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RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Report by the Secretary-General

1. Pursuant to resolution 570 (XIX) adopted by the Economic and Social Council on 20 May 1955, the Secretary-General transmitted to the Governments of States Members and non-Members of the United Nations the Report of the Committee on the Enforcement of International Arbitral Awards[1/] and the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards annexed thereto. The Secretary-General asked Governments for their comments with respect to the text of the draft Convention, and the desirability of convening a conference to conclude a convention on that subject, and also inquired whether they would be prepared to participate in such a conference.

2. Furthermore, the Secretary-General, pursuant to the same resolution, transmitted the draft Convention and the Report of the Committee to the International Chamber of Commerce and to twenty non-governmental organizations in consultative status considered to be interested in international commercial arbitration for their comments, and to the International Institute for the Unification of Private Law, for its information.

3. Comments on the draft Convention have been received from fifteen Governments and four non-governmental organizations, as follows:

Governments: Austria, Belgium, Brazil, China, Denmark, France, Federal Republic of Germany, India, Japan, Republic of Korea, Lebanon, Mexico, Philippines, Switzerland, Union of Soviet Socialist Republics.

1/ Official Records of the Economic and Social Council, nineteenth session, Annexes, agenda item 14, document E/2704 and Corr.1.

Non-governmental organizations: International Chamber of Commerce, International Law Association, Société Belge d'Etudes et d'Expansion and Society of Comparative Legislation.

4. The comments from Governments are contained in Annex I, and the comments from non-governmental organizations in Annex II hereto.

5. The following Governments have expressed themselves in favour of convening a conference to conclude a convention and have indicated that they are prepared to participate in such a conference: Austria, Belgium, Federal Republic of Germany, India, Israel, Japan, Switzerland, Union of Soviet Socialist Republics. The Governments of Brazil, Ceylon, France, Denmark and the Philippines have stated that, if it is decided to convene a conference, they are prepared to participate in it. The Government of the Republic of Korea, while being favourable to convening a conference, has reserved its reply to a later time on whether it would participate. The Governments of China and Mexico have submitted comments on the draft Convention, without expressing any view regarding the desirability of convening a conference, or their participation.

6. The Government of Lebanon, while approving the draft Convention, has expressed the view that it is not in favour of convening a conference to adopt the Convention, because each State can study separately the draft Convention and accede to it if it so desires. The Governments of Canada, Union of South Africa and United States of America have not submitted comments on the draft Convention, and have stated that they would not expect to participate in a conference should such a conference be convened.

ANNEX I

Comments by Governments

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ANNEX I

GENERAL OBSERVATIONS

Austria

"Unfortunately, the draft does not introduce any standardized international reform of the arbitration system, for it contains frequent references to the legislation of particular States (see for instance article IV (a) and (g), and other provisions). Neither does it contain uniform international rules covering conflicts of law; instead, these conflicts will be governed by the rules applicable under the law of the State in which the doubt concerning the law to be applied is of practical significance.

"We therefore wish to draw attention to the urgent need to standardize the rules governing arbitral procedure and to request that, in the light of the preliminary work, a draft should be prepared which would standardize these rules. In this connexion, we wish to refer to the Atti del Convegno Internazionale per la riforma dell'arbitrato (Proceedings of the International Meeting on Arbitration Reform), Milan, 1955.

"With a view to an early settlement of at least part of this problem, it would be desirable to prepare a further convention dealing with these questions."

Denmark

"The Danish authorities have no objection to present regarding the draft convention adopted during the Economic and Social Council's nineteenth session concerning the Enforcement of International Arbitral Awards.

"Pursuant to Danish Law arbitral awards are not directly exigible, and the following reservation must, therefore, be made:

"In pursuance of Danish Law, arbitral awards rendered by an arbitral tribunal are not directly exigible; to enforce an award it will be necessary in each case to take ordinary legal steps. In the course of the proceedings, however, the arbitral award will generally be accepted by the courts without further investigation as the basis for the judgment of the case."

Federal Republic of Germany

"The draft Convention is an improvement on the Geneva Convention on the Execution of Foreign Arbitral Awards in that it is designed to facilitate further the recognition and enforcement of foreign arbitral awards.

"In article I, paragraph 1, the conditions laid down in article 1, first paragraph, of the Geneva Convention concerning the field of application of the Convention no longer appear. Under the draft Convention it would suffice (subject to certain provisos) if the award was made in the territory of another State. There is some doubt whether this provides a sufficiently clear and definite basis for recognition and enforcement. The Convention is intended to relate to the recognition and enforcement of such arbitral awards as are not regarded as domestic by the courts of the State in whose territory they are relied upon. The best way to ensure that even arbitral awards which cannot be regarded as domestic are recognized and enforced would be for the Contracting States to undertake to incorporate provisions analogous to those contained in the Convention in their municipal law as a whole. This would mean that a uniform law would come into existence concerning the recognition and enforcement of arbitral awards the benefit of which would extend not merely to arbitral awards made in a Contracting State but, generally, to all arbitral awards not regarded as domestic under the lex fori. Possibly, the idea of such a uniform law is the thought underlying article I, paragraph 1, inasmuch as it contemplates that henceforth the relationship with a Contracting State is to be irrelevant for the purpose of determining the nature of an arbitral award. An obligation at international law to recognize and enforce any arbitral award whatsoever made outside the territory of a Contracting State would transcend the scope of a typical multi-lateral convention, for the convention would then also operate in favour of States which are not parties thereto. The technically correct procedure, therefore, would be to unify the municipal legislation on the subject by means of a uniform law.

