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COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

SUMMARY RECORD OF THE EIGHTH MEETING

Hold at Headquarters, New York,
on Tuesday, 8 March 1955, at 2.45 p.m.

CONTENTS

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/C.2/373 and Add.1,
E/AC.42/1 and E/AC.42/2, E/AC.42/L.2 to 16) (continued)

PRESENT:

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

Observer from an inter-governmental organization:

Mr. HAZARD	International Institute for the Unification of Private Law
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Representatives of non-governmental organizations:

Category A:

Mr. ROSENTHAL	International Chamber of Commerce
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Category B and Register:

Mr. KOPPERS	International Law Association
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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/C.2/373 and Add.1, E/AC.42/1 and E/AC.42/2, E/AC.42/L.2 to 16) (continued)

The CHAIRMAN asked the Committee to decide, for the guidance of the drafting sub-committee, whether the clause proposed by the USSR concerning the finality of the award (E/AC.42/L.2, point 4) should be included in article III or in article IV.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that its proper context was article III since the finality of an award was one of the principal conditions of recognition or enforcement.

Mr. MEHTA (India) agreed but suggested that the clause should follow the lines of article 1 (d) of the Geneva Convention of 1927.

Mr. DENNEMARK (Sweden) drew attention to his proposal (E/AC.42/L.11) and suggested that the drafting sub-committee might be asked to modify it for insertion in article III.

The CHAIRMAN suggested that the drafting sub-committee should be requested to prepare, in the light of the various proposals, a suitable clause for insertion in article III.

It was so agreed.

Mr. MEHTA (India) asked whether it was also proposed that article IV, paragraph (e), should be shifted to article III.

The CHAIRMAN observed that the question of annulment was separate from that of finality, and the paragraph would remain in article IV unless there was a proposal to the contrary.

Article VI of the preliminary draft convention prepared by the International Chamber of Commerce

Mr. NIKOLAEV (Union of Soviet Socialist Republics) referred to his proposal for the addition of an article protecting the operation of bilateral agreements (E/AC.42/L.2, point 7). He agreed with the Chairman's statement at the previous meeting that article VI dealt with the same subject and suggested that the drafting sub-committee should be asked to incorporate a clause modelled on his draft in that article.

Mr. NISO (Belgium) and Mr. TRUJILLO (Ecuador) said that the redraft of article VI should also protect multilateral agreements.

The CHAIRMAN suggested that as the Committee was agreed on the principle that existing agreements should not be affected by the proposed convention, the drafting sub-committee should be asked to prepare a suitable text.

It was so agreed.

Final clauses (articles VII to X of the preliminary draft)

Mr. MEHTA (India) noted in connexion with article VII that the 1927 Convention had restricted signature of the signatories of the 1923 Protocol. If the latter was to remain in force, some provision analogous to that contained in the 1927 Convention should be inserted in article VII.

Mr. NISOT (Belgium) thought that article VI would provide the necessary protection for the signatories of the 1923 Protocol.

Mr. DENNEMARK (Sweden) recalled his proposal for a new article I concerning the recognition of the validity of written agreements (E/AC.42/L.8). As such an article would make it unnecessary to mention the 1923 Protocol in article VII, the question mentioned by the Indian representative should remain in abeyance pending a decision on his proposal.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) saw no reason for the differentiation between Member and non-member States in the first sentence of article IX. He proposed that the first sentence should be amended to read "the present convention may be denounced by any State Party to it" (E/AC.42/L.2, paragraph 6).

Mr. SCHACHTER (Secretariat) read out the wording currently used in denunciation clauses of conventions prepared under the auspices of the United Nations.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that a text following the standard clause just read would probably be acceptable.

The CHAIRMAN suggested that the drafting sub-committee should be requested to prepare a new version of article IX in consultation with the Secretariat.

It was so agreed.

The CHAIRMAN, speaking as the representative of Australia, introduced his proposal (E/AC.42/L.7) for a new article to provide for the particular position of federal States, a considerable part of whose legislative powers was vested in their constituent units. The text followed closely the wording of a similar article prepared for inclusion in the draft covenants on human rights. The subject matter of the proposed arbitration convention was not within the jurisdiction of the central Government of federal States, and unless such an article as he proposed was included in the convention, Australia and many other federal States would probably not be able to ratify the convention.

