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SUMMARY RECORD OF THE TWENTY-THIRD MEETING

Held at Headquarters, New York,
on Monday, 9 June 1958, at 3.30 p.m.

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President: Mr. SCHURMANN Netherlands

Executive Secretary: Mr. SCHACHTER

CONSIDERATION OF OTHER POSSIBLE MEASURES FOR INCREASING THE EFFECTIVENESS OF
ARBITRATION IN THE SETTLEMENT OF PRIVATE LAW DISPUTES (E/CONF.26/L.60) (concluded)

The PRESIDENT said that following the discussions on the draft recommendation drawn up by the Committee on Other Measures (E/CONF.26/L.60, Annex), the Secretariat had prepared two footnotes. The first footnote, relating to sub-paragraph 1 of the first operative paragraph of the draft, read as follows: "For example, the Economic Commission for Europe and the Inter-American Council of Jurists". The second footnote, referring to sub-paragraph 5 of that same paragraph, read: "For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists".

Mr. BAKHTOV (Union of Soviet Socialist Republics) observed that although it was easy to obtain information on the work of the Economic Commission for Europe, which was a subsidiary organ of the United Nations, it was much more difficult to find out about the work being done by the other bodies mentioned in the proposed footnotes. Since the USSR delegation possessed no information on that work, it would be unable to vote for the two footnotes.

The PRESIDENT put to the vote the text of the two footnotes proposed by the Secretariat.

The two footnotes were adopted by 26 votes to 4, with 7 abstentions.

Sir Claude COREA (Ceylon) said that he would have no objection to mention being made of all the organizations which had made some contribution in the sphere of arbitration. He did not, however, see any valid reason for distinguishing between them and for singling out some of them for special mention in the recommendation. Since his delegation was unable to agree to such a procedure, it had abstained from voting on the two footnotes.

Sub-paragraph 1 of the first operative paragraph of the draft recommendation (E/CONF.26/L.60, Annex) was adopted by 32 votes to none, with 3 abstentions.

Mr. MALOLES (Philippines), commenting on sub-paragraph 2 of the first operative paragraph of the draft recommendation (E/CONF.26/L.60, Annex), pointed out that the Committee on Other Measures had been instructed to submit suggestions.

(Mr. Maloles, Philippines)

That idea was not correctly conveyed by the words "It concurs" at the beginning of the sub-paragraph, and the expression did not seem well-chosen. Moreover, it would doubtless be better to keep only the second part of sub-paragraph 2.

Sir Claude COREA (Ceylon) thought that sub-paragraph 2 would lose much of its importance if the beginning were omitted. The objection of the Philippine representative might be met by replacing the words "It concurs" by "It recognizes".

Mr. MALOLES (Philippines) said that he was satisfied with the words "It recognizes".

The PRESIDENT suggested that the words "It concurs" at the beginning of sub-paragraph 2 of the first operative paragraph should be replaced by "It recognizes".

It was so decided.

Mr. HERMENT (Belgium) noted that co-ordination and the need to avoid duplication of effort were mentioned in several sub-paragraphs of the first operative paragraph (E/CONF.26/L.60, Annex). In order to avoid repetition, a special clause might be included on that subject. He proposed the deletion of the passage beginning with the words, "due regard being given ..." in sub-paragraph 2.

Mr. PEARSON (United Kingdom) recalled that the question had already been considered by the Committee on Other Measures, which had decided that it was desirable to mention, whenever possible, the need to avoid duplication of effort and to ensure co-ordination.

The Belgian amendment was rejected by 7 votes to 3, with 19 abstentions.

Mr. ILLUECA (Panama) thought, with respect to sub-paragraph 4, that there was a certain contradiction in inviting the regional commissions and other bodies to convene study groups and seminars and, at the same time, in recommending that they should assure economy of effort and resources. He proposed, therefore, the deletion of the phrase beginning "but regards it...".

The Panamanian amendment was rejected by 14 votes to 11, with 8 abstentions.