"If, however, this course should not be adopted then a definite criterion will have to be found for determining what arbitral awards are to be covered

by the Convention. Arbitral awards which the lex fori regards as domestic would certainly not be covered; hence the Convention will apply only to arbitral awards which under the lex fori cannot be regarded as domestic. Consequently, if an obligation at international law is entered into, the benefit of the obligation would extend solely to a specified category of arbitral awards. For the purpose of determining what arbitral awards are to qualify for the benefit the criterion cannot presumably be the place where the award was made. Admittedly, the seat of the arbitral tribunal may - but is not inevitably bound to - influence the nature of the award. The following hypothetical case is an illustration:

> Two nationals of State X, who are domiciled in Contracting States Y and Z respectively, agree upon an arbitral tribunal having its seat in State Y. The procedure is to be in accordance with the municipal law of State X. The arbitral award made in State Y will be regarded, under the lex fori of State X, as a domestic award even though made abroad. The grounds on which State X treats the arbitral award as domestic are to be found in the application of the rules of procedure of State X.

"The nature of the arbitral award is determined by reference to the rules of procedure which are applicable, in toto or else as subsidiary rules, to the award. There is no such thing as an arbitral procedure that is completely divorced from some municipal procedural law. Indeed, there must be some relationship between the arbitral procedure, which may of course be subordinated to the autonomous will of the parties, and a domestic system of procedure, if only so that national courts should be able to act, should the need arise, for example in the appointment of substitute arbitrators or the examination of witnesses.

"If the rules of procedure are the criterion, then those arbitral awards which are regarded as domestic awards in another Contracting State may be favoured. The consequence would be, for the Contracting States, an obligation

at international law binding every Contracting State to recognize and enforce an arbitral award which, under the law of another Contracting State, is to be regarded as a domestic award.

.....

"Consideration should also be given to the idea of extending the scope of the Convention to cover, in addition to awards, settlements reached before arbitral tribunals. At the time when the Geneva Convention was drafted it was decided not to include provisions relating to such settlements; the absence of such a provision has often proved a regrettable omission in practice. It is proper, therefore, to suggest that this gap should now be closed."

Japan

"1) It is deemed necessary that the relationship between the proposed Convention and the Convention of 1927 be clarified, viz.: whether new Convention is to take the place of that of 1927, or it is to become a separate and independent convention. Should the latter be the case, the new convention should make clear the treatment between signatories to both conventions or a signatory to one of the two conventions and that to the other.

"2) The discussion raised at the time of the drafting of the Convention about the inclusion of a clause pertaining to the effect of arbitral agreement seems to call for the addition of a provision to govern the interrelations between the Protocol of Arbitral Clause of 1923 and the new Convention in respect to 1) above."

Lebanon

"The Lebanese Government expresses general approval of the draft Convention adopted by the Committee on the Enforcement of International Arbitral Awards on 15 March 1955."

Philippines

"The Philippine Government finds no constitutional or legal objections to the said Draft Convention nor to Philippine accession thereto."

Switzerland

General remarks

"This draft Convention will serve no useful purpose unless it represents a marked advance over the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. Such an advance is possible only to the extent that international arbitral awards are made more independent of the law of the country in which the arbitration takes place. Accordingly, it should be provided that the will of the parties prevails over the law and that their will is the principal basis of the validity of the arbitral award, the exceptional cases in which enforcement of the award may be opposed being reduced to the strict minimum.

"The draft as a whole undoubtedly represents an advance over the 1927 Geneva Convention.

"The purpose of a new convention relating to arbitrations is not to introduce all the desired improvements at once, but to achieve substantial progress in some directions as soon as possible. It is therefore desirable that a diplomatic conference to conclude a new international convention on the recognition and enforcement of foreign arbitral awards should be convened at an early date.

Title of the Convention

"The draft of the International Chamber of Commerce (ICC) was entitled, 'Convention on the Enforcement of International Arbitral Awards'. The Ad Hoc Committee set up by the United Nations Economic and Social Council (ECOSOC) nevertheless considered it necessary to include in its draft the phrase "foreign arbitral awards", taken from the 1927 Convention, on the grounds that the expression "international arbitral awards" normally referred to arbitration between States.

"It should be noted, however, that an arbitral award differs from a judicial decision in that it does not acquire a national character by virtue of State sovereignty; on the contrary, the arbitral award is the outcome of an agreement between private parties and is shaped by that agreement. It is therefore permissible to speak of international awards. Moreover, there can be international awards in private law as well as international awards in public law.

"To remove doubt and to preserve the essential notion of international awards, while taking into account the objection of the ECOSOC Committee, the following title might be used:

"'Convention on the Recognition and Enforcement of International Arbitral Awards in Private Law'."

ARTICLE I

Austria

"The term 'arbitral award' is not defined. Consequently, it will depend on the law of the State in which it is to be enforced whether a particular decision is to be regarded as an arbitral award. From the practical point of view, it is probably not necessary to define the term in the text of the convention. Decisions of so-called arbitral tribunals which have compulsory jurisdiction (e.g., in Austria, the arbitral tribunals concerned with the social insurance scheme) do not fall within the scope of the convention.

"The convention should perhaps be expanded to include arbitral settlements. There would have to be an express provision to that effect; this would be in keeping with Austrian practice (paragraph 1, line 16 of the rules governing the enforcement of judicial decisions). Because the opportunities for testing the validity of decisions are adequate and the grounds for refusing enforcement offer sufficient protection, there should be no objection to such a provision.

"We have no objection to the scope of application of the convention, as specified in article I, paragraph 1, of the draft, although there are considerations of international law and psychology making so wide a range inadvisable, for example:

"(a) As it is worded, article I, paragraph 1, of the draft convention applies also to cases in which the arbitral award was made in a State which is not a Contracting State and the parties to the arbitration proceedings are not nationals of any Contracting State. Can one seriously expect a State to bind itself, in international law, to enforce decisions which are not (either by reason of the place where the award was given or by reason of nationality or by reason of the residence or domicile of the parties in a Contracting State) related to the one or other of the Contracting States?

