UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/AC.42/SR.7
29 March 1955

ORIGINAL: ENGLISH

COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

SUMMARY RECORD OF THE SEVENTH MEETING

Held at Headquarters, New York,
on Monday, 7 March 1955, at 2.50 p.m.

CONTENTS

55-07236

PRESENT:

Chairman:	Mr. LOOMES	Australia
Members:	Mr. NISOT	Belgium
	Mr. GALLEGOS	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

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/C.2/373 and Add.1, E/AC.42/1, E/AC.42/2, E/AC.42/L.1 to 13) (continued)

Article IV, paragraph (a) of the preliminary draft convention (continued)

Mr. DENNEMARK (Sweden) wished to alter the wording of his revised proposal (E/AC.42/L.9/Rev.1) by placing the phrase (ordre public) after the word "law". The Committee could not go into the precise meaning of ordre public, but the expression appeared in many conventions, including that between France and the United Kingdom on the enforcement of foreign judgments.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) supported the Swedish representative's view. The inclusion of the phrase in conventions concluded by the USSR had never given rise to any difficulties.

Mr. NISOT (Belgium) supported the Swedish proposal in its French version.

Mr. MEHTA (India) proposed for the sake of clarity that the words "..., or the subject matter thereof,..." should be inserted after the word "award" and that the word "the" should be substituted for "fundamental". He could see no reason for the use of the word "fundamental".*

Mr. DENNEMARK (Sweden) explained that he had included the word "fundamental" lest the clause should be used to exaggerate difficulties in the enforcement of foreign awards. A reference to the material rules of law would not be sufficient. He agreed that the first Indian proposal stated a matter of fact, but he had never seen the words used in an international convention. He would therefore maintain his proposal as revised.

---

* Amendments formally proposed in document E/AC.42/L.12

Mr. MEHTA (India) observed that the expression he had proposed was in fact used in article IV, paragraph (b). As it was generally conceded that the competent authority had to go behind the award itself to discover whether anything contrary to public policy was involved, his amendment would simply make more explicit what was in any case tacitly understood. There seemed to be little reason to restrict the full scope of the expression "the principles of the law" by introducing the word "fundamental".

Mr. WORTLEY (United Kingdom) said that he could accept the Swedish proposal subject to the Indian amendments. The inclusion of the word "fundamental" might give rise to difficulties, as an English court could not distinguish between fundamental and other principles of the law. The addition of the phrase "or the subject matter thereof" would enable the competent authority to intervene in any case in which the award was not illegal on the face of it. The word "manifestly" was, however, not very appropriate, as it appeared also to mean "on the face of it".

Mr. DENNEMARK (Sweden) replied that on the Continent of Europe a distinction was drawn between fundamental and other principles of the law, even if it was not drawn in English law. "Manifestly" was intended to mean "obviously", not "on the face of it". The expression had been used in the convention on the enforcement of foreign judgments between Switzerland and Sweden.

Mr. WORTLEY (United Kingdom) suggested that the word "clearly" might be substituted for "manifestly". In English law, "public policy" had a narrower meaning than ordre public, so that little of substance from that point of view was added by the Indian amendment. Nevertheless, the amendment made the clause clearer, and he would accept it.

Mr. MEHTA (India) accepted the substitution of "clearly" or "manifestly".

Mr. DENNEMARK (Sweden) accepted the substitution of "clearly" or "manifestly".

Mr. OSMAN (Egypt) supported the Indian proposal for the inclusion of a reference to the subject matter of the award, as a safeguard against fraud. He had no objection to the retention of the word "fundamental"; the expressions "principles of the law" and ordre public would have the same sanction.

Mr. NISOT (Belgium) pointed out that if the award relied on principles incompatible with the fundamental principles of the law, it would be illegal, and accordingly there seemed to be little need for the clause. He had no objection to the word "fundamental" provided that the expression droit public, which occurred in article 1 (e) of the 1927 Convention was retained.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) saw no need for the Indian amendment, since the subject matter of an award could not be distinguished from the award itself.

