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COMMITTEE ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

First Session

SUMMARY RECORD OF THE FOURTH MEETING

Held at Headquarters, New York,
on Thursday, 3 March 1955, at 10.50 a.m.

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55-07227

PRESENT:

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

Observer for 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/C.2/373 and Add.1; E/AC.42/1 and E/AC.42/2; E/AC.42/L.2 and E/AC.42/L.6) (continued)

Mr. DENNEMARK (Sweden) said the proposed convention should stipulate that recognition of the validity of an agreement to submit to arbitration disputes arising out of a contract would preclude either party to the contract from suing on the contract. Recognition of the validity of the agreement to arbitrate would deprive the courts of jurisdiction.

Mr. WORTLEY (United Kingdom) said that the point was important. A provision should be included in the draft convention which would explain what exactly was meant by submission to arbitration.

Mr. MEHTA (India) pointed out that the situation to which the Swedish representative referred would not debar a party to a contract from suing the other party. The existence of an arbitration agreement would, however, compel the court to stay its proceedings pending the completion of the process of arbitration.

Mr. NISOT (Belgium) suggested that the Swedish representative should submit a proposal in writing as it was difficult to discuss such matters in the abstract.

Mr. DENNEMARK (Sweden) accepted the suggestion.

The CHAIRMAN invited the Committee to consider article III (a) of the draft convention. The United Kingdom had suggested that in the Committee's report it should be made clear that the expression "written agreement" in article III (a) was understood to include common form submissions (contrat type). A formal amendment to the article (E/AC.42/L.2) had been submitted by the delegation of the Soviet Union.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that his delegation proposed the insertion of the words "or an arbitral clause in the contract" after "written agreement" in sub-paragraph (a). The purpose of the amendment was to clarify the wording of the sub-paragraph in order to avoid the words "written agreement" being interpreted as referring only to special agreements (compromis) and as not including arbitration clauses in contracts.

Mr. DENNEMARK (Sweden) felt that the Soviet representative's point could be met by the deletion of the word "written" from the text of the sub-paragraph. In some countries a written agreement to submit to arbitration was not valid unless signed by both parties.

Mr. NISOT (Belgium) considered it essential to retain the word "written".

Mr. MEHTA (India) agreed. An agreement to submit to arbitration might be in the form of an exchange of letters or telegrams, but it had to be in writing to be enforceable in the courts of India. The word "written" should therefore be retained.

The CHAIRMAN, speaking as the representative of Australia, suggested the expression "agreement in writing".

Mr. DENNEMARK (Sweden) felt that it should be made clear that the expression "written agreement" or "agreement in writing" did not require the actual signatures of both parties in order to be valid.

Mr. WORTLEY (United Kingdom) supported the interpretation given by the Indian and Swedish representatives. He was also prepared to support the Soviet amendment.

Mr. TRUJILLO (Ecuador) preferred the text of sub-paragraph (a) as proposed by the International Chamber of Commerce. In most Latin American

(Mr. Trujillo, Ecuador)

countries an agreement to submit to arbitration involved two stages: (1) the expression by both parties of their willingness to submit to arbitration; (2) the actual submission to arbitration (compromis), in the form of a document signed by the two parties and notarially certified setting out the complaint of the aggrieved party and the reply thereto. He was therefore unable to support the Soviet amendment.

Mr. WORTLEY (United Kingdom) suggested that a suitable reservation clause might be included in the draft convention which would permit each contracting State to give its own definition of the expression "written agreement".

Mr. NISOT (Belgium) felt that the interpretation of the expression could be left to the courts.

Mr. DENNEMARK (Sweden) urged that no provision should be inserted which could be interpreted as making the signature of both parties to an arbitration agreement mandatory.

Mr. MEHTA (India) said that in any case a provision requiring the signature of the parties would be difficult to observe in normal international business dealings. A buyer usually sent his order in writing. The seller made known his terms, which normally included an arbitration clause. The buyer then accepted the terms by telegram.

Mr. WORTLEY (United Kingdom) agreed. Countries which insisted upon the signature of both parties should be permitted to specify that requirement in a reservation clause. With regard to the Belgian representative's suggestion that the interpretation of a written agreement should be left to the courts, he felt that the point should be settled before litigation was started.

Whether or not a compromis, as understood in most Latin American countries, was an essential element in an arbitration agreement, should be specified in the draft convention.

Mr. NISOT (Belgium) had no objection to either the ICC draft or the USSR amendment: both included the word "written".