"(b) If, say, the chamber of commerce of a certain State is a popular choice as the seat of the arbitral tribunal there is little inducement for that State to accede to the convention, for, in its own territory, the arbitral awards, being domestic, are enforced in any case, whilst even if it is not

itself a Party to the convention the awards of the arbitral tribunal sitting in that State's chamber of commerce are likewise enforced in States which are Parties to the convention; and, lastly, that State may perhaps not be very anxious to bind itself to enforce arbitral awards made abroad.

"It would be desirable, at the end of the paragraph, after the reference to physical and legal persons, to insert an express reference to trading corporations.

"Since the term 'legal persons' includes States, the draft convention seems admittedly to cover arbitral wards made in their favour or against them in cases of disputes with subjects of private law. Nevertheless, it would be desirable to provide expressly that the convention is also applicable in cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes."

China

"The first part of article I, paragraph 2, provides: 'Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.' It follows from this provision that any person receiving an arbitral award in a Contracting State may request recognition and enforcement, and this right is not limited to the nationals of a Contracting State. The Chinese Government considers this provision as too liberal, and is of the opinion that, on the basis of the principle of international reciprocity, such a right should be restricted in accordance with the spirit of article I of the 1927 Convention on the Execution of Foreign Arbitral Awards, which provides: 'An arbitral award ..... shall be recognized as binding and shall be enforced ..... provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies, and between persons who are subject to the jurisdiction of one of the High Contracting Parties.'"

Japan

"The provision of the latter part of Article I, paragraph 2, is not altogether necessary as viewed from the angles of the Convention of 1927 and of Japanese domestic laws."

Lebanon

"Nevertheless, it /the Lebanese Government/ considers it necessary to maintain the reservation contained in article I, paragraph 2, to the effect that the Convention will apply only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State and to disputes arising out of contracts which are considered as commercial under national law."

Mexico

"Article I defines and limits the scope of application of the draft Convention. The Mexican Government would be unable to accede to this instrument without a proviso to the effect that it would be applied subject strictly to reciprocity, like the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927, and only in respect of awards given under compromis which are regarded as commercial in Mexican law. In its report, the Committee explains that in its view 'it would not be desirable to establish a strict requirement of reciprocity'. Nevertheless, article X, paragraph 2 of the draft Convention stipulates that 'A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is bound by the Convention'. There would seem to be an inconsistency between the Committee's statement and the provisions of the draft Convention. If article X, paragraph 2 can be interpreted as recognizing the principle of strict reciprocity, the Mexican Government would be satisfied on that point.

"The Mexican Government further considers that it would be advisable to include in the draft Convention the stipulation contained in the Geneva Convention that the arbitral award must have been made in a dispute between persons who are subject to the jurisdiction of one of the Contracting States. The Mexican Government takes this view because Mexican law regards arbitral

awards as acts which in themselves are private, since they are made pursuant to compromis concluded between private persons, and which become enforceable only when the logic of the award is, in addition supported by the authority of a judicial decision."

Switzerland

"The text proposed by the United Nations experts is broader in scope than the ICC's text.

"In the first place - a feature which we welcome - it does not automatically limit the application of the convention to commercial disputes only. Since the different legal systems vary considerably in their idea of what 'commercial law' embraces, it is wise not to invite difficulties by restricting the application of the Convention to disputes arising out of relations governed by commercial law.

"In the second place, article I, paragraph 2, is so drafted as to enable States to accede which might have been discouraged from ratifying the Convention by the departure from the principle of reciprocity.

"On the other hand, it is to be regretted that the text proposed by the ICC defining the awards to which the Convention will apply was not adopted. The phrase 'arbitral awards made in the territory of a State other than the State in which such awards are relied upon' may well give rise to confusion. We realize that the reference is to awards settling disputes which have arisen between persons subject to the jurisdiction of different States or which involve relationships in law that produce their effects in the territories of different States. But the text is not clear. For example, one inference that could be drawn from the definition is that if a contract of sale makes provision for the appointment of an arbitral tribunal in the buyer's country, then the seller - under the draft convention - cannot obtain enforcement of the award in the buyer's country; he could only do so if the arbitral tribunal met in his own country or in a third State.

"We consequently suggest that the idea contained in the ICC draft should be introduced into the text proposed by the United Nations experts and that article I, paragraph 1, should be worded as follows:

'Subject to paragraph 2 of this article, this Convention shall apply to the recognition and enforcement both of arbitral awards made abroad and of arbitral awards arising out of differences between parties domiciled in the territories of different States.'"

Union of Soviet Socialist Republics

"In article I it should be specified that the term 'arbitral awards' covers not only awards made by arbitral tribunals set up to deal with specific cases but also awards made by permanent arbitral authorities established under the law of any Contracting State."

ARTICLE II

Federal Republic of Germany

"In article II it would be desirable to add a provision to the effect that arbitral awards which are to be recognized should be declared enforceable according to the same procedure as that applied to domestic arbitral awards. Such a provision would lay down the general rule that in the proceedings in which awards are declared enforceable no differentiation should be made between domestic and other arbitral awards, for example, in determining what authority is competent to declare a particular award enforceable."

ARTICLE III

Austria
ad art. III (a):

"We wish to point out that under Austrian law, a mere exchange of telegrams or subsequent confirmation of an oral agreement to arbitrate would not satisfy the requirement that the arbitration agreement must be in writing.

"It may also be doubtful whether, under the legislation of some States, an exchange of letters would fulfil the condition stipulating an agreement in writing.