Mr. NISOT (Belgium) agreed that the article was necessary to enable federal States to deal with certain constitutional difficulties and supported the Australian proposal. The proposed convention should be so drafted as to enable the largest possible number of commercially important countries to become Parties to it. It would be regrettable if a country like the United States of America did not become a Party to the convention.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said the Australian proposal was unacceptable. It was not a new proposal; a similar provision had been introduced on earlier occasions, carefully considered and rejected in a number of organs of the United Nations. Paragraphs 1, 2, 3(a) and 3(b) of the proposed article reproduced a text proposed by Australia, India and the United States of America for inclusion in the draft covenant on human rights at the eighth session of the Commission on Human Rights (E/2573, paragraph 246). Paragraph 3(c) was the same as the French amendment to that joint proposal (E/2573, paragraph 248) and paragraph 4 reflected a Belgian amendment to the same proposal (E/2573, paragraph 247). The Commission on Human Rights had rejected the principle of a "federal clause" and had accepted a USSR proposal, which it had incorporated at its tenth session in the draft covenant on economic, social and cultural rights and the draft covenant on civil and political rights as a separate article (E/2573, pages 65 and 71). The article specified that the provisions of the covenant extended to all parts of federal States without any limitations or exceptions.

The Committee should follow the precedent established by the Commission on Human Rights in the matter of the so-called "federal clause". The inclusion of a federal clause in the draft convention would conflict with the principles of international law because it would produce inequality between unitary States and federal States in respect of the scope of their obligations under the convention. Moreover, the inclusion of the "federal clause" in the convention on the **enforcement** of arbitral awards would render the convention ineffective.

Mr. DENNEMARK (Sweden) agreed with the Soviet Union representative. It was a well-established principle in international law that a federal State which ratified a treaty was responsible for the constituent units and that it would not ratify until satisfied that the latter would approve. He could not see how paragraph 4 of the Australian proposal (E/AC.42/L.7) would work. If an arbitral award was to be rendered in Australia, a European firm would not know whether the award was correct or not and whether it would be enforced. Moreover, there should be no difference in principle between the treatment of federal and unitary States. The Australian proposal should accordingly be rejected.

Mr. MEHTA (India) said that India was a federal State, but its law seemed to differ from that of Australia. Legislation enacted by the Central Government of India applied to all the States, and the States could not pass legislation inconsistent with it. India could therefore ratify the convention. Other federal States might well consult their constituent units before ratifying, but to include a special article in the convention itself would give rise to all manner of difficulties.

Mr. WORTLEY (United Kingdom) asked whether ratification by the Australian Parliament would be valid with regard to federal agencies, if any, and federal territories such as Canberra, if no Australian State ratified.

The CHAIRMAN, speaking as the representative of Australia, replied that the Australian Parliament's exclusive powers extended to external affairs only. It could not ratify a convention which it could not itself enforce. The situation was quite different from that in India. There were no federal agencies dealing with the matters to which the convention related and it was unlikely that many arbitral awards would be sought in Canberra.

Mr. ROSENTHAL (International Chamber of Commerce) observed that the practical difficulty for businessmen engaged in international trade was that they would not know with whom they were dealing in a federal State. They would have trouble in ascertaining whether a constituent unit had or had not ratified the convention.

The CHAIRMAN, speaking as the representative of Australia, doubted whether businessmen would encounter any great complications of that kind.

He acknowledged that the Soviet Union representative had been right in arguing that the insertion of a federal State clause would produce inequality between States wholly bound by the convention and States only partly bound. But from the practical point of view, it would be better for a State to be bound only in respect of certain of its constituent units than not to be bound at all. The question was not a new one. The Conference on the Status of Stateless Persons

(The Chairman)

had included a federal State clause in the convention it had prepared and there was a similar clause in the Convention relating to the Status of Refugees. Those precedents showed that the constitutional difficulties of certain States could be considered in international law and that federal States should be allowed to become Parties to conventions to the extent to which they were able to do so. The Committee had been asked to draft a convention which would obtain the greatest possible number of ratifications; consequently, every effort should be made to meet the difficulties of federal States.

The Australian proposal could perhaps have been drafted more concisely, but his delegation had felt it necessary to include all the proposals made during the lengthy debates on the subject which had taken place in United Nations bodies and to which the Soviet Union representative had very pertinently referred. A shorter draft might have been dangerous.

