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OFFICIAL REPORT

of the

UNITED STATES DELEGATION

to the

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

United Nations Headquarters, New York

May 20 - June 10, 1958

Submitted to the SECRETARY OF STATE

W.T.M. Beale
Chairman of the Delegation

August 15, 1958

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I. INTRODUCTION AND SUMMARY

The United Nations Conference on International Commercial Arbitration was held at United Nations Headquarters, New York, from May 20 to June 10, 1958.

The movement for a conference of governments on commercial arbitration originated with the International Chamber of Commerce, a non-governmental organization having consultative status with the Economic and Social Council. In 1953 the ICC prepared a draft convention on the enforcement of international arbitral awards as a replacement for the most effective existing multilateral convention on this subject, the Convention on the Execution of Foreign Arbitral Awards signed at Geneva September 26, 1927. The ICC proposals embodied advanced concepts of arbitration law. In particular, the ICC postulated the idea of a supranational law of arbitration which would free arbitral awards entirely from control by national laws. Under this concept the award would be subject only to the will of the parties as expressed in the agreement to arbitrate and to the canons or standards for enforcement provided by multilateral convention.

In 1954 ECOSOC established an ad hoc committee of experts to study the question of the enforcement of foreign arbitral awards, as presented by the ICC. The United States voted in favor of establishment of the committee of experts as a gesture of support for arbitration generally but it did not seek representation on the committee. The ad hoc committee, which was composed of representatives of Australia, Belgium, Ecuador, Egypt, India, Sweden, The Union of Soviet Socialist Republics, and The United Kingdom, met in March 1955. After detailed consideration of the ICC proposals, it formulated a draft convention of its own, which differed in material respects from that sponsored by the ICC and represented much less of a departure from the substantive principles of the Geneva Convention.

ECOSOC thereupon sought the views of governments as to the desirability of calling an international conference to conclude a convention along the lines of the draft prepared by the committee of experts. When a reasonable number of governments expressed approval, ECOSOC, by Resolution 604(XXI), adopted May 3, 1956, formally decided to summon a conference to consider such a convention, and, also, "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes". The United States abstained from voting on this resolution.

The Conference devoted the bulk of its time and attention to the framing of a convention on the recognition and enforcement of foreign arbitral awards. Although based upon the ECOSOC draft, the new convention goes substantially beyond it in a number of particulars. The most important is the addition of provisions for recognition of the validity of contracts or agreements for submission of existing and future disputes to arbitration.

The Conference also gave brief and rather sketchy consideration to other possible measures for the more effective use of arbitration in the settlement of private law disputes. The only tangible result of this

phase of its work was adoptation of a formal resolution recommending post-Conference study of such measures through appropriate organs of the United Nations and other qualified bodies.

In accordance with its instructions, the United States Delegation participated in the Conference in a limited way. It did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle and emphasizing the value of the pragmatic as opposed to the multilateral convention approach to progress in arbitration. It was most active in the discussion of other measures and was largely responsible for adoption of the resolution favoring post-Conference study of such measures.

As a result of its participation in the Conference and its review and consideration of the work of the Conference, the Delegation recommends, for reasons set forth in detail in this Report, that: (1) the United States not sign or adhere to the convention, and (2) that it give serious study to the possibility of taking the initiative with respect to implementing the resolution on other measures.

The reasons for the Delegation's recommendation with respect to the convention may be summarized as follows:

1. The convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.

2. The convention, if accepted on a basis that assures such advantages, will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.

3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.

4. The convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.

II. AGENDA

The agenda was adopted unanimously on the opening day of the Conference. It consisted of the following items:

1. Election of the president and other officers.
2. Adoption of the agenda.
3. Adoption of the rules of procedure.
4. Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
5. Consideration of other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.
6. Adoption and signature of the Final Act and Convention.