"Accordingly, the expression 'in writing' should (if it is intended to carry this meaning) be more specifically defined as meaning that the condition

it implies will also be deemed to be fulfilled for the purposes of the convention if there are two separate documents constituting an agreement (exchange of letters) and if an agreement concluded by word of mouth, by telephone, by telctype or by telegraph is subsequently confirmed by both parties in writing.

ad art. III (b):

"The effect of article III (b), read in conjunction with article V (b), is that the party claiming the recognition of an arbitral award or its enforcement must supply documentary evidence that the enforcement of the award has not been suspended; in other words, that party would have to supply negative evidence, which could not be furnished as of the time when the claim is made but, at best, as of some date in the past, since some time must necessarily elapse between the issuance of the corresponding confirmation by the arbitral tribunal or by the authority with which the arbitral award was deposited, and the making of the claim, particularly if a translation has to be prepared.

"The burden of the proof that the enforcement of the arbitral award has been deferred in the country in which the award was made - a fact which would in law operate to suspend enforcement - would therefore rest on the unsuccessful party in the arbitration proceedings. Consequently, the fact of suspension should be mentioned in article IV as one of the grounds by reason of which enforcement is to be refused, notwithstanding the fulfilment of the conditions laid down in article III (see also comment on article IV (e)).

"This would make it unnecessary, at the stage at which an enforcement order is made, to require proof that the enforcement of the arbitral award has not been suspended in the State in which the award was made. Lastly, the expression 'suspension of enforcement' should be defined more precisely, for it obviously is not meant to include every postponement in the enforcement proceedings, but only a suspension directly affecting the arbitral award itself."

Belgium

"Article III (a): As the only form of an agreement to arbitrate is the compromis or the arbitral clause, it would seem advisable for the sake of greater clarity, to substitute the word 'compromis', which has a precise meaning, for

the words 'special agreement'. In any event, the adjective 'special' is inappropriate if it is intended to convey the meaning of 'separate', since a compromis can properly form part of the text of another agreement.

"Furthermore, there is an element of risk if the arbitration agreement simply refers to private rules of arbitral procedure. We believe that article III should include a provision to the following effect:

> 'If the parties intend to be governed by private rules of arbitration, these rules must be reproduced in their entirety in the body of the agreement or in an annex thereto.'

"Article III (b):

"(1) The award must be final.

"This provision is ambiguous, for the word 'final' is open to different interpretations. It should therefore be explained. It would be preferable to revert to the more explicit wording of the Geneva Convention, or at least to state in the report that, in this respect, the draft is not intended to derogate from the Geneva Convention, the word 'final' meaning 'not open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist)'.

"(2) In the country where it was made, the award must have become operative and, in particular, its enforcement must not have been suspended.

"That is the principle laid down in the draft.

"The Geneva Convention dispenses with the formality of a prior enforcement order (exequatur) in the country in which the award was made; the draft Convention should lay down the same rule in unambiguous terms.

"The draft contains contradictory provisions: if a prior enforcement order is required, then the provision of article IV (g) becomes superfluous. It is hardly open to doubt, however, that an award which 'has become .... operative' means nothing else than an award which is the subject of an enforcement order made by the president of a court of first instance (Code of Civil Procedure, article 1020).

"Our objection would be met by the deletion of the word 'operative'.

"In any event, the question should be studied."

Brazil

"The Brazilian Government accepts the present draft but it has a few remarks and observations to make concerning certain articles, especially article III of the present draft, to which it wishes to offer an amendment, to be added as paragraph (c), with the following text:

> '(c) that the award has been ratified, in the country where it was made, by a competent judicial authority, and that it receive, in the country where enforcement is sought, the sanction required by local law.'

"The Brazilian Government will, however, be prepared to accept a similar provision to be included as a reservation in the draft convention instead as an addition to article III."

China

"The draft Convention, adopting the views of the International Chamber of Commerce, has liberalized the conditions for the execution of arbitral awards by national enforcement agencies so as to facilitate the enforcement of arbitral awards. It has therefore eliminated or modified the restrictions imposed by the 1927 Convention. However, the enforcement of arbitral awards has an important bearing on the rights and interests of the parties concerned. Consequently, no excessive latitude should be allowed in the consideration of the conditions to be met. Thus it is necessary to retain certain conditions set forth in the 1927 Convention. For example, article I, paragraph 2 (a), of the 1927 Convention lays down the condition that 'the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto', and article II, paragraph 2, of the same Convention provides that 'if the award has not covered all questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantees as that authority may decide'. In the draft Convention, neither article III (a) nor article IV (d) has included the above-mentioned conditions. It is suggested that similar provisions should be added to the draft Convention."

Federal Republic of Germany

"Article III, clause (b) should stipulate only that the award must be final. In procedure, however, this description has no significance except in the sense that the award must possess a kind of formal legal validity (force of res judicata); it cannot, as stated in the report of the Committee on the Enforcement of International Arbitral Awards (E/2704, page 9, paragraph 33) mean that the arbitral award must have settled all matters at issue between the parties. The additional stipulation that the award must be 'operative' may prove misleading; it also appears redundant."

France

"It is stated in article III (a) of the draft that, to obtain the recognition and enforcement of foreign arbitral awards, the parties must have agreed, in writing, either by a special agreement or by an arbitral clause in a contract, to settle their differences by means of arbitration.

"This provision would seem to restrict considerably the scope and importance of the Convention. It is a not unusual practice in international trade to conclude an arbitration agreement by an exchange of letters or telegrams.

"It would therefore be better to stipulate simply that evidence in writing is required which proves the will of the two parties to settle their differences by means of arbitration."

Mexico

"The Mexican Government approves of the provisions in the draft (articles III and IV) stipulating that the award must have become final and operative in the country in which it was made and that recognition and enforcement of the award may be refused if:

"(a) the subject matter of the award is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; or

"(b) the recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law (ordre public) of the country in which the award is sought to be relied upon."