The PRESIDENT, referring to sub-paragraph 5, explained that, in accordance with the Conference's decision, the phrase in brackets would be included in a footnote.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) asked what was meant by the phrase "such other institutions as may be established in the future", in the second operative paragraph.

The PRESIDENT replied that it referred to the arbitration facilities the establishment of which was to be encouraged under the terms of sub-paragraph 2 of the first operative paragraph.

Mr. MALOLES (Philippines) wished to know by whom the "steps" referred to in the third operative paragraph were to be taken.

The PRESIDENT explained that they were to be taken by the United Nations, which was mentioned in the preceding paragraph.

The draft recommendation as a whole (E/CONF.26/60, Annex) was adopted by 35 votes to none, with one abstention.

ADOPTION AND SIGNATURE OF THE FINAL ACT AND CONVENTION (E/CONF.26/8, 9; E/CONF.26/L.28, L.49, L.58, L.61)

Mr. RAMOS (Argentina), speaking as Chairman of the Drafting Committee, said that in several instances the Committee had found itself discussing questions of substance which had not come within its terms of reference. That had been the case, in particular, with respect to the phrase "on the basis of reciprocity" in article I, paragraph 3, and the phrase "a competent authority" in article V, paragraph 1 (e) and at the beginning of article VI.

On two occasions the Committee had felt that the Conference's decision had not been entirely justified. Since its terms of reference had not, however, authorized it to decide matters of substance, it had preferred to refer the questions to the Conference itself. The first point related to the word "voluntarily" in article I, paragraph 2, which seemed redundant and ought to be deleted. The second concerned the insertion of the phrase "or was prevented from presenting it" in article V, sub-paragraph 1 (b); that would be a useful addition to the present text and would also be consistent with the legislation of most countries.

It had occurred to the Committee that some States might interpret article I, paragraph 3, as authorizing them to apply the Convention only to the recognition and enforcement of awards and not to the recognition of the arbitration agreements referred to in article II. The Conference, however, had decided not to permit States to make any reservations to article II. Since article I, paragraph 3, might be interpreted in a manner inconsistent with that decision, the Conference should consider whether, in those circumstances, it wished to retain the present wording of paragraph 3 or not.

The Committee had thought that a general clause prohibiting reservations should be incorporated in the Final Act rather than in the Convention itself.

Title of the Convention

Mr. MATTEUCCI (Italy) observed that the title referred to "foreign" arbitral awards although the word "foreign" did not appear in the body of the Convention. He thought that it would be sufficient to speak simply of the recognition and enforcement of "arbitral awards".

Mr. POINTET (Switzerland) agreed with the representative of Italy that the title of the Convention should be in keeping with its text. He would have preferred the phrase "arbitral awards in private law".

Mr. WORTLEY (United Kingdom) did not like the term "in private law" since the Convention might apply to public arbitral bodies.

Mr. POINTET (Switzerland) said he would not ask the Conference to take a decision on the formula he had suggested but, as the word "foreign" might be misleading, it would be better to omit it, as proposed by Italy.

Mr. DAPHTARY (India) proposed that, as article I, paragraphs 1 and 2, had defined the awards to which the Convention applied, the title should read "Convention on the Recognition and Enforcement of Certain Arbitral Awards".

Mr. KANAKARATNE (Ceylon) felt that the wording proposed by the representative of India was somewhat vague. He would prefer that the title should not be modified.

Mr. URQUIA (El Salvador) thought that the title should speak of "some" arbitral awards, rather than of arbitral awards in general.

Mr. BAKHTOV (Union of Soviet Socialist Republics) thought it best to keep the title that had been approved by the Drafting Committee. The Convention itself defined the types of arbitral awards to which it applied, so there was no risk of confusion.

The PRESIDENT put to the vote the Italian proposal to omit the word "foreign" from the title.

The Italian proposal was rejected by 26 votes to 7, with 2 abstentions.

The PRESIDENT remarked that, in view of the vote on the Italian proposal, it was unnecessary to put the Indian proposal to the vote.

Article I

At the request of Mr. COHN (Israel), the PRESIDENT asked the Conference to decide whether or not it wished to reconsider the vote it had taken on the word "voluntarily".