III. PARTICIPATION

45 countries were represented at the Conference by official delegations:

Albania
Argentina
Australia
Austria
Belgium
Brazil
Bulgaria
Byelorussian SSR
Ceylon
Colombia
Costa Rica
Czechoslovakia
Ecuador
El Salvador
Finland
France
Federal Republic of Germany
Guatemala
Holy See
India
Iran
Israel
Italy
Japan
Jordan
Laos
Monaco
Netherlands
Norway
Pakistan
Panama
Peru
Philippines
Poland
Sweden
Switzerland
Thailand
Tunisia
Turkey
Ukrainian SSR
Union of Soviet Socialist Republics
United Arab Republic
United Kingdom
United States
Yugoslavia

Three countries were represented by observer delegations:

Federation of Malaya
Indonesia
Mexico

Three inter-governmental organizations were represented:

Hague Conference on Private International Law
International Institute for the Unification of Private Law
Organization of American States

Ten non-governmental organizations were represented:

American Foreign Insurance Association
Chamber of Commerce of the United States
Consejo Inter-Americano de Comercio y Produccion
International Association of Legal Science
International Bar Association
International Chamber of Commerce
International Federation of Women Lawyers
International Law Association
Junior Chamber International
Societe de Legislation Comparee

IV. UNITED STATES DELEGATION

The members of the United States Delegation were:

United States Representative & Chairman of the Delegation:

W.T.M. Beale, Jr., Deputy Assistant Secretary of State for Economic Affairs.

Alternate United States Representative:

Edmund F. Becker, Deputy Director, Office of Trade Promotion, Department of Commerce.

Advisers:

John J. Czyzak, Office of Assistant Legal Adviser for Economic Affairs, Department of State.

Seymour M. Finger, United States Mission to the United Nations.

Charles H. Sullivan, Trade Agreements and Treaties Division, Department of State.

V. ORGANIZATION OF THE CONFERENCE

A. Officers:

On the opening day, C.W.A. Schurmann, Netherlands Ambassador to the United Nations, was unanimously elected President of the Conference. Three Vice Presidents also were unanimously elected at the same time. They were: C. K. Daphtary of India, Constantino Ramos of Argentina, and Jaroslav Pscolka of Czechoslovakia.

Oscar Schachter, Director of the General Legal Division of the Legal Office of the United Nations, acted as Executive Secretary of the Conference, Vladimir Fabry of the General Legal Division as Deputy Executive Secretary and Paolo Contini as Senior Legal Officer.

B. Committees:

The Conference elected to do the greater part of its work in plenary sessions rather than divide it among committees. This decision recognized that almost every delegation was interested in several of the topics that might appropriately be assigned to committees and that extensive use of the committee method of procedure accordingly would work a hardship on the smaller delegations. It was agreed, however, that where discussion of particular provisions of the draft convention in plenary meetings revealed serious divergences of view, ad hoc working parties would be formed to seek to resolve the difficulties and recommend possible solutions. Accordingly, six committees and working parties were established by the Conference:

1. A Credentials Committee was set up pursuant to Rule 2 of the Rules of Procedure, as amended pursuant to a United States proposal and adopted at the second plenary meeting. The members of this Committee were: Australia (chairman), Belgium, Ceylon, Colombia, Italy, Peru, Tunisia, USSR, and United States. Mr. Finger served as the United States representative on this committee.

2. A Committee on Other Measures was set up to consider matters coming within the scope of Agenda Item 5 and make appropriate recommendations to the Conference. Membership on this Committee was open, and representatives of the following 21 delegations attended the Committee's sessions; Argentina (chairman), Australia, Belgium, Bulgaria, Ceylon, Federal Republic of Germany, France, Italy, Japan (vice chairman), Laos, Netherlands, Norway, Panama, Philippines, Sweden, Switzerland, Ukrainian SSR, USSR, United Kingdom, United States and Yugoslavia. Mr. Becker acted as United States representative on this Committee and was its Rapporteur.

3. Working Party I was formed on an ad hoc basis to consider problems involving Article I, paragraph 1, on the scope of the convention, particularly the definition of awards to be covered by the convention and the nature and extent of reservations, and to make recommendations to the Conference. Members of the Working Party were: Colombia, Czechoslovakia, France, Federal Republic of Germany, India (chairman), Israel, Italy, Turkey, USSR, and United Kingdom. In accordance with the general tenor of its instructions the United States Delegation did not seek representation on this Working Party.