Switzerland

"Article III (a): It is stated that the parties must have agreed to settle 'their' differences by means of arbitration; it would be better to replace the possessive adjective 'their' by 'the' (followed by the noun in the singular), for it is obvious that when two or more parties insert an arbitral clause in a contract, that clause can apply only to differences between the parties. Article III (a) should therefore read:

'(a) That the parties named in the award have agreed in writing, either by a special agreement or by an arbitral clause in a contract, to settle the difference by means of arbitration;'

"Article III (b): The draft prepared by the United Nations experts provides that the arbitral award the recognition and enforcement of which are sought must have become final and operative. If the provision means that the award must have not only the authority, but also the binding force, of res judicata, then it goes much too far and all the difficulties caused by article 1 (d) of the Geneva Convention of 1927 will recur. For if it is a condition that the award must have the binding force of res judicata, then the time limits which have to elapse before the enforcement of an award can be obtained will be extended considerably; the consequence will be that the procedure will be retarded, whereas disputes occurring in international trade should be settled as promptly as possible.

"We therefore take the view that the idea of the ICC should be accepted, in other words, that the problem should be approached from the angle of annulment. Precautions should, of course, be taken lest an arbitral award that has been contested but not yet annulled in the country in which it was made qualify for recognition in the country of enforcement. For this reason, allowance would have to be made for the suspension of the arbitral award.

"Furthermore, in some cases the applicant for enforcement may find it difficult to produce the positive proof required in the draft of the United Nations experts. We would therefore prefer a provision requiring only negative proof, the onus being on the party opposing enforcement. This shift of the burden of proof seems all the more justified as in his suit for recognition and enforcement, the applicant's task is in any case hard enough, not least because suit is brought in the other party's court.

"We therefore propose the following text for article III (b):

'(b) That, in the country where the award was made, the award has not been annulled and that its enforcement has not been suspended.'"

ARTICLE IV

Austria

ad article IV (b):

"The wording is not quite clear. Is the text intended to mean that it will be sufficient if on one single occasion a hearing was granted? Or must the party in question have had an opportunity to attend throughout the proceedings?

"Presumably, the intention was to stipulate that the unsuccessful party in the arbitration proceedings must have had an opportunity to present its case at the proper time and also to reply to argument for the other side and to the evidence of witnesses.

ad article IV (e):

"In this clause the words 'or that its enforcement has been suspended in the said country' should be inserted after the word 'made'. Cf. comments ad article III (b).

ad article IV (f):

"This provision seems to be open to question, because it might furnish a pretext for refusing enforcement. Every judicial decision and also every arbitral award should be so phrased as to be capable of enforcement. This is a point to be taken into account already in the proceedings. While it is true that if the arbitral award is not stated clearly it may be incapable of enforcement, there is no need to say so specifically.

ad article IV (g):

"The provision should be worded more clearly. The decisive authority as regards the composition of the arbitral tribunal and the arbitral procedure should be the agreement between the parties, provided that this agreement was effective under the law of the State in which the arbitral award was made.

"In the absence of such an agreement, the legislative provisions in force in the State in which the award was made should be decisive. The result, of course, would be reliance on the local law relating to arbitral procedure; but this cannot be avoided, and is but one more proof of the urgent need to standardize the rules governing arbitral procedure.

"Not only a breach of the provisions relating to the composition (constitution in the French text) of the arbitral tribunal, but also a breach of those relating

to the place where the arbitration proceedings are held (e.g., if the arbitral tribunal should sit in a country other than that agreed upon) should constitute grounds for refusing enforcement.

"If the provision were taken literally, even a slight and unimportant departure from the agreement between the parties or, in the absence of such an agreement, from the local law relating to arbitral procedure, would constitute a ground for refusing enforcement. The consequence would be, however, that in many cases the recognition and enforcement of an arbitral award would be frustrated without just cause. The procedural violations referred to in paragraph (g) should be specified more clearly, possibly by a formula providing that they render the award void or voidable, depending on the local law.

ad article IV (h):

"It might be advisable to specify that unless the incompatibility exists by a certain date enforcement cannot be refused on the grounds of incompatibility with public policy (ordre public). This is certainly the position if the arbitral award or the subject matter thereof is incompatible with public policy both when the arbitral award is made and when it is sought to be relied upon (i.e., when its recognition or enforcement is applied for); presumably, however, it is also the position if the incompatibility existed only at the time when the award was made but not at the time when it was sought to be relied upon; and also if the incompatibility, though non-existent at the time when the award was made, does exist by the time of the application for enforcement."

Belgium

ad article IV

"1. Clauses (a) and (h)

"The first of these provisions is included in the second.

"We consider that the two texts should be merged into a single clause (a), which might be worded as follows:

> '(a) That the subject matter of the award is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon, or that the recognition or enforcement of the award would be clearly incompatible with public policy or with fundamental principles of the law (ordre public) of that country; or'

"2. Clauses (b) and (c)

"Both these clauses are concerned with the rights of the defence - in other words, they deal with the same subject. They should therefore be amalgamated as was done in article 2 (b) of the Geneva Convention, in a single clause, reading as follows:

> '(b) That the party against whom the award is invoked was not given notice of the appointment of the arbitrator or of the arbitration proceedings in due form or in sufficient time to enable him to present his case, or that the said party, being under a legal incapacity, was not properly represented; or'

"It might be useful to specify in the report that the words 'in due form or in sufficient time' mean: 'in the manner and within the time limit prescribed by the law of the country in which the award was made';

"3. Clause (d)

"Under the second part of this provision decisions which fall within the terms of the submission to arbitration may be separated from those which do not, provided that they are not interdependent.

"This provision might prove extremely troublesome in practice and might give rise to procedural difficulties (for example, if the foreign judge should grant only a partial enforcement order in respect of an arbitral award that is the subject of a comprehensive order in the country in which the award was made).

"We cannot but approve of the attitude of the Belgian representative who opposed the adoption of the provision in question.