Mr. MEHTA (India) was prepared to accept the USSR amendment but thought it might be improved if it were amended to read: "that there exists between the parties named in the award a written agreement, contained in a document or other assurance, stipulating settlement of their differences by means of arbitration". The expression "written agreement" would then clearly have the broad meaning which the conditions of international trade necessitated.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that his delegation could accept the Indian amendment to the USSR amendment. So far as the question of "written agreement" was concerned, Soviet foreign trading practice was similar to that described by other speakers, but there had to be something in writing, if only in the form of correspondence, stipulating recourse to arbitration.

It was agreed that the revised USSR amendment to article III (a) would be referred to the drafting sub-committee.

Mr. TRUJILLO (Ecuador), supported by Mr. NISOT (Belgium) said that it would be inadvisable to attempt to include in the convention a definition of the expression "written agreement" that would suit all jurisdictions. He suggested that the drafting sub-committee should prepare a reservation clause that would permit each contracting State to interpret the term according to its own usage.

It was so agreed.

The CHAIRMAN drew attention to the United Kingdom suggestion made in a working paper, to the effect that the Committee's report should explain that the expression "written agreement" was understood "to include common form submissions (contrat type)".

Mr. NISOT (Belgium) agreed, but thought that it would be better to say "not to exclude" instead of "to include".

Mr. WORTLEY (United Kingdom) said that he had been instructed to seek a report that was as comprehensive as possible. The views of all delegations on all aspects of the proposed convention would be very valuable and should find a place in the report.

Mr. DENNEMARK (Sweden) observed that article III (a) was intended to replace article 1 (a) of the 1927 Convention. The reference to validity under the law applicable to the submission to arbitration had thus been abandoned in favour of clause stipulating the mere existence of a written agreement. He thought that the report should explain the significance of the change, and make clear under which law the written agreement would have to be valid.

Mr. NISOT (Belgium) said that that point could not be clarified unless the Committee wished to draw up a virtual code of international private law. He had participated in the drafting of the 1927 Convention and he could assure the representative of Sweden that the phrase "valid under the law applicable thereto" was no more specific than the ICC wording.

Mr. DENNEMARK (Sweden) was prepared to let the matter rest, but observed that the 1927 Convention indicated at least that the applicable law was the law governing the submission, whatever that might be in the particular case. There was no such guidance in the ICC draft.

Mr. SCHACHTER (Secretariat) described the intention of the ICC draftsmen by reading out the ICC's comment on the point at issue (E/C.2/373, p.10).

Mr. WORTLEY (United Kingdom) and Mr. NISOT (Belgium) saw no essential difference. The agreement would have to be made under some national law and that would be the applicable law. That was obvious and did not have to be specified.

Mr. MEHTA (India) quoted the relevant section of the United Kingdom Arbitration Act, 1950, which was essentially the same as the Indian Act. Both followed the principle of lex loci. He thought that a precise provision along those lines should be included in the proposed convention, which could specify a written agreement which was valid according to the law where the agreement was made or where the acceptance had taken place.

Mr. WORTLEY (United Kingdom) said that the Indian representative's point seemed to be that in the absence of a formal submission, the lex loci contractus of the business transaction would govern, but the law of the submission would apply where there was a formal submission. For that purpose the retention of article 1 (a) of the 1927 Convention would be useful.

Mr. NISOT (Belgium) observed that in spite of the vagueness of article 1 (a) it had not given rise to difficulties in application. He wondered whether the ICC representative would not agree that its retention would not defeat the purposes of the proposed convention.

Mr. ROSENTHAL (International Chamber of Commerce) agreed that the 1927 text was sufficiently elastic. It would be impossible to be more specific. Each case would have to be considered by the competent court in the light of the particular circumstances.

The CHAIRMAN invited the Committee to consider article III (b) of the ICC draft and the United Kingdom amendment to it (E/AC.42/L.6).

Mr. WORTLEY (United Kingdom) said that, unlike the 1927 Convention, the ICC draft permitted the parties, by agreement, to stipulate their own rules of procedure, and that it seemed that it was only in the absence of such agreement that the law of the country where arbitration took place would govern the arbitration procedure. Even allowing for the fact that, in the first case, the ICC no doubt expected its own or similarly recognized rules of procedure to be used, he failed to see how arbitration could function properly in the absence of some national machinery to enforce the observance of those rules.