4. Working Party II was set up to make recommendations with respect to inclusion in the convention of provisions for recognition of the validity of arbitration agreements. Members of the Working Party were: Belgium, Federal Republic of Germany, Poland, Sweden, Turkey, USSR, and United Kingdom. The United States Delegation did not seek representation on this Working Party.

5. Working Party III was set up to resolve various differences with respect to Articles III, IV and V of the draft convention, dealing with the conditions and standards applicable to the enforcement of foreign arbitral awards, and to recommend a new or revised version of these Articles to the Conference. Members of this Working Party were: Czechoslovakia, El Salvador, France, Federal Republic of Germany, Guatemala, Italy, Japan, Netherlands, Pakistan, Sweden, Switzerland, Tunisia, USSR, and United Kingdom. The United States Delegation did not seek representation on this Working Party.

6. A Drafting Committee was established to put the text of the convention in final form. Members of the Committee were: Argentina (chairman), Czechoslovakia, France, Israel, Netherlands, USSR, and United Kingdom. The United States Delegation did not seek representation on this Committee.

VI. WORK OF THE COMMITTEES

The Credentials Committee held a single meeting, on May 9, and approved the credentials of 44 delegations. It found that the credentials of the delegation of Albania had not been issued by the head of state or foreign minister, as required by Rule 2 of the Rules of Procedure. While expressing the belief that under the circumstances the Albanian credentials

might nevertheless be accepted, the Committee in effect referred the matter to the Conference for final decision.

The work of the other Committees and Working Parties is dealt with in connection with discussion of the work of the Conference as a whole.

VII. WORK OF THE CONFERENCE

The work of the Conference is summarized in two documents:

1. Convention on the recognition and enforcement of foreign arbitral awards.

2. Final Act, which incorporates the resolution of the Committee on Other Measures recommending further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

Copies of the Convention and Final Act are attached.

A. Analysis of Provisions of Convention:

Article I: This Article defines the scope of the convention. Paragraph 1 in effect constitutes a definition of "foreign" awards for convention purposes. It provides that the convention applies to: (a) awards handed down in a foreign country, and (b) awards "not considered as domestic" in the country of enforcement. The first category of awards represents a simple application of the territorial principle. If an award is rendered outside the territories of the country of enforcement, it is a foreign award and thus subject to the convention. The second category of awards represents an adjustment to the complex situation of a number of countries in Western Europe which do not accept the territorial principle but apply other criteria such as the nationality of the parties to the arbitration or the nationality of the procedural law under which the arbitration was conducted.

Paragraph 1 also provides that the awards covered by the convention shall arise out of "differences between persons". Hence, the convention is not limited to commercial arbitration in the strict sense of the term but extends to civil arbitrations on all kinds. The reference to "persons, whether physical or legal" is intended to assure that awards arising out of arbitrations to which corporations are parties shall be covered by the convention. The wording of this provision includes public as well as private corporations. The intention of the Conference was in fact to cover arbitrations to which public corporations had become parties in their capacity as entities having rights and duties under private law.

Paragraph 2 is in the nature of a clarification to assure that the convention covers awards arising out of arbitrations conducted by permanent arbitral bodies as well as to arbitrations conducted in each case by an *ad hoc* tribunal. This provision is intended to take due account of institutional arbitration which is commonly used in countries with planned economies. It is definitely understood, however, that the convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties are obliged to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently would not come within the purview of the convention.

Paragraph 3 contains two optional reservations permitting countries to limit the scope of the commitments assumed under paragraph 1. The first reservation establishes the rule of reciprocity as to awards deemed enforceable under the convention. Contracting countries may opt, on signature, ratification or accession, to apply the convention only to awards rendered in the territory of another contracting country. Unless a country avails itself of this reservation, it is obligated to apply the convention to awards rendered in any foreign country, whether a contracting party or not. Although there was some tendency to regard this reservation as an undesirable narrowing of the scope of the convention, it was recognized that many countries were opposed to the concept of universality in paragraph 1 and would not sign or ratify the convention except on a basis of reciprocity.

The second reservation allows contracting countries to limit their commitment to awards in cases of disputes arising out of legal relationships considered as commercial under their national law. The intent was to accommodate a number of countries having separate civil and commercial codes and permitting arbitration only with respect to differences cognizable under the commercial code. The phrase "legal relationships whether contractual or not" is employed to assure coverage not only for disputes arising under commercial contracts but for other disputes, such as damage claims, which might come within the scope of the commercial code.