The Conference decided, by 22 votes to 5, with 8 abstentions, to reconsider the vote it had taken on the word "voluntarily".

Mr. COHN (Israel) proposed the deletion of the word "voluntarily" in article I, paragraph 2.

The proposal of Israel was adopted by 24 votes to 2, with 7 abstentions.

Mr. MALOLES (Philippines) thought that "persons, whether natural or artificial" would have been better than "persons, whether physical or legal" in paragraph 1. However, he would not make a formal proposal to that effect unless the Conference was strongly of the same opinion.

Mr. WORTLEY (United Kingdom) considered that article I, paragraph 3 would have to be modified if the interpretation referred to by the Chairman of the Drafting Committee was to be avoided. The provisions of article II must be binding on States; otherwise, a party to a dispute might have recourse to the courts, even if it had signed an arbitral agreement. In order to avoid that difficulty, all that was necessary was to change the position of the word "only"

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in the English text. The French text would read "déclarer qu'il appliquera la Convention à la reconnaissance et à l'exécution des seules sentences rendues...". In that way one could be sure that every State recognized the validity of arbitral agreements, and the principle of reciprocity would also be safeguarded.

Mr. HERMENT (Belgium) agreed with the representative of Norway. There was no need for the words "on the basis of reciprocity" in article I, paragraph 3.

Belgium would find it impossible to accede to the Convention if the present text of article II was maintained. That article did not answer the purpose of the Convention, which was the recognition of awards after arbitration.

Mr. KESTLER FARNES (Guatemala) thought that the British amendment, while appearing to be a simple drafting change, actually introduced a delicate matter of substance. By inserting a clause on the validity of arbitral agreements, the Conference had exceeded the terms of reference given to it by the Economic and Social Council.

In reply to a question by Mr. MAURTUA (Peru), Mr. RAMOS (Argentina), speaking as Chairman of the Drafting Committee, said that that Committee had felt that the general clause on reservations should appear in the Final Act rather than in the body of the Convention.

Mr. MAURTUA (Peru) thought that this solution was likely to create difficulty since some States might accede to the Convention without approving the Final Act.

Mr. PSCOLKA (Czechoslovakia) supported the United Kingdom proposal, but opposed the elimination of the words "on the basis of reciprocity".

Mr. SANDERS (Netherlands) said that the Netherlands delegation was inclined to approve the text proposed for article I, paragraph 3 (E/CONF.26/L.61) which provided for only one reservation. It realized, however, that the new text which prevented States from limiting the application of the Convention to commercial disputes, would cause great difficulties to countries like Belgium. The Netherlands delegation did not want to reopen the discussion on reservations but simply suggested the reintroduction of that reservation which had never caused any difficulties in practice and appeared in the text of the Special

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Committee, which the Governments had had plenty of time to consider. In this way the Conference would make it possible for some countries which played a very active role in arbitration to accede to the Convention.

Mr. BAKHTOV (Union of Soviet Socialist Republics) supported the United Kingdom proposal on article I, paragraph 3.

Mr. RAMOS (Argentina) agreed with the representative of Belgium that article II might be dropped from the Convention. The Conference had first voted in this sense by a large majority and had reversed its vote by a much smaller majority. It seemed logical, consequently, to permit States to make reservations concerning the provisions of article II and there was no reason to believe that States would automatically make use of that privilege.

He suggested that article I, paragraph 3 be left as it stood. The British amendment raised a fundamental issue and, if the Conference wished to make a change on those lines, it should do so by the proper procedure and not by a drafting amendment.

Mr. KANAKARATNE (Ceylon) did not think that the United Kingdom representative had intended to make a substantive amendment and he supported the United Kingdom proposal on article I, paragraph 3.

He was in favour of retaining the words "on the basis of reciprocity" for the reasons given by the representative of Czechoslovakia. Although it had submitted an amendment to the contrary (E/CONF.26/L.14), the delegation of Ceylon was willing to accept a clause limiting the scope of the Convention to commercial disputes if that clause would allow Western European countries with separate systems of commercial and civil law to sign the Convention.