(Mr. Wortley, United Kingdom)

His principal objection to the provision in question, however - and therefore to the whole draft convention - was that it might well involve ousting the jurisdiction of the courts of the country in which the arbitration took place. The idea that international awards could be "completely independent of national laws" as the ICC stated in its comments (E/C.2/373, page 7) necessarily implied the idea of an arbitration independent of national laws and therefore free from control by national courts. Presumably, if the parties chose their own procedure and the arbitrator complied with it, the courts of the United Kingdom would not have the powers which they now had to exercise intervention and control. To become effective, the clause would not only require an amendment of the Arbitration Act, 1950, to divest the courts of their present powers; it would be unacceptable in principle, as the exclusion of the courts from those functions might lead to injustice and abuse.

Consequently, in order to ensure that, whether or not the parties agreed on the arbitral procedure, that procedure would be in accordance with the law of the country in which the arbitration took place, the United Kingdom had submitted alternative texts (E/AC.42/L.6) to replace article III (b).

Mr. LENNEMARK (Sweden) found the first alternative proposed by the United Kingdom unacceptable. The parties might agree to apply the law of one country, the arbitration procedure might take place in a second country, and the award be made in a third, and the question would then arise which of the three separate systems of law should prevail. While the second alternative was better, it carried the implication, as a condition, that the parties must have agreed on the manner of arbitration, whereas in many cases there was no such stipulation but merely a general clause in a contract stating that disputes would be referred to arbitration.

He wondered what would happen under the ICC draft if the parties failed to agree on the locus of arbitration.

Mr. ROSENTHAL (International Chamber of Commerce) replied that presumably in that case arbitration could not take place.

(Mr. Rosenthal, International Chamber of Commerce)

He failed to see, however, why the ICC text should be unacceptable to the United Kingdom. Where the parties agreed in advance on the manner of arbitration, they generally selected a known arbitration tribunal. That tribunal would have its own rules of procedure, which would undoubtedly be in accordance with the law of the country in which the arbitration would take place. Those rules were generally clearer and easier for businessmen to understand than statute law. Where no such tribunal was mentioned in the original agreement, each of the parties would appoint one arbitrator, and the two arbitrators would choose an umpire. In such a case there would be no previously established rules of procedure, and the ICC text therefore provided that the arbitration would be governed by the laws of the country in which it took place.

Mr. WORTLEY (United Kingdom) said that, since the ICC apparently did not wish to remove arbitral procedure from the sphere of application of national law, it should not object to its text being amended in such a manner as to ensure that even arbitral procedure agreed upon by the parties was in accordance with that law. To eliminate the possibility of a conflict of national laws, to which the Swedish representative had drawn attention, would be a matter of drafting; the important thing was to establish that national law would prevail over any agreement between the parties which might be contrary to that law.

Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that he was prepared to accept the ICC text of article III (b) as it stood. That text should be read in conjunction with article III (a), which prescribed a written agreement. Such an agreement would no doubt stipulate the place and manner of arbitration. Article III (b) dealt merely with the subsequent action, and clearly indicated that there were two possibilities. Either the parties had selected their tribunal and rules of procedure in advance, in which case there was no problem; or else they had not, in which case the ICC text provided that the law of the country in which the arbitration took place would apply. He therefore failed to understand the United Kingdom representative's objection. If, for example, a Soviet foreign trade organization and a British firm agreed that any disputes arising between them should be settled in Moscow by the

(Mr. Nikolaev, USSR)

Foreign Trade Arbitral Commission, those disputes would naturally be dealt with in accordance with the rules of procedure of the Moscow Foreign Trade Arbitral Commission, and not under United Kingdom law.

Mr. NISOT (Belgium) agreed with the USSR representative. He too found the ICC text entirely acceptable.

Mr. DENNEMARK (Sweden) also agreed with the USSR representative, but pointed out that article III (a) did not necessarily mean that the manner and place of arbitration must have been stipulated in advance. Many written agreements merely provided that disputes would be referred to arbitration, without further details, and such agreements would be perfectly valid under that article.

Mr. MEHTA (India) said that an arbitral award made in pursuance of a written agreement entered into by the parties freely and in full awareness of the possible consequences should be enforced. So long as it was found that the will of the parties had been given effect, a court would not go behind the award to see if the country's laws had been observed. He was therefore able to accept the ICC text.

The CHAIRMAN, speaking as the repsesentative of Australia, said that the question was one of the utmost importance; the acceptance of the draft convention depended on it. The draft convention should not make it possible for the parties to enter into an agreement specifying rules of procedure that were contrary to the law of the country of arbitration. He agreed with the United Kingdom representative that the wording of article III (b) as it stood concealed that danger, and hoped that it would be redrafted to state that, in case of conflict, the law of the country of arbitration would prevail.

The meeting rose at 1 p.m.