Article II: The purpose of this Article is to round out the convention by providing an appropriate treaty rule with respect to agreements or contracts to arbitrate. The inclusion of such a rule was occasioned partly by a desire for logical completeness and partly by the need to define the relationship of the new convention to the Geneva Convention. The latter is closely interlocked with the Protocol on Arbitration Clauses signed at Geneva September 24, 1923. The Geneva instruments together form a unit, and if the Convention were to be replaced, it would be necessary either to define the relationship between the new convention and the Protocol or to provide for replacement of the latter instrument also.

Paragraph 1 provides that contracting countries shall recognize the validity of written agreements to submit differences to arbitration. The provision is so worded that both agreements to submit existing disputes (submissions) and agreements to submit disputes which may arise in the future (compromissory clauses) are covered. The requirement that the agreement concern a subject matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting the title to real property are not arbitrable. Paragraph 2 is in effect a clarification of the requirement in paragraph 1 that the arbitration agreement must be in writing.

Paragraph 3 makes provision for the enforcement of the rule established by paragraph 1. If a party to an arbitration agreement fails to abide by the agreement and attempts to bring the dispute into court, the court will refuse to entertain an action relating to the dispute and instead will direct the parties to proceed to arbitration. Such a provision is common

to the statutory law of most countries, including the United States. It may be noted, however, that two other remedies usually provided by modern arbitration statute, the stay of motion pending arbitration and the court appointment of arbitrators, are not included in the convention.

Article III: This Article sets out the basic rule on the enforcement of awards. It establishes two major requirements: (a) that the procedural law to be observed shall be that of the country in which enforcement is sought, and (b) that the conditions to be applied to determine whether awards are entitled to enforcement shall be those, and only those, laid down in Articles IV, V and VI of the convention.

In addition, at the instance of the United Kingdom, a provision was added for essentially national treatment in the matter of the administrative conditions and the fees and charges applicable to foreign awards.

Article IV: Articles IV, V and VI in effect constitute a unit. Taken together they set forth in full the conditions governing the granting or refusal of enforcement to a foreign award. Article IV, however, has the particular purpose of stipulating the affirmative actions that must be taken by the successful party in an arbitration in order to obtain enforcement in a foreign country. Significantly, these actions are reduced to a minimum. All the successful party need do is to submit to the court proper copies of the award and the underlying agreement to arbitrate. Unless the losing party is able to challenge the award under Article V, paragraph 1, or unless the court finds the award incompatible with Article V, paragraph 2, the successful party in effect is entitled to enforcement simply by applying for it.

Article V: This Article sets forth the sole grounds on which a losing party may challenge a foreign award. Paragraph 1 provides certain grounds for denial of enforcement with respect to which the burden of proof, a difficult and often decisive matter in court actions, is placed on the losing party. Paragraph 2 provides two grounds: public policy and non-arbitrable character of the dispute, which may be invoked by the court of the country of enforcement on its own motion.

Paragraph 1(a) establishes grounds for denial of enforcement deriving from the underlying contracts. Enforcement may be refused if the parties to the agreement were not legally competent, because of minority or mental incapacity or the like, or if the agreement is not a valid one. In the latter case, however, the convention does not establish a fixed rule, such as either lex loci contractus or the law of the place of arbitration, as to the law by which the validity of the agreement is to be determined. On the contrary, it permits free choice of law by the parties.

Paragraph 1(b) and (c) set forth grounds for denial of enforcement intended mainly to safeguard the interests of the losing party.

Paragraph 1(d) establishes the ICC concept of the "autonomy of the will of the parties" as to choice of arbitration procedures. The parties are free to choose the procedural law which is to govern their arbitration. It thus would not preclude the conduct of an arbitration under procedures at variance with or even illegal under the law of the place of arbitration

and enforcement could be denied only if the procedures actually used constituted a breach of the agreement to arbitrate. Whether they constituted a breach of the local procedural law well might be immaterial. This provision should be read, however, together with paragraph 1(a), requiring that the agreement be valid under its proper law.

