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COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

SUMMARY RECORD OF FIFTH MEETING

Held at Headquarters, New York,
on Thursday, 3 March 1955, at 3.10 p.m.

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55-07230

PRESENT:

Chairman:	Mr. LOOMES	Australia
Members:	Mr. NISOT	Belgium
	Mr. TRUJILLO	Ecuador
	Mr. OSMAN	Egypt
	Mr. MEHTA	India
	Mr. DENNEMARK	Sweden
	Mr. WORTLEY	United Kingdom of Great Britain and Northern Ireland
	Mr. NIKOLAEV	Union of Soviet Socialist Republics

Observer from an inter-governmental organization:

	Mr. HAZARD	International Institute for the Unification of Private Law

Representative of a non-governmental organization:

Category A:	Mr. ROSENTHAL	International Chamber of Commerce

Secretariat:	Mr. SCHACHTER	Director, General Legal Division
	Mr. CONTINI	Secretary of the Committee

CONSIDERATION OF THE QUESTION OF THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS AND, IN PARTICULAR, OF THE PRELIMINARY DRAFT CONVENTION ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS PREPARED BY THE INTERNATIONAL CHAMBER OF COMMERCE (E/AC.2/373 and Add.1, E/AC.42/1, E/AC.42/2, E/AC.42/L.2, L.3, L.5 and L.6) (continued)

Article III (b) of the preliminary draft prepared by the International Chamber of Commerce

The CHAIRMAN drew attention to the amendments submitted by the United Kingdom and the Soviet Union (E/AC.42/L.6 and L.2).

Mr. WORTLEY (United Kingdom), introducing his amendment, explained that in the United Kingdom a party which feared an error of law on the part of the arbitrator was free, in the course of the arbitration proceedings, to apply to a court for a ruling on the particular point. The court, after giving its ruling, referred the case back to the arbitrator. That was a kind of judicial control to which the Government of the United Kingdom attached great importance.

Mr. MEHTA (India) proposed that to cover that point a proviso should be added to article III (b) stipulating that the agreement between the parties should not be inconsistent with the law of the country in which the award was relied on or made.

Mr. ROSENTHAL (International Chamber of Commerce) said that both the United Kingdom amendment and the proviso proposed by India might cause difficulties. Parties in bad faith might rely on them to evade or delay the enforcement of the award.

Mr. WORTLEY (United Kingdom) stated that section 21 of the Arbitration Act, 1950, not only did not open the way to delaying tactics but was intended to guarantee better arbitration. A court's decision on a question of law raised by a party to the dispute enlightened the arbitrator, who would thus make his award in accordance with the law of the land.

Mr. MEHTA (India) explained that a similar provision existed in Indian law and in no way prevented the arbitrator from remaining the sole judge of the facts.

Mr. DENNEMARK (Sweden) observed that what was being discussed was a peculiarity of English law which had no reference, for instance, to arbitral proceedings conducted by the International Chamber of Commerce itself. There was no reason to amend the text of the preliminary draft.

Mr. WORTLEY (United Kingdom) stated that his Government was particularly anxious that the construction of paragraph (b) should be unequivocal in the sense that the judicial control to which he had drawn attention remained unimpaired. Possibly only a drafting point was involved.

The CHAIRMAN proposed that paragraph (b) should be referred to the drafting sub-committee, which would try to work out precise terms and submit them to the Committee for a decision later.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) asked for a clearer statement of the United Kingdom and Indian proposals. He thought that the ICC text was clear enough. If the parties had not agreed on an arbitral procedure, the law of the country where the award was to be made applied. The question whether the will of the parties should prevail over the law, or vice versa, would not have arisen if the United Kingdom amendment had not substituted the word "and" for the word "or". He enquired why that change had been made.

Mr. WORTLEY (United Kingdom) explained that in proposing the amendment the United Kingdom had wished to prevent a United Kingdom arbitrator from being forced to apply some foreign law which did not allow for the judicial control provided for in English law.

Mr. DENNEMARK (Sweden) supported the point of view expressed by the Soviet Union representative. The parties concerned were free to choose a procedure differing from that ordinarily applicable under the law of the country

(Mr. Dennemark , Sweden)

in which the arbitration was to take place. In his opinion the text of the preliminary draft was an improvement over the Geneva Convention. The use of the word "and" instead of "or" in the latter Convention had given rise to certain difficulties.

Mr. OSMAN (Egypt) thought, for the purpose of determining whether the will of the parties prevailed over the law, the question to be settled was whether the term "law" meant legislative provisions intended to remedy the absence of agreement between the parties or mandatory legislative provisions. The distinction was admitted in Egypt.

India's oral proposal apparently related to mandatory provisions and would therefore be acceptable.

Mr. DENNEMARK (Sweden) said that some members of the Committee seemed to be confusing civil law and civil procedure, which, incidentally, appeared to be inseparable in English law. If the United Kingdom representative meant by the word "law" in his amendment the mandatory provisions of which the Egyptian representative had spoken, that was a special question which should more properly be dealt with in article IV.

Mr. SCHACHTER (Secretariat) observed that the difference between the Indian oral proposal and the ICC text was that under the Indian proposal the arbitral award could be contested in the country of its enforcement on the grounds that it was contrary to the law of the country in which it had been made, whereas under the ICC text enforcement could be refused only if the contesting party had first applied for an order to set aside the award to a court of the country in which it had been made.

Mr. WORTLEY (United Kingdom) pointed out that the provision of English law to which he had referred was intended to enable a mistake to be corrected without the award having to be set aside.

Mr. SCHACHTER (Secretariat) pointed out that the two texts differed with respect to the place where the award could be contested; he suggested that the scope of article IV, paragraph (e) should be enlarged.