Mr. ROSENTHAL (International Chamber of Commerce) suggested that article IV, paragraph (b), gave adequate protection in the cases which the Indian representative had in mind.

Mr. MEHTA (India) replied that article IV, paragraph (b), dealt with quite different cases. The purpose of his amendment had been simply to provide clearer guidance for the courts which were asked to enforce an award and to assure them that they were empowered to go behind the award to see whether there was anything in the subject matter that was at variance with public policy. He was still unconvinced that the word "fundamental" added anything that would not be covered by the expression "the principles of the law".

Mr. NISOT (Belgium) remarked that if the differences between English law and other legal systems were so insuperable, the Committee might perhaps draft two conventions, one for the countries which followed the English system and the other for the rest.

The CHAIRMAN, speaking as the representative of Australia, supported the Indian amendments. It was generally agreed that the competent authorities could look into the subject matter of an award, and there was no objection to so stating. In Australia no distinction was made between fundamental and other principles of the law, but only between substantive and adjective law.

Speaking as the CHAIRMAN, he called for a vote in principle on the first Indian amdnement to the Swedish proposal (E/AC.42/L.9/Rev.1) (to insert "or the subject matter thereof" after "award"), pointing out that the final decision would still be subject to the drafting sub-committee's consideration.

The first Indian amendment was adopted by 4 votes to 3.

Mr. NISOT (Belgium) pointed out that the representative of Ecuador, had he been present, would most probably have voted with the countries the legislation of which was based on the Napoleonic code.

The CHAIRMAN called for a vote on the Indian proposal that the word "fundamental" (E/AC.42/L.9/Rev.1) should be replaced by "the".

The proposal was not adopted, 3 votes being cast in favour and 3 against, with 1 abstention.

Article IV, paragraph (g) (continued)

Mr. MEHTA (India) asked that the consideration of his proposal for a new paragraph (g) (E/AC.42/L.5) should be deferred.

It was so agreed.

Article IV, paragraph (f)

Mr. DENNEMARK (Sweden) suggested that his proposal for a new paragraph (f) (E/AC.42/L.11) should be referred to the drafting sub-committee.

It was so agreed.

The CHAIRMAN proposed that the final paragraph of article IV of the preliminary draft should also be referred to the drafting sub-committee.

It was so agreed.

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

The CHAIRMAN recalled that during the earlier discussion it had been suggested that the point raised in the United Kingdom amendment to article III, (E/AC.42/L.6) might be met by the addition of a clause along the following lines to article IV: "that the composition of the arbitral authority and the arbitral procedure have not been in accordance with the law of the country in which the arbitration took place". The existing article III, paragraph (b), would then be deleted.

Mr. WORTLEY (United Kingdom) said that he would be perfectly prepared to accept some such wording. All reference to "agreement between the parties" would then be omitted, and consequently, the danger - which was a weakness of the ICC text - that agreement between the parties might oust the jurisdiction of the courts would be removed. While the consequences of the existing provision would be less serious now that certain other changes had been made in the draft convention, it was still desirable that the courts of the country of arbitration should have the power to intervene if, for example, an arbitrator should become insane or if it should be necessary to compel the attendance of witnesses at the arbitration proceedings.

Mr. MEHTA (India) agreed that the lex fori should prevail, and was therefore prepared to accept the text read out by the Chairman.

Mr. DENNEMARK (Sweden) drew attention to a passage in the ICC report (E/C.2/373, page 7) objecting to that type of provision because the awards rendered in pursuance of it would be "national awards only". If, for example, the parties agreed to be governed by the ICC rules of procedure, he felt that the award should be enforceable in other countries; he wondered whether the proposed text would bar that possibility.

Mr. WORTLEY (United Kingdom) thought that the award would be enforceable. His difficulty was that he could not reconcile himself to the idea, referred to on the same page of the report, of "an award completely independent of national laws". For that reason, and also because in the ICC text of article III, paragraph (b), agreement between the parties was in juxtaposition to the law of the country where the arbitration had taken place, he had feared that there was an intention to set up agreement of the parties as an alternative to the law, a proposition which he could not accept.