Mr. ROGNLIEN (Norway) observed that if the Conference adopted the Netherlands proposal for the reinsertion of the commercial clause, it would have to discuss the possibility of accepting other reservations such as the one referred to by the representative of Italy.

Mr. WORTLEY (United Kingdom) said he still believed that it was essential, in order to avoid any misunderstanding, to clarify the meaning of article I, paragraph 3. Countries should not be permitted to sign the Convention under the impression that they could then avoid its application by refusing to recognize the validity of arbitral agreements. Under the new text of article VII, paragraph 2, the present Convention was to supersede that of 1927. In those circumstances, it

/...

(Mr. Wortley, United Kingdom)

would be better to have no convention at all than to have one greatly inferior to the 1927 instrument. But the Conference would run that very risk if it accepted the interpretation of the Argentine representative and permitted States to disregard the provision relating to the validity of arbitral agreements.

Mr. RAMOS (Argentina) pointed out to the Belgian representative that, contrary to the opinion of the United Kingdom representative, he believed that article I, paragraph 3, did not permit States to evade the provisions of article II.

Mr. MATTEUCCI (Italy) supported that viewpoint, recalling that at the time when the Conference had adopted article I, paragraph 3, article II had not yet existed. The Conference's intention had been to restrict the application of the Convention, not to permit States to evade the provisions of article II.

The PRESIDENT put to the vote the United Kingdom amendment to article I, paragraph 3.

The United Kingdom amendment was adopted by 22 votes to 8, with 6 abstentions.

Mr. URABE (Japan) asked how many countries would benefit from the Netherlands proposal.

Mr. SANDERS (Netherlands) replied that Belgium and, in all probability, France were among those countries. Moreover, he did not see how that reservation could have adverse effects. It had already been included in the 1955 text.

Mr. KORAL (Turkey) thought that it was not correct to regard the commercial clause as a reservation. In addition to France and Belgium, the Netherlands proposal would benefit Turkey, in which commercial law was distinct from civil law. The reciprocity clause and the commercial clause had always gone together, and such was the case in the draft prepared by the Special Committee (E/2704/Corr.1, annex).

Mr. MALOLES (Philippines), speaking on a point of order, asked whether the Netherlands motion to reconsider a decision already taken by the Conference was admissible.

The PRESIDENT put to the vote the Netherlands proposal for reconsideration of the decision whereby the Conference had rejected the commercial clause.

The proposal was adopted by 16 votes to 6, with 12 abstentions.

Mr. KORAL (Turkey) pointed out that the commercial clause was very different from any reservation clause because it referred to the very basis of the legal system. If the Conference accepted the commercial clause, the Convention could obtain world-wide acceptance and thus mark a great advance over previous conventions.

Mr. ROGNLIEN (Norway) said that he was uncertain about the scope of the clause. He wished to know whether, in the event of its adoption, the Convention could apply to disputes not arising out of a contract.

The meeting was suspended at 5.30 p.m. and resumed at 5.50 p.m.

Mr. BAKHTOV (Union of Soviet Socialist Republics) proposed that, in view of the difficulties apparently caused by the Netherlands amendment, the Conference should return to the text drafted by the Special Committee (E/2704/Corr.1, annex, article I, paragraph 2, second sentence), which had evoked no objection during the first discussion on article I in plenary session.

Mr. WORTLEY (United Kingdom) supported the Soviet proposal, particularly since the instructions which the plenipotentiaries had received from their Governments were based on the Special Committee's draft. The Conference should thus be able to reach a rapid decision.

Mr. SANDERS (Netherlands) also supported the Soviet representative's suggestion, but proposed that the word "disputes" in the English text should be replaced by "differences" and the word "contracts" by "legal relationships" in order to bring the provision into line with the other articles approved by the Drafting Committee.

Mr. WORTLEY (United Kingdom) supported that proposal.

Mr. BAKHTOV (Union of Soviet Socialist Republics) pointed out that the first change concerned only the English text. The second, however, affected all the versions of article I. For his part, he would prefer the Special Committee's text as it stood.