Mr. WORTLEY (United Kingdom) proposed that the discussion should be held over until that paragraph was considered.

Mr. NISOT (Belgium) observed that paragraph (g) of the Belgian amendment to article IV (E/AC.42/L.3) and the fourth USSR amendment to article III (E/AC.42/L.2) both provided that the award must have become final, a condition which provided a guarantee for the country of enforcement. The consideration of the fourth USSR amendment should also preferably be postponed until article IV, paragraph (e) was discussed, inasmuch as the amendment was capable of being incorporated equally well in article IV and in article III.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) accepted the Belgium representative's proposal.

The CHAIRMAN proposed that the discussion of article III, paragraph (b) should be deferred until article IV, paragraph (a) was discussed.

It was so decided.

Article IV, paragraph (a)

Mr. NISOT (Belgium), introducing his amendments to article IV (E/AC.42/L.3), said it stated in affirmative language what was expressed negatively in the draft prepared by the International Chamber of Commerce. Paragraph (d) of his amendments was self-explanatory; paragraph (g) corresponded to the fourth USSR amendment (E/AC.42/L.2).

Mr. WORTLEY (United Kingdom), supported by Mr. MEHTA (India), said that putting the passage in question in a positive form would result in placing the burden of proof on the party in whose favour the arbitral award had been made. He therefore preferred the ICC text.

Mr. NISOT (Belgium) said he would not press the change of style.

Mr. MEHTA (India) said that the phrase "contrary to public policy" in article IV, paragraph (a) did not in his opinion offer sufficient safeguards to the country in which the award was to be enforced. He had therefore proposed an amendment to the clause in question (E/AC.42/L.5).

Mr. NISOT (Belgium) thought that the Indian representative should have been satisfied with the ICC text; he asked for the ICC representative's views on the point.

Mr. DENNEMARK (Sweden) recalled that the notion of public policy or public order (ordre public) had long been familiar on the continent of Europe, and he appealed to the representatives of countries following the English legal system to endeavour to change their attitude. He cited a clause from a convention between Sweden and Switzerland concerning the enforcement of judgments and arbitral awards which provided "that the recognition of the decision be not clearly incompatible with the public order". He suggested that that wording should be used in the report to explain the meaning of ordre public.

Mr. OSMAN (Egypt) observed that the terms "illegal", "void" and "not enforceable" which appeared in the Indian amendment precisely described a contract repugnant to public policy. He did not object to the insertion of those terms in article IV, paragraph (a), but he wished the notion of public policy to be likewise expressly referred to.

Moreover, the Indian amendment spoke of the subject matter of the contract to which the award related, whereas the ICC text spoke of the enforcement of the award. There might be cases in which the subject matter of the contract would be legal, while the enforcement of the award would be contrary to public policy.

Mr. WORTLEY (United Kingdom) thought that, as the Egyptian representative had suggested, the Indian amendment and the ICC text could be combined.

Mr. DENNEMARK (Sweden) said that he would prefer the ICC text, as the Indian amendment might have undesirable consequences.

Mr. ROSENTHAL (International Chamber of Commerce) agreed with the Egyptian representative regarding the difference between the two texts. The notion of public policy might be supplemented by the idea that the submission to arbitration must have been valid under the law of the country where the award was made, an idea expressed in article 1, paragraph (a) of the 1927 Convention. Under the Indian amendment one would have to enquire, not into the award, but into the subject matter of the contract - a dangerous proceeding, as the Swedish representative had pointed out.

Mr. MEHTA (India) said that any country which ratified the convention and so undertook to enforce awards made abroad would have to be satisfied that the contract to which the award related was in conformity with its law. Otherwise it would be encouraging its nationals to take unlawful advantage of an abnormal situation.

Mr. DENNEMARK (Sweden) said that a contract might be in conformity with the law of the country in which it had been concluded and not with that of the country in which enforcement of the award was sought, without however being contrary to that country's public policy. The Geneva Convention provided for the enforcement of an award relating to such a contract, whereas the system proposed by the Indian representative would make enforcement impossible in such a case. It would be wiser to keep the provisions of article 1, paragraph (e), of the Geneva Convention, under which the enforcing court could, in cases of manifest violation of public policy, enquire into the contract to which the award related.

Mr. MEHTA (India) and Mr. WORTLEY (United Kingdom) thought that neither the article referred to nor article IV, paragraph (a), of the ICC draft made it clear enough that the enforcing court had that power. A more specific clause should be drafted.

Mr. NISOT (Belgium) felt that it would be dangerous to change the clause as drafted. To empower the enforcing court to enquire into the substance would mean to deny the very purpose of a convention on the enforcement of foreign arbitral awards.

Mr. DENNEMARK (Sweden) agreed with the Belgian representative. A contract might not be in conformity with a country's law, possibly for technical reasons, while being fully compatible with the general principles of that law.

The CHAIRMAN remarked that views on the point were divided. He therefore suggested that the drafting sub-committee should prepare two different texts, reflecting those views, and that the Committee should then choose between the two.

It was so decided.

Article IV, paragraph (b)

Mr. WORMLEY (United Kingdom) asked whether the words "the law of the country" which appeared in paragraph (b) meant the law in force at the time when the award was made or the law in force at the time when the enforcement of the award was sought. The question applied not only to that particular paragraph, but to the whole convention.

The CHAIRMAN said the question might be discussed later. No other difficulty having arisen with regard to that paragraph, and no amendments having been proposed, it could therefore be referred to the drafting sub-committee

It was so decided.

The meeting rose at 4.45 p.m.