award was relied upon.

Mr. BULOW (Federal Republic of Germany) said that the questions raised in articles III, IV and V of the draft Convention should be dealt with in systematic order, with a view to facilitating the practical application of the Convention. He agreed with the Netherlands representative that the enforcement of a foreign arbitral award should be subject to as few formalities as possible. Moreover, the question of the burden of proof placed upon the party invoking the award and the party against whom the award was invoked should be clearly settled. The exact task of the competent authority from whom enforcement was sought should also be clarified. Lastly, there should be adequate safeguards for the party against whom the award was invoked.

He considered that those questions could best be dealt with by using the draft Convention as a basis for discussion.

He agreed with the Israel representative's proposal that article III should be deleted. Sub-paragraph (a) sought to settle the question of the validity of an arbitral agreement, as indicated in paragraph 30 of the Report of the 1955 Committee (E/2704 and Corr. 1). The Committee had not concerned itself with the question of the burden of proof and consequently had not included in the draft Convention a specific provision on that subject, nor had it dealt explicitly with the form of the arbitration agreement. In those circumstances, his delegation believed that sub-paragraph (a) should be deleted, thus leaving open the question of the form and validity of the arbitration agreement. They would be determined by the competent authority in accordance with the domestic law of the State concerned and the rules of private international law.

The purpose of sub-paragraph (b), as the Committee explained in paragraph 32 of its report, was to safeguard the rights of the losing party. The objective could also be achieved by allowing that party to request a stay of the decision on a claim for enforcement, as proposed in the fourth amendment submitted by the delegation of the Federal Republic of Germany in document E/CONF.26/L.34.

Mr. KORAL (Turkey), referring to the decision to base the discussion on the Netherlands redraft of articles III, IV and V (E/CONF.26/L.17), observed that Governments had based their preliminary studies and comments on the draft

(Mr. Koral, Turkey)

Convention as set out in the report of the 1955 Committee. The Netherlands redraft, however, had not followed the order in which the substantive questions had been dealt with in the draft Convention, thus making it difficult for delegations to discuss both versions of each article separately.

Enforcement of a foreign arbitral award either had to be made explicitly conditional on the award having become final in the country where it had been made or the competent judge in the country of proposed enforcement had to be given full authority to control the procedure himself. The draft Convention had clearly chosen the first alternative but the Netherlands redraft was somewhat ambiguous on that issue. Moreover, the latter failed to indicate what law should govern the arbitral agreement, although its use of the words "validly agreed in writing" in the proposed new text of article III and article IV (a) would inevitably raise that very question. Nor was the issue clarified by the implication in article IV (c) of the Netherlands text that the agreement would not be governed by any law.

The Netherlands draft not only reversed the order in which the substantive questions had been dealt with in the draft Convention but also added an element of confusion to some of the articles under consideration. He therefore sincerely believed that the best course would be to consider articles III, IV and V as set out in the draft Convention and to deal with the Netherlands redraft as constituting amendments to that basic text. In that connexion, he hoped that the Committee's text would be defended before the Conference. If a member of the Committee was not available, he would gladly accept that responsibility.

The PRESIDENT observed that the Conference had decided at its previous meeting to base its discussion of articles III, IV and V on the revised text submitted by the Netherlands. However, there was nothing to prevent members who preferred the original text in the draft Convention from adducing arguments in support of their view while discussing the Netherlands draft.

Mr. MAURTUA (Peru) noted that the substantive question raised in article III (b) of the draft Convention had been transferred in the Netherlands draft to article IV (f), where it was stated in negative terms. Moreover, a new element had been introduced by the reference to "ordinary means of recourse".

(Mr. Maurtua, Peru)

With respect to the second sentence of the Netherlands text of article III, an agreement usually required the fulfilment of certain conditions which could not very well be met by a mere exchange of telegrams.

Mr. PSCOLKA (Czechoslovakia) felt that the term "agreement in writing" used in articles III and IV (a) should be included in the draft Convention but should not be given too broad a connotation. In that connexion, the definition of the words "in writing" proposed in the amendment submitted by the Federal Republic of Germany (E/CONF.26/L.19) lacked precision. Under that definition, the question might arise whether a difference had in fact been submitted to arbitration.

With regard to the provision in the Netherlands draft that an agreement in writing should be held to include an exchange of letters or telegrams, he felt that any agreement reached by exchange of telegrams should subsequently be confirmed by an exchange of letters.

If the Conference decided to delete article III of the draft Convention, he would insist that the requirement of an agreement in writing should be included in another article.

On the question of the validity of an agreement in writing, a point raised in the Netherlands draft of article IV (a), he felt that the question should be determined under the law of the State in which enforcement of the award was sought. Under the Israel amendment (E/CONF.26/L.31), a submission to arbitration would also be held valid if it was valid under the law of the State where it had been made, but that provision was unacceptable to his delegation because it might compel a court to enforce an award which was not valid under the law of its own country. He therefore preferred the wording in the Netherlands draft.

The meeting rose at 1 p.m.