Mr. COHN (Israel) noted that in article I, paragraph 3, as recast by the Drafting Committee, the word "contracting" between the words "any" and "State" had been deleted. In the interests of uniformity, the same change should be made in the Special Committee's text which was to be adopted. Moreover, the word "contracts" should be replaced by "legal relationships", as suggested by the Netherlands representative.

Finally, referring to the remarks of the Indian representative, he thought that the expression "on the basis of reciprocity" would apply only to the first sentence of paragraph 3.

The PRESIDENT put to the vote the proposal to replace the word "contracts" by "legal relationships".

The proposal was adopted by 19 votes to 5, with 6 abstentions.

Mr. WORTLEY (United Kingdom) proposed that the words "whether contractual or not" be inserted after "legal relationships".

The proposal was adopted by 26 votes to none, with 5 abstentions.

After an exchange of views by Mr. WORTLEY (United Kingdom), Mr. DAPHETARY (India) and Mr. RAMOS (Argentina) on how the sentence relating to the commercial clause should be linked to the one constituting article I, paragraph 3, in the text approved by the Drafting Committee, Mr. URQUIA (El Salvador) proposed that the new sentence should begin with the words: "It may also declare that it will apply the Convention only ..."

Mr. ROGNLIEN (Norway) thought that the words "on the basis of reciprocity" should also apply to the second sentence. For that reason, he found the Salvadorian amendment unacceptable.

Mr. RAMOS (Argentina) and Mr. HERMENT (Belgium) said that the concept of reciprocity could not apply to the commercial clause. Countries which did not distinguish between commercial and other obligations obviously could not introduce that distinction into their domestic law for the sake of reciprocity.

Mr. GEORGIEV (Bulgaria) remarked that reciprocity did nevertheless exist between countries with the same legal system.

The PRESIDENT put to the vote the sentence relating to the commercial clause, in the form proposed by the Salvadorian representative, as amended by the Netherlands and the United Kingdom.

The sentence relating to the commercial clause, as amended, was adopted by 24 votes to 2, with 6 abstentions.

The PRESIDENT put article I as a whole to the vote.

Article I was adopted by 28 votes to 1, with 1 abstention.

Mr. BULOW (Federal Republic of Germany) regretted that the reservation mentioned in document E/CONF.26/L.49, paragraph 3 (b) had been rejected by the Conference, as his delegation would find itself in a difficult position. The reservation would have applied only in cases where, in accordance with the will of the parties, an arbitral award had been made abroad under German procedural law. In the past, such an award would have been regarded as domestic but under the Convention, as adopted, the German Government and courts would be obliged to recognize and enforce such awards as foreign arbitral awards. While article 1044 of the German Code of Civil Procedure provided that both domestic and foreign arbitral awards were to be dealt with in the same way in the matter of costs, there was a distinction between the two types of awards as far as annulment proceedings were concerned. A foreign award could be set aside only by a foreign court.

Consequently, inasmuch as the Convention did not require any Contracting State to amend its domestic law and contained no provision that could be so interpreted, awards made abroad under German procedural law would be regarded as foreign for the purposes of recognition and enforcement, but as domestic for the purposes of possible annulment. German courts would continue to hear applications for the annulment of such awards and would not deny their protection to parties which had expressly submitted to German procedural law. In his delegation's view, the interests of all those concerned would then be safeguarded.

Mr. MATTEUCCI (Italy) said that the scope of application of the Convention, as defined by the Conference also raised difficulties for his

(Mr. Matteucci, Italy)

delegation. Under Italian law, foreign awards could not be enforced in Italian territory when the parties were either Italian nationals or persons normally resident in Italy. As his Government would be unable to make a reservation in that respect, it might have difficulties in acceding to the Convention. The situation would have been avoided if the various States had been equally ready to compromise and if some of them had not sought to impose their legal notions on the Conference. As matters stood, the Italian Government's decision whether or not to accede to the Convention would be influenced by legal, political and psychological considerations.

Article II

Mr. KORAL (Turkey) proposed that the words "of its own motion" in paragraph 3 should be deleted. A court should not have the power to impose arbitral procedure when the parties to the arbitration agreement both wished to submit the dispute to the ordinary courts.