"4. Clause (f)

"The Belgian representative quite rightly objected to the inclusion of this superfluous clause."

China

See comments under article III.

Federal Republic of Germany

"In article IV it does not seem necessary that clause (b) should include sufficient notice of the appointment of the arbitrator as a ground for refusal of recognition and enforcement. It is, in any case, customary to stipulate that if an arbitrator is not appointed in good time, the right to designate an arbitrator passes to a third party or else that one of the parties may apply to a

national court. Hence the timely appointment of the arbitrator cannot subsequently be of any significance in the recognition and enforcement of the arbitral award.

"The further stipulation in clause (b) that notice must have been given in due form may lead to difficulties in practice, for it is not certain what criteria are to be applied in determining whether 'due form' has been observed. Therefore this clause, which did not figure in the corresponding provision of the Geneva Convention (article 2 (b)), should be deleted.

"In addition at the end of clause (d) of the proviso which reads: 'provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted' arouses some misgivings. One consequence of the proviso would be a partial recognition and enforcement of an award - a concept utterly foreign to international law. In practice, moreover, it would, in conflict with the spirit of the Convention, open the door to a review as to substance.

"Article IV, clause (f) is likewise open to serious objections, for this provision too, might introduce the possibility of a review as to substance, which would be undesirable.

"Article IV, clause (g) represents an amplification of article I (c) of the Geneva Convention in that it includes a reference to the actual arbitral procedure. The Geneva Convention was concerned only with the constitution of the arbitral tribunal. There appears to be no reason to widen the scope of this provision, and the reference to arbitral procedure should therefore be deleted from clause (g).

"Article IV, clauses (b), (e) and (g) are designed chiefly to protect the party against whom the award is invoked. Hence it appears unnecessary for the authority concerned to ascertain whether the grounds for refusal provided by these clauses are present, and preferable to leave it to the party in question to decide whether or not to invoke them. Not until a party invokes the one or other of these grounds should the court enquire whether the objection is valid. It is therefore advisable that an additional paragraph should be included on the lines of that contained in article IV, paragraph 2, of the International Chamber of Commerce draft and already proposed by the Representative of Sweden (report, page 13)."

France

"....."

"(3) Article IV (e) does not constitute an adequate safeguard, for enforcement may be sought abroad before the award has been annulled in the country in which it was made. Accordingly it should be provided that, if judicial proceedings for the annulment of the award have been initiated, the recognition or enforcement of the award may be suspended until a final decision has been given.

"(4) Article IV (g) might with advantage be redrafted.

"This provision states that the enforcement of the arbitral award may be refused only if the arbitral procedure was not in accordance with the agreement of the parties to the extent that such agreement was lawful in the country where the arbitration took place. Taken literally, these words might be argued to mean that if the procedure was not in accordance with the agreement of the parties, in a case in which the agreement was unlawful, enforcement cannot be refused - an interpretation which is manifestly not in keeping with the intention of the authors or with the object of the Committee."

Japan

"Article IV (f) is deemed dispensable. Aside from the fact that occurrence of a case falling thereunder would be virtually improbable, it is feared that such a clause will give ground for refusal of fulfilment of awards by a party to which a disadvantageous award has been adjudicated, with the result that the execution of awards will be unduly delayed.

"It is hoped that the nature of the 'Arbitral authority', article IV (g) be defined clearly.

"Deletion of the terms 'subject matter thereof' in Article IV (h) is advisable as they would occasion confusion in the interpretation of the same clause."

Mexico

See comments under Article III.

Republic of Korea

"The Convention provides that recognition and enforcement of a foreign arbitral award shall be accepted only in a case where the parties named in the award have agreed upon in writing either by a special agreement or by an arbitral clause in a contract. And in this regard, it is also stipulated that without prejudice to this provision, this recognition and enforcement may be refused only if the competent authority in the country where such recognition or enforcement is sought, is satisfied with conditions specified in Article IV of the draft Convention.

"These stipulations are in themselves considered as appropriate; that is, recognition and enforcement of a foreign arbitral award are based on the agreement or contract between the parties and on the other hand, opportunities to refuse such recognition or enforcement are also given although subject to certain conditions.

"However, attention is drawn to the possible fact that a foreign arbitrator may make an unfair award, despite such stipulations. In this case, indeed under Article IV of the said draft Convention, recognition or enforcement of this award may be refused, but such refusal of recognition or enforcement will not be admitted to be acceptable unless the competent authority in the country where this recognition or enforcement is sought, is satisfied with specified conditions. And consequently there still remains some unfair award to be recognized or enforced upon the parties under the proposed draft Convention.

"In view of these facts, in order to prevent an arbitrator from making such unfair award, it is required to provide for stipulations governing foreign arbitrator. The Government of the Republic of Korea, therefore, wishes to advise to insert into the draft Convention arbitrator clauses on procedure for appointment of an arbitrator, on duty to be imposed upon the arbitrator and also on disapproval of the arbitrator providing that if any arbitrator who may possibly make an unfair award is appointed such appointment may be refused."

Switzerland

"As regards the grounds for refusing recognition and enforcement of the arbitral award, clause (i) is likely to be a fresh source of contention, for it

would enable the losing party to resort to all kinds of delaying tactics and manoeuvres. The provision contained in clause (f) should therefore be deleted. Another reason for the deletion is that clause (h) contains a proviso relating to ordre public, so that what clause (f) was in essence meant to safeguard is already covered; besides, if clause (f) is deleted, an unduly broad interpretation will no longer be possible.