Mr. WORTLEY (United Kingdom) observed that some machinery would be required to deal with the special position of federal States. Since mainly a question of drafting seemed to be involved, the drafting sub-committee might be asked to work out a suitable text. The difficulties seemed to vary from federal State to federal State; he would like to know, for example, whether all the Soviet Republics would be bound if the Soviet Union Government signed the convention.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) replied that all the Union and Autonomous Republics of the USSR would naturally be automatically bound by such a signature. That was why he had objected to a federal State clause, which would leave it quite unclear which constituent units were bound and which were not. It would be only reasonable for a federal State to consult its constituent units before proceeding to the preparation of the convention. If the USSR was to be wholly bound by the convention, it was natural that it should expect all other Parties to be. He agreed with the remarks of the representatives of Sweden and the ICC.

He did not agree with the Belgian representative that the United States of America would be unable to sign the convention without a federal State clause,

for by virtue of article 6, paragraph 2, of the United States Constitution a treaty ratified by the Union became the supreme law of the land.

The Australian representative's contentions were not convincing. Australia might not have been able to sign the Convention relating to the Status of Refugees, but it had signed an international instrument dealing far more closely with local matters - the Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at The Hague in May 1954.

He could not agree with the suggestion that the clause in question should be referred at that stage to the drafting sub-committee. It was a substantive rather than a drafting question. It had been discussed for many years by the Commission on Human Rights and a body of opinion had already been formed, opposed to the inclusion of a federal State clause in United Nations conventions.

Mr. DENNEMARK (Sweden) also opposed reference of the clause to the drafting sub-committee.

Mr. MEHTA (India) and Mr. WORTLEY (United Kingdom) agreed that some formula should be found to cover the difficulties of federal States, and suggested that the Belgian draft article (E/AC.42/L.10/Rev.1) might be broadened to include a reference to federal States.

Mr. NISOT (Belgium) and the CHAIRMAN, speaking as the representative of Australia, had no objection to an amalgamation of the Australian and Belgian proposals.

Mr. OSMAN (Egypt), supported by Mr. WORTLEY (United Kingdom), suggested that a far easier way of meeting the difficulties of federal States, whose constitutions appeared to differ widely, would be to allow them to make reservations at the time of signature.

The CHAIRMAN, speaking as the representative of Australia, said that he had no objection to that suggestion in principle.

Mr. NISOT (Belgium) suggested that a very general clause might be drafted allowing federal States to make reservations and also allowing reservations concerning the territorial application of the convention.

Mr. MEHTA (India) remarked that all objections would be met if the reservations clause was sufficiently elastic.

Mr. DENNEMARK (Sweden) said that a vote on a matter of such substance would be unavoidable. The question should not be referred to the drafting sub-committee until the full Committee had discussed it exhaustively. He needed more time to consider the Australian proposal and the wholly new suggestion about reservations. The discussion should therefore be deferred.

It was so agreed.

The CHAIRMAN invited the Committee to consider the territorial application clause proposed by Belgium (E/AC.42/L.10/Rev.1).

Mr. NISOT (Belgium), introducing his proposal, explained that the draft convention on the enforcement of foreign arbitral awards pre-supposed a high degree of civilization on the part of the persons to whom it was to apply. It could not reasonably be imposed on peoples who, as the Charter itself recognized, needed to be guided by an advanced Power. The Belgian proposal would permit contracting States to exclude such peoples temporarily from the application of the convention and to extend its provisions to them as soon as their degree of development warranted.

Mr. OSMAN (Egypt) thought that instead of the Belgian draft, article 10 of the 1927 Convention might, with a few minor changes, serve the purpose.

Mr. DENNEMARK (Sweden) shared that view.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) argued against the Belgian proposal. There was no good reason to restrict the application of the future convention in the manner proposed. The Commission on Human Rights - a more widely representative body than the present Committee - had at its tenth session rejected a similar clause proposed by Belgium for inclusion in the draft international covenants on human rights. Furthermore, in its resolution 422 (V) the General Assembly had requested the Commission on Human Rights to include in the draft covenants a clause stating that the provisions of those instruments would extend to all dependent territories of contracting States. The colonial clause proposed by Belgium should therefore be rejected both because it would defeat the purpose of the draft convention and because it was in direct contradiction with resolution 422 (V).