Mr. OSMAN (Egypt) suggested that the text of article III, paragraph (b), might put the law of the country first and allow the agreement by the parties to deviate from that law to the extent permitted by the law itself. He would introduce a formal amendment to that effect.*

Mr. WORTLEY (United Kingdom) supported the Egyptian representative's suggestion.

In reply to a question by Mr. SCHACHTER (Secretariat), Mr. MEHTA (India) explained that if two parties agreed to arbitrate in London in accordance with French law, French substantive law would apply and, once the award had become final, if it was to be enforced in France, the French court would undertake to enforce it and would not go behind it. The arbitral procedure, however, would be governed by English law, and the English courts would have jurisdiction over the proceedings to ensure that there was no misconduct.

The CHAIRMAN said that the Secretariat had suggested that the ICC text of article III, paragraph (b), should end with the words "agreement of the parties", the rest of the paragraph being deleted, and that in article IV, a clause should be added under which recognition and enforcement of the award could be refused if it was established that the composition of the arbitral authority and the arbitral procedure had been inconsistent with the law of the country where the arbitration had taken place.

---

* Subsequently circulated as document E/AC.42/L.13.

Mr. ROSENTHAL (International Chamber of Commerce) remarked that, while he would rather keep the ICC text of article III, paragraph (b) intact, he preferred the Secretariat suggestion to that of the Egyptian representative, because the former placed the burden of proof on the unsuccessful, and the latter on the successful party to the arbitration. From the businessman's point of view, it was important not to make it easy for the unsuccessful party to evade his obligations, after he had freely agreed to arbitration.

Mr. MEHTA (India) agreed with the ICC representative. He accordingly suggested that a clause reflecting the substance of the Egyptian amendment and placing the onus of proof on the unsuccessful party should be incorporated in article IV, and that article III, paragraph (b), should be replaced by a provision stating that the award must have become final in the country where arbitration had taken place.

Mr. WORTLEY (United Kingdom) said that he too appreciated the ICC representative's point; he therefore supported the Indian suggestion.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) recalled that the question of the finality of the award had been dealt with in point 4 of the USSR amendment (E/AC.42/L.2). Consequently, he welcomed the suggestion for an analogous provision just made by the Indian representative but requested that further discussion of the Egyptian amendment should be deferred until that amendment had been circulated in writing.

The CHAIRMAN noted that there seemed to be no objection to a reference to the finality of the award being included in article III. He therefore proposed that the drafting sub-committee should be asked to draw up a suitable clause.

It was so decided.

It was further decided to postpone discussion of article III, paragraph (b), until the Egyptian amendment had been circulated in writing.

Mr. WORTLEY (United Kingdom) recalled that he had proposed the insertion in article IV of a clause reading, "that the award has been made in pursuance of a submission to arbitration not valid under the law applicable thereto". Other amendments to the draft convention might make that clause unnecessary, but he wished to keep it in abeyance until he was satisfied that that was so.

Article V of the preliminary draft convention

The CHAIRMAN said that article V of the ICC draft was a concise version of article 4 of the 1927 Convention (E/C.2/373/Add.1).

Mr. DENNEMARK (Sweden) said that article V, paragraph (b), placed an undue burden on the party claiming recognition or enforcement of an award; that party should not have to supply evidence of the existence of the written arbitration agreement if the other party did not dispute the fact of such an agreement. Under the Swedish Act of 1929 the successful part had only to supply the original award, or a duly authenticated copy thereof, and evidence showing that the time limit for appeals had expired.

Mr. MEHTA (India) was of the opinion that the written agreement should be part of the evidence to be produced by the party applying for enforcement. Under English and Indian law all the documents relating to the award had to be filed, even in the case of an internal award.

The CHAIRMAN thought that the object of article V, paragraph (b), was to require the successful party to show that the award was capable of recognition or enforcement.

He drew attention to the USSR amendment to article III (E/AC.42/L.2, point 4) which would, if read in conjunction with article V, paragraph (b), require evidence showing that the time limit for appeals had expired.