Paragraph 1(e) involves the "double exequatur" or dual judicial review of the award. This sub-paragraph in effect works to maintain the system of dual control, for it permits denial of enforcement if the award has not become "binding" on the parties. To give an award binding force presumably would entail scrutiny and confirmation of the award by the courts of the country where the arbitration was held.

The term "binding" was used here because of the difficulty in determining the legal import of the terms "final" and "operative" used in the corresponding provision of the ECOSOC draft convention. The former term, however, seems to be open to much the same objection as the latter.

Article VI: This Article is intended to give the court of the enforcing country permissive authority to suspend enforcement proceedings, if action to vacate or suspend the award has been instituted in the country where the arbitration was held. Since this provision is not in mandatory terms, however, the court could continue with enforcement proceedings notwithstanding the filing of an action to review the award in another country that might result in invalidating the award.

This Article also provides that when enforcement proceedings are suspended the party seeking enforcement (the claimant) may require the party resisting enforcement (the defendant) to give security. This rather novel provision is designed as a check upon obstructive tactics by unsuccessful parties to an arbitration.

Article VII: This Article defines the relationship between the new convention and other arbitration treaties. Paragraph 1 is a saving clause for existing bilateral and multilateral treaties. Paragraph 2 terminates the Geneva Convention and Protocol between parties to the new convention.

Articles VIII and IX: These Articles deal with signature and accession. They are in the form usually adopted in conventions concluded under United Nations auspices, except for the provision permitting signature or accession by any country "to which an invitation has been addressed by the General Assembly of the United Nations". This provision, which theoretically would permit signature by unrecognized regimes, was carried over from the ECOSOC draft. It was opposed unsuccessfully by the United States during the Conference. The United States, however, successfully led the opposition to a Soviet move that would have opened the convention directly to signature by "all states".

Article X: This Article, the so-called "colonial clause", is intended to make allowance for countries wishing to extend the convention to autonomous or semi-autonomous dependent areas.

Article XI: This Article, the so-called "federal state clause", is intended to make allowance for countries having a federal system of government. In effect this Article requires of a federal state a determination as to whether particular articles of the convention come within the jurisdiction of the central or the local authority. In the former case the articles are fully binding. In the latter case the central authority is obligated only to bring the articles in question to the attention of the local authorities with a favorable recommendation.

Articles XII and XIII: These Articles, dealing with entry into force and denunciation, are in the form usually adopted in conventions concluded under United Nations auspices. Article XIII also contains, however, a saving clause for arbitral proceedings instituted prior to denunciation.

Article XIV: This Article is intended to permit the application of a rule of reciprocity in situations where other contracting countries do not assume full obligations under the convention, as, for example, by reason of the "federal state clause".

Articles XV and XVI: These Articles, which provide for notifications and for depositary functions, are in the form usually adopted in conventions concluded under United Nations auspices.

B. Summary of Conference Debates on the Convention:

During the Conference the greater portion of the debate was given over to three major substantive questions: (1) the scope of the convention and consequently the definition of "foreign award"; (2) the inclusion of provisions for recognition of the validity of arbitration agreements; and (3) the "double exequatur" or dual judicial control of the award.

1. Scope of the Convention: The first major issue to develop in the Conference had to do with the scope of the convention. This issue turned essentially on the definition of a "foreign" award. There was general agreement that the convention should apply to foreign awards only. The ICC concept of an "international" award was ignored, and at no time was there discernible sentiment in favor of covering domestic awards. When it came to working out a formula on coverage for foreign awards, however, it soon became clear that there was no common view as to what constitutes a foreign award. Moreover, the Conference debate revealed such diversity of national law and such differences in criteria used to determine whether an award is foreign or not that a single acceptable formula proved impossible to attain.

The Conference early showed the existence of two widely divergent views as to the proper criteria. One is the concept of "territoriality". Under this concept, the character of an award is fixed by the place in which it is rendered. If it is rendered in a foreign country, it is ipso facto a foreign award. The other is the concept of "nationality". Under this concept various criteria involving nationality in some manner is applied. In some cases the criterion is the nationality of the parties to the arbitration. In others it is the nationality of the procedural law used. In still others it is domicile in, or other substantial connection with the place of arbitration.