"The purpose of the provision contained in article IV (g) is to enable the court of the country of enforcement to determine whether the 'agreement was lawful in the country where the arbitration took place'. Such a provision would enable the losing party to resort to further delaying tactics and the proceedings might thus be protracted; furthermore, the weapon of annulment could then too easily be brought into play. Indeed, under clause (g) as now drafted, the court of the country of enforcement would have authority to annul an arbitral award, on the ground that it was not in accordance with the law of the country where the arbitration took place, even in a case in which the award would not necessarily be null and void under that law itself. Such a possibility certainly did not enter into the intentions of the authors of the draft. Clause (g) should therefore be amended to cover this aspect of the problem."

Union of Soviet Socialist Republics

"Article IV, sub-paragraph (f) should be deleted.

"In article IV, sub-paragraph (h), the words 'or the subject matter thereof' should be deleted."

ARTICLE V

Austria

"See comments on article III (b)."

Federal Republic of Germany

"Under article V the only condition laid down with regard to copies of arbitral awards is that they should be duly authenticated. Similarly, translations are required only to be duly certified. The Committee on the Enforcement of International Arbitral Awards regards this rule as a considerable

liberalization of the terms of article IV (1) and (2) of the Geneva Convention (report, page 14). It is doubtful, however, whether the provision will in fact produce the favourable result expected; it seems much more likely to lead to uncertainty. In the absence of more particular directions concerning the precise conditions to be fulfilled by a 'duly authenticated copy' or a 'duly certified translation', the court applied to will probably be guided by the lex fori. Hitherto the rule has been that the award had to be duly authenticated 'according to the requirements of the law of the country in which it was made' (article IV (1) of the Geneva Convention). It would probably be as well to leave the Geneva formula unchanged, for there is greater affinity with the law of the country in which the award was made than with the lex fori. With regard to the certification of translations, however, it would be sufficient to specify, unlike article IV (2) of the Geneva Convention, that such translation must be certified correct by a sworn translator of one of the two States."

ARTICLE VI

Austria

"In connexion with this article one must consider what significance should henceforth attach to the Geneva Protocol of 1923 and to the Geneva Convention of 1927. In no circumstances should the new convention be retrograde in its effect.

"States Parties to the 1923 Protocol and the 1927 Convention which do not accede to the new convention should continue to be bound by these earlier instruments.

"On the other hand, as between the States Parties to the Geneva Convention which ratify or accede to the new convention, the latter should supersede the former, and this should be stated expressly. It would lead to a confusion of the law if both conventions were to be in effect concurrently as between the same States. In this connexion, cf. article 29 of the Convention relating to civil actions (The Hague, 1954) and article 27 of the Berne Convention for the Protection of Literary and Artistic Works (Brussels, 1948), which expressly regulate the extent of validity of the old and the new Conventions as between States Parties to both.

"The provision might read as follows:

'As between States which have ratified it or acceded to it, this Convention shall supersede the Geneva Protocol on Arbitration Clauses of 24 September 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927.'"

Belgium

"In order to avoid possible controversy, the adoption of the draft Convention should have the effect of terminating the 1927 Convention as between the Contracting States.

"A proliferation of diplomatic conventions on the same subjects is bound to give rise to difficulties of interpretation and application."

India

"The first part of Article VI did not find a place in Article V of the Geneva Convention of 1927 and was incorporated by the Committee in Article VI. This provides that 'the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of Arbitral Awards entered into by the contracting States'. The wording of this article is not free from ambiguity inasmuch as it may be interpreted to include the Geneva Convention of 1927 also as this Convention is a multilateral agreement concerning the recognition and enforcement of Arbitral Awards. But the object of the proposed Convention 'is to establish a new convention which while going further than the Geneva Convention in facilitating the enforcement of foreign Arbitral Awards, would at the same time, maintain generally recognized principles of justice and respect the Sovereign rights of States'. This part of the article would therefore require modification with a view to clarifying the position."

Switzerland

"This article deals with bilateral or multilateral agreements concluded by the States Parties to the Convention. Perhaps it should provide that such instruments may be relied on in so far as they stipulate more liberal conditions governing the recognition and enforcement of international arbitral awards in private law but cannot be relied on if they stipulate more stringent conditions We do not think the text as drafted is sufficiently clear on this point."

ARTICLE VII

India

"Clause 1 of article VII of the draft Convention as worded is likely to exclude some important countries with which various members of the United Nations have trade relations from becoming parties to the Convention. In view of the growing world trade with these countries, it is not desirable to exclude them from joining the Convention. It is the view of the Government of India that a Convention of this kind must be open to all countries. Since, as worded, Clause 1 of Article VII is likely to prevent certain countries which do not fall in the three categories mentioned therein from becoming parties to the Convention, it is suggested that this article be modified by the addition of the following, viz: 'or any other State interested in becoming a party to the Convention' at the end of the Clause."

Union of Soviet Socialist Republics

"Article VII of the Draft Convention should be left as it appears in the Draft Convention prepared by the International Chamber of Commerce (E/C.2/373): i.e. the Convention should be open to the signature of all States. Article VIII, paragraph 1, and articles XIV and XV of the Draft Convention should be amended accordingly."

ARTICLE VIII

Union of Soviet Socialist Republics

See comments under Article VII.

ARTICLE IX

Union of Soviet Socialist Republics

"Article IX of the Draft Convention should be deleted in its entirety and article XII, paragraph 2, should be deleted accordingly."

ARTICLE X

Japan

"Article X, paragraph 2, is believed not necessarily essential."

Union of Soviet Socialist Republics

"Article X of the Draft Convention should be deleted in its entirety, and in view of the deletion of this article and of article IX, article XIV, sub-paragraph (c) should also be deleted."

ARTICLE XII

Switzerland

"This article specifies the time when the Convention wi.` cease to be applicable with respect to a Contracting State which has denounced it. However, it contains no provision regarding the status of whatever enforcement proceedings are pending at the time when the denunciation takes effect.

"We therefore propose the addition to Article XII of a provision to the effect that the Convention shall continue to be applicable to arbitral awards in respect of which enforcement proceedings have been instituted before the denunciation takes effect."

