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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE THIRD MEETING

Held at Headquarters, New York,
on Wednesday, 21 May 1958, at 2.50 p.m.

CONTENTS

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/2822 and Add.1 to 6; E/CONF.26/2, 26/3 and Add.1, 26/4, 26/7) (continued)

GENERAL DEBATE (continued)

Mr. URABE (Japan) said that Japan, whose economy and prosperity were greatly affected by the manner in which international trade flowed, was always ready to assist in removing obstacles to such trade and thus to facilitate business intercourse. That was why his Government was a party to the Protocol on Arbitration Clauses of 1923 and to the Convention on the Execution of Foreign Arbitral Awards of 1927. It had also included clauses regarding the enforcement of arbitral awards in several of the bilateral agreements which it had concluded. Its paramount objective had always been to guarantee justice by a procedure both more expeditious and less costly than litigation.

The Japanese Government considered that the draft before the Conference was a progressive document and a substantial improvement over the Geneva Convention of 1927. The Ad Hoc Committee deserved high praise for having produced what was a sound compromise between idealism and realism. Some countries doubtless regarded the draft as not sufficiently far-reaching and would have preferred an instrument more along the lines proposed by the International Chamber of Commerce. His Government thought, however, that the Chamber, in its zeal for perfection, had failed to pay sufficient heed to the existing state of the domestic laws of many countries. While the Convention to be concluded should be sufficiently progressive to satisfy the requirements of international trade, it must not be so revolutionary as to discourage potential signatories.

Notwithstanding its general support of the draft, his delegation believed that the text required certain improvements. For example, care should be taken to accord due judicial protection to the party against whom an arbitral award was being enforced; but it was equally important not to delay the enforcement procedure by placing undue emphasis on the protection, to the detriment of the claimant.

Another matter requiring careful consideration was the relationship between the new Convention and the Geneva Agreements of 1923 and 1927. On that point, the Japanese Government had come to much the same conclusion as the Netherlands Government (E/CONF.26/3/Add.1). The fact that the validity of the Geneva Agreements would remain unaffected by the new Convention must, in the final

analysis, benefit the party seeking enforcement and thus help to bring about the desired results.

Lastly, his delegation wished to emphasize that the new Convention should permit of no reservations except those explicitly authorized by the text itself. If reservations were accepted indiscriminately, particularly with regard to articles III and IV, they would most likely defeat the very purpose which the Convention was designed to achieve.

Mr. HOLLEAUX (France) said that, as the Geneva Agreements of 1923 and 1927 were now somewhat outdated, the French Government warmly welcomed the work accomplished by the International Chamber of Commerce and by the 1955 Ad Hoc Committee in paving the way for a new instrument of international arbitration. In considering the Committee's draft, however, the Conference should always remember that that draft had never been designed to serve as anything more than a basis of discussion.

The first preoccupation of the Conference, in its efforts to render international arbitration as universally effective as possible, should be to simplify - to the greatest extent consistent with the rights of the parties - the formalities attendant upon the issue of the enforcement order (exequatur). That would require a careful, even critical, approach to draft articles III, IV and V.

Secondly, international arbitration could not be truly effective unless there was greater emphasis on the principle of freedom of contract. That did not apply solely in the context of the arbitration agreement, but to the arbitration operation as a whole. The will of the parties could not be regarded as the absolute criterion, prevailing over the law in all circumstances, but all due importance should be attached to it. In that connexion, the French delegation welcomed the pertinent comments of the Government of Switzerland (E/2822).

A further question which would inevitably have to be considered, was that of the applicable law. The Geneva Agreements had deliberately evaded that problem, but in view of subsequent developments, it would now have to be faced. The draft recognized that fact, but the relevant provisions were open to the criticism that they approached the problem only indirectly and tended to attach an exaggerated importance to the place where the award was rendered. Practice had shown that the place of pronouncement was often an insignificant factor, and the prominence given to it in the draft tended to obscure the strictly private nature of the arbitration operation.

(Mr. Holleaux, France)

Lastly, he could not share the anxieties of the Italian representative that courts might prove reluctant to attribute to the will of the parties the role that it deserved. Judicial records, at least in the countries with a classical law tradition, showed that there was nothing to fear on that score.

Mr. HERMENT (Belgium) said that, as a signatory of the Agreements of 1923 and 1927, the Belgian Government hoped fervently that the Conference would prove successful. However, constructive results could be attained only if the delegations present recognized the dangers of trying to do away with the traditional powers of the courts and refrained from pressing proposals designed to kill private international law. The Conference should adopt a prudent approach, never attempting more than was genuinely possible.

Mr. RENOUF (Australia) said that Australia, as a federal country, would have found it very difficult to subscribe to the original preliminary draft discussed by the 1955 Ad Hoc Committee. The views of the various States of the Commonwealth had been sharply divided on that document and, had it remained in its original form, their general consent might never have been obtained. His delegation was therefore deeply grateful to the bodies responsible for the Conference's preparatory work, which had overcome the major difficulties of the problem of application to federal States. In its present form, the draft Convention was generally acceptable to the Australian States and the Commonwealth Government.