Mr. NISOT (Belgium) replied that the USSR representative's remarks were irrelevant. Surely it could not be seriously suggested that an arbitration convention should be made applicable without transition to primitive peoples.

Mr. WORTLEY (United Kingdom) said that there was no need to raise side issues. From the practical point of view, it was impossible to dictate to States for which of their territories they should assume the obligations deriving from the convention, since they were not under a duty to ratify it in the first place. The important thing was that it should be clear to all to what extent each contracting State committed itself.

He proposed that the Australian and Belgian proposals should be discussed together later, when members had had time to think them over.

It was so decided.

Article III, paragraph (b) of the preliminary draft convention (resumed)

The CHAIRMAN invited consideration of the Egyptian, Indian and Swedish amendments (E/AC.42/L.13, L.15 and L.16) to article III, paragraph (b).

On the suggestion of Mr. NISOT (Belgium), Mr. CSMAN (Egypt) agreed to delete the words "by express provisions" (par des stipulations expresses) in his amendment, as being superfluous.

Mr. TRUJILLO (Ecuador) said that the word "otherwise" in the Egyptian amendment implied that the law could allow an agreement that was not in accordance with the law, which was manifestly absurd. It would be better to change the closing passage of the amendment to read: "... in so far as the said law permits."

Mr. DENNEMARK (Sweden) said that, to meet the point raised at an earlier meeting by the ICC representative, he wished his amendment (E/AC.42/L.16) to relate to article IV, not to article III. He saw very little difference between his own text and the amendments proposed by the Egyptian and Indian representatives, beyond the fact that under his own any procedure chosen by the parties that was not expressly forbidden by the law would be permitted, which was as it should be. Where there was no agreement between the parties, the law of the country of arbitration would of course prevail.

Mr. MEHTA (India) drew attention to a very important difference: the Swedish text did not provide that, where there was an agreement between the parties, the arbitral procedure would still be subject to control by the courts of the country of arbitration. He would prefer the Egyptian and Indian amendments to be referred to the drafting sub-committee for final drafting.

Mr. NISOT (Belgium) pointed out that all three amendments differed radically from the ICC text of article III, paragraph (b) in one respect. In the ICC text, agreement between the parties prevailed over the law, whereas under the amendments the law would prevail at all times.

Mr. ROSENTHAL (International Chamber of Commerce) agreed that that was so. Indeed, the basic thesis of the ICC was that, if the parties were able to agree, they should be free to select the arbitral body to which they would submit their dispute and to agree that the procedure would be governed by that body's rules. If the Committee insisted on limiting that freedom, he for his part preferred the Swedish amendment because it allowed the parties greater latitude than either the Indian or the Egyptian amendment.

Mr. MEHTA (India) pointed out that if the Swedish amendment were to be inserted in article IV, it would have to be changed from the positive to the negative form. It might then read as follows: "that the composition of the arbitral authority and the arbitral procedure were not in accordance with the agreement of the parties, to the extent and in the manner allowed by the law of the country in which arbitration took place, or, failing agreement between the parties in this respect, that the composition of the arbitral authority and the arbitral procedure were not in accordance with the law of the country in which arbitration took place." The word "forbidden", to which the Swedish representative attached some importance, would have to be eliminated.

Mr. OSMAN (Egypt) said that he had no objection to having the substance of his amendment placed in article IV instead of in article III, paragraph (b), so that the burden of proof would fall on the unsuccessful, rather than on the successful party. He pointed out, however, that articles III and IV both laid down conditions which had to be fulfilled if the award was to be enforceable. It might be more logical to group together in one article conditions applicable to the country in which the award was made, and in another those applicable to the country in which it was to be enforced. A third article might then be added, indicating whether the successful or the unsuccessful party bore the burden of proof in each particular case.

The CHAIRMAN noted that there was general agreement on the principle that, to the extent permitted by the law of the country in which arbitration took place, the parties should be free to choose the rules of procedure which were to be applicable to the arbitration.

He proposed that the drafting sub-committee should be asked to work out a suitable clause embodying that principle, in the light of the amendments submitted and the views expressed in debate.

It was so decided.

The meeting rose at 5.00 p.m.