Union of Soviet Socialist Republics

See comments under Article IX.

ARTICLE XIII

Japan

"Disputes occurring among Member States in connexion with the application or interpretation of the proposed Convention are desired to be finally settled by the equitable judgement of third parties. It is accordingly deemed that the inclusion of the reservation clause of Article XIII, paragraph 2, is unnecessary."

Lebanon

"The Lebanese Government is in favour of article XIII, paragraph 2, which leaves States free to refuse to accept the jurisdiction of the International Court of Justice."

Switzerland

"We welcome the introduction of a jurisdictional clause. We should, however, prefer this provision to apply to all the States which ratify the Convention, and not only to those which choose not to take advantage of the reservation provided. Paragraph 2 of article XIII might therefore be deleted."

Union of Soviet Socialist Republics

"Article XIII should be amended to read as follows:

'Any dispute which may have arisen between any two or more Contracting States concerning the interpretation or application of this Convention, which has not been settled by negotiation, shall, with the consent of all parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.'"

ARTICLE XIV

Union of Soviet Socialist Republics

See comments under article VII and article X.

ARTICLE XV

Union of Soviet Socialist Republics

See comments under article VII.

ANNEX II

Comments by Non-Governmental Organizations

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ANNEX II

GENERAL OBSERVATIONS

International Chamber of Commerce

"Title of the Convention

The ICC's Preliminary Draft had as its title 'Convention on the Enforcement of International Arbitral Awards'. The ECOSCC Committee's draft was entitled 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards'.

For reasons which will be developed below in connexion with Article I of the draft, the Commission considered that a title that was both broader and simpler could be adopted with advantage. It would be as follows:

'Convention on the International Recognition and Enforcement of Arbitral Awards'."

Société Belge d'Etudes et d'Expansion

"In examining the draft, we constantly bore in mind the practical aim pursued, as defined in paragraph 69 of the report:

'to further the formulation of a set of rules governing arbitration proceedings which might be adopted by the various countries of the world.'

"We feel, in fact, that in order to be useful in the broadest sense of the word, the Convention should be acceptable to the largest possible number of countries, even at the cost, in the case of some countries, of a voluntary surrender of some of their prerogatives.

"One of the chief difficulties in the enforcement of foreign arbitral awards is that, in order to be enforceable, the award must be in conformity with the will of the parties or, where they have failed to agree on the procedure to be followed, the procedure must be in conformity with the law of the country where the award was made.

"It would therefore be desirable for the Economic and Social Council to instruct the Ad Hoc Committee to draw up a convention laying down general rules of procedure to be observed in all arbitration proceedings. The drafting of such a text should not present major difficulties and its adoption by States would ipso facto eliminate many of the procedural devices commonly resorted to for the purpose of resisting applications for an enforcement order."

Society of Comparative Legislation

Title of the Convention

"Instead of replacing the phrase 'international arbitral awards' by 'foreign arbitral awards', it would be preferable to add to it the words 'in private law'. This addition would eliminate any possibility of confusion with 'arbitration in public international law', while, by maintaining the adjective 'international', stress would be laid on the objective of the international economic circles represented by the International Chamber of Commerce - which initiated the 1927 Geneva Convention even as it initiated the draft under consideration - namely, to facilitate the enforcement of arbitral awards of an international nature and, more specifically, of an international commercial nature.

"The title proposed by the ICC, though narrower in scope, had the advantage of avoiding the difficulties which foreign arbitral awards in civil disputes may present. Because the title 'foreign arbitral awards' covers this type of dispute, the Governments which are potential parties to the Convention will be more hesitant in agreeing to the adoption of a simplified procedure.

"This procedure is not open to the same objections in commercial as in civil matters, first, because businessmen and persons who engage in commerce in general are usually well-informed and experienced people who may be expected to know what they are doing when they choose arbitration; secondly, because these are the people who are anxious to obtain a decision as quickly as possible and to make sure that it is enforced without their becoming entangled in further stages of procedure or formalities which may be multiplied and complicated by a waning of good faith on the part of the losing parties.

"Lastly, the term 'international awards' contains a promise for the future; it suggests that international organizations may bend their efforts towards a larger and more rewarding goal: namely, that arbitral awards may be made under the rules of procedure of international arbitration centres, the agreement of the parties stipulating that the arbitration proceedings shall be governed by those rules, the provisions of which would tend to remove arbitral awards from the sphere of national laws on procedure - usually far too rigid to meet the

wishes of international commerce - and to place them rather, where their enforcement is concerned, under an international organ concerned with verifying their prima facie validity.

"In leaving the Contracting States free to apply the Convention only to disputes arising out of contracts which are considered as commercial (article I, paragraph 2), the authors of the draft have made it possible to limit the sphere of application of the convention and to give it a definite subject matter: 'international commercial awards in private law'.

"If the Convention is limited to commercial disputes, even States and public corporations can be subjected to the same simplified enforcement procedure, provided that their will to settle the matter by arbitration has been clearly indicated and that the proper formalities required to give it valid expression - if any such formalities are called for under their national law - have been observed."

ARTICLE I

International Chamber of Commerce

"The dissimilarity of the titles chosen by the ICC and by ECOSOC for the Draft Conventions framed by them respectively, rather indicate that the two drafts do not quite aim at the same ends.

"Article I of the Preliminary Draft of the ICC and paragraph 1 of article I of the ECOSOC draft agree only in so far as they both restrict the Convention's scope to the recognition and enforcement of awards containing a foreign element. But the ECOSCC Committee of Experts proposed to retain as sole criterion of what constituted a foreign element the fact that recognition and enforcement of the award are demanded in a country other than the one in which the award was made. The ICC, however, wished to allow for two other possibilities: first, cases where the parties had their principal establishments or usual residences