Mr. DENNEMARK (Sweden) suggested that further discussion of article V, paragraph (b), should be deferred pending a decision on the final form of article III.

It was so agreed.

The CHAIRMAN suggested that perhaps article V should also reproduce, as an additional provision, the final paragraph of article 4 of the 1927 Convention which referred to translations of relevant documents. He invited comments on his suggestion.

Mr. MEHTA (India), Mr. OSMAN (Egypt) and Mr. WORTLEY (United Kingdom) favoured the reproduction of the paragraph in the new convention.

The Chairman's suggestion was agreed to.

Mr. NISOT (Belgium) observed that some countries had more than one official language.

Mr. WORTLEY (United Kingdom) suggested that the paragraph should refer to translation into "an" official language instead of "the" official language.

The CHAIRMAN asked for a decision in principle, for the guidance of the drafting sub-committee, on the inclusion in article IV of a new sub-clause, as proposed by the Indian representative (E/AC.42/L.5, point 3), concerning vague and indefinite awards.

The proposal was adopted in principle by 4 votes to 3, with 1 abstention.

The CHAIRMAN invited discussion of the Swedish proposal concerning the recognition by the contracting States of the validity of a written agreement (E/AC.42/L.8, point 2).

Mr. DENNEMARK (Sweden) said that it would be illogical if the Committee accepted the principle of a convention without accepting the principle of the international recognition of the validity of written arbitration agreements. Economic and Social Council resolution 520 (XVII) instructed the Committee to study the ICC draft "in the light of all the relevant considerations" and to submit such proposals as it might deem appropriate. Certainly paragraph 1 of the Geneva Protocol of 1923, on which his proposal was based, was a relevant consideration.

Mr. NISOT (Belgium) said that under the Council's resolution the considerations had to be relevant to the ICC draft, which did not mention the principle enunciated in the Swedish proposal. The latter was therefore beyond the Committee's terms of reference and if it was considered the Belgian delegation would not be able to participate in the discussion.

Mr. WORTLEY (United Kingdom) saw no reason why the Swedish proposal should not be debated. The 1927 Convention had a clause expressly referring to the 1923 Protocol and there could be no question about the relevance of the 1927 Convention to the Committee's work. He wished to emphasize, however, that the 1923 Protocol and the 1927 Convention would continue in force unless expressly denounced.

The CHAIRMAN ruled that, as the Swedish proposal was indirectly related to the 1927 Convention, it was not out of order.

Mr. DENNEMARK (Sweden) said that he had no desire to make ratification more difficult. However, he was concerned about the possibility of one of the parties regretting the matter having been subjected to arbitration and desiring that the courts should settle the dispute.

Mr. MEHTA (India) explained that if there was a valid agreement, judicial proceedings could be stayed pending the making of the award, but the Swedish proposal would go further and prevent the institution of proceedings.

(Mr. Mehta, India)

That was not a proposition acceptable to common law countries, nor was the proposed provision necessary since the danger envisaged by the Swedish representative would not arise.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that his country was not a Party either to the 1923 Protocol or to the 1927 Convention. It would not be able to accept any provision that would affect the operation of the numerous bilateral agreements to which it was a Party, and his delegation had proposed an article to that effect (E/AC.42/L.2/Corr.1).

The CHAIRMAN suggested that the USSR representative's proposal could be considered in connexion with article VI of the ICC draft.

Mr. ROSENTHAL (International Chamber of Commerce) said that his organization had thought that recognition of the validity of written agreements was implicit in the ICC draft. However, he could cable ICC headquarters for comment on the Swedish proposal.

The CHAIRMAN suggested that further discussion on the particular question should be deferred for a few days.

It was so agreed.

The CHAIRMAN suggested that the proposal in point 4 of document E/AC.42/L.8 should be considered after a decision had been taken on point 2.

Mr. DENNEMARK (Sweden) explained that under Italian law an agreement to arbitrate between two Italian citizens, both domiciled in Italy, could not be considered international.

Mr. WORTLEY (United Kingdom) said that the Committee's report should explain in general terms the need for the proposal in point 4.

The meeting rose at 5 p.m.