The PRESIDENT recalled that the Conference had already settled the matter.

Mr. URABE (Japan) moved reconsideration, under rule 21 of the rules of procedure.

Mr. MATTEUCCI (Italy) saw no need to reopen the question. Paragraph 3 merely stated two possibilities: that the Court could act either of its own motion or at the request of one of the parties. In a State whose domestic law did not recognize the first possibility, the courts would obviously have only the second open to them.

The PRESIDENT put to the vote the Japanese representative's motion for reconsideration of the inclusion of the words "of its own motion".

The Japanese representative's motion was rejected by 10 votes to 9, with 8 abstentions.

There being no further objections, article II, as approved by the Drafting Committee, was adopted.

Article III

Mr. HERMENT (Belgium) proposed that the words "more onerous conditions" in the second sentence should be replaced by "more onerous rules of procedure".

The PRESIDENT put the proposal to the vote.

The result of the vote was 12 in favour and 8 against, with 5 abstentions.

The proposal was not adopted, having failed to obtain the required two-thirds majority.

Mr. RAMOS (Argentina) asked for separate votes on the two sentences composing article III.

The first sentence of article III was adopted by 25 votes to none.

The second sentence of article III was adopted by 25 votes to 3, with 4 abstentions.

Article III as a whole was adopted.

Article IV

Mr. URQUIA (El Salvador) requested that, in the Spanish text of article IV, the words "junto con la demanda" should be replaced by the words "junto con la solicitud", as "solicitud" was the term used for an application for recognition and was closer to the English text.

The PRESIDENT stated that it was merely a matter of translation.

Mr. RAMOS (Argentina) saw no objection to the use of the word "solicitud", although he did not think the change was essential.

Article IV was adopted.

Article V

Mr. BAKHTOV (Union of Soviet Socialist Republics) felt that paragraph 1 (a) was not sufficiently clear. The phrase "the law applicable" should be defined. He therefore proposed that paragraph 1 (a) should be redrafted to read: "the arbitration agreement or the arbitration clause is not valid under the national law to which the parties have subjected their agreement or, failing any indication thereon, under the law of the country where the award was made; or".

Mr. ROGNLIEN (Norway) thought it would be simpler to delete any reference to the applicable law. He therefore proposed that paragraph 1 (a) should read: "the arbitration agreement or the arbitration clause is not valid; or".

The PRESIDENT put to the vote the Norwegian representative's proposal. The Norwegian representative's proposal was rejected by 17 votes to 3, with 6 abstentions.

The PRESIDENT then put to the vote the USSR representative's proposal. Paragraph 1 (a), as proposed by the USSR representative, was adopted by 14 votes to 7, with 9 abstentions.

Mr. SANDERS (Netherlands) proposed that paragraph 1 (b) should be redrafted to read: "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or".

The Netherlands representative's proposal was adopted by 18 votes to 5, with 9 abstentions.

Mr. BAKHTOV (Union of Soviet Socialist Republics) proposed that paragraph 1 (e) should be amended to read: "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Mr. HERMENT (Belgium) asked what was the meaning of the word "binding" in that context.

Mr. RAMOS (Argentina) and Mr. URQUIA (El Salvador) stated that the word "binding" replaced all such terms commonly used in the various legal systems as "res judicata", "final", "enforceable", etc.

Mr. KESTLER FARNES (Guatemala) said that, while accepting sub-paragraph 1 (e), his delegation would interpret the word "binding" as meaning "final and enforceable".

The PRESIDENT put to the vote the USSR representative's proposal. Paragraph 1 (e), as proposed by the USSR representative, was adopted by 20 votes to 3, with 8 abstentions.

The PRESIDENT stated that the Conference would continue its consideration of article V at the following meeting. He also inquired whether representatives had any objections regarding the text of the Final Act and, in particular, its paragraph 14 concerning the prohibition of reservations. If there were no objections, the Secretariat would immediately prepare the final text.

It was so agreed.

The meeting rose at 7.15 p.m.