His delegation would propose minor modifications to the various provisions at the appropriate time.

Mr. HAIGHT (International Chamber of Commerce) said that his organization was grateful to all who had made it possible to hold the Conference. For nearly forty years the ICC had urged the adoption of measures that would facilitate the arbitration of international commercial disputes and the international enforcement of awards. It had, from the beginning, recognized that one of the barriers to the development of trade had been the complexity and variety of national legal systems and it had therefore endeavoured to aid businessmen in their efforts to find means of settling their disputes quickly, simply and privately.

After the adoption of the 1923 Protocol, in which the principle of giving effect to the will of the parties with respect to arbitration had been recognized, a major step forward had been taken with the adoption of the 1927 Convention,

(Mr. Haight, ICC)

which had had its origin in an ICC resolution. That Convention had, however, failed to meet the requirement of international business that the settlement of disputes should be achieved by arbitral methods with a minimum reference to national legal systems. It had stipulated that in order to be enforceable an award must conform not only to the will of the parties but also to the law of the country in which it was made. That had created a grave problem for international business, as arbitrators were frequently chosen not because they happened to live in a country whose law the parties were willing to accept but because they were the most qualified arbitrators for the disputes in question.

Great changes had occurred in international trade since 1927. Not only had the volume of such trade greatly increased, but business could now be transacted all over the world in much the same way as had previously been possible only within the borders of one country. At the same time, the emergence of new nations in less developed parts of the world had greatly increased the complexities of trade.

Not infrequently nationals of one country were unwilling to accept the law of the country of the other party. In such cases they settled upon some neutral place of arbitration. In so doing, they did not think in terms of litigation. All they wished to do was to dispose of their differences privately, quickly and inexpensively. For that purpose they often had recourse to the services of the ICC.

The difficulty arose when one of the parties to an international arbitration refused to comply with the arbitral award, because that party claimed that some procedural formality in the country where the award had been made had been disregarded.

It was difficult to see why the procedural requirements of the country where the arbitration took place should have any relevance. That country was not asked to make any State facility available to the parties. All that happened was that the parties visited one or more experts, who, after hearing the various facts of the case and the arguments of the parties, decided in favour of one of them.

If the court, in another country, that was asked to enforce the award was satisfied that that award had been made in accordance with fundamental principles of justice and the agreement of the parties, what reason was there for trying to ascertain whether the procedural requirements of the country where the arbitration took place had been followed? The case for invoking the law of that country seemed

(Mr. Haight, ICC)

to be based on concern lest an arbitration proceeding was conducted without judicial supervision. But it was difficult to see why there should be any more supervision of that aspect of a contract than any other. The parties had not asked for supervision, the arbitrator had not sought it, and the court which was asked to enforce the award could decide for itself whether there was any aspect of the arbitration proceeding which would justify denial of recourse to its enforcement facilities.

The insistence on judicial supervision of an award rendered in another country was perhaps due to a dislike for any procedure which, while satisfactory to the parties and consistent with the basic standards of fair play, ousted some foreign court of jurisdiction. Such a view was a fallacy. A United States court had held:

> "... an agreement to arbitrate... has no effect upon the jurisdiction of any court. Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement, or that peculiar offspring of legal ingenuity known as the covenant not to sue. Each disposes of issues without litigation. One no more than the other ousts the courts of jurisdiction."

Essentially, what the ICC was seeking was acceptance of the principle of freedom of contract and of the right of businessmen to arbitrate their differences and enforce awards in accordance with their own contractual commitments. In their view, one of the best ways to promote international trade was to interfere with contractual liberty as little as possible. Court proceedings could be long and costly, it might be very difficult for the parties to change positions taken in public litigation, and deep conflicts often developed when parties faced each other in a public arena.

Common sense and the laws of most countries required parties to fulfil their contracts, and where they had agreed to arbitrate disputes it was only just that the courts of all countries should give effect to such agreement.

It was the task of the Conference to encourage recourse to the friendly arbitration of disputes and to simplify the procedures for the enforcement of awards. On behalf of the international business community, the ICC urged the Conference to adopt a simple and flexible system for the enforcement of arbitral awards which would (1) cover the widest possible area of private international

(Mr. Haight, ICC)

disputes; (2) avoid the difficulties inherent in any reference to the municipal law of the country in which the award was made; (3) provide for a simple and swift enforcement of arbitral awards on the basis of evidence that the award was the final decision made by a competent arbitrator in accordance with the agreement of the parties; and (4) limit the grounds on which the enforcement of such an award could be refused to serious procedural irregularities, incompatibility with the public policy of the country of enforcement, or proof that the award had been annulled.

The meeting rose at 3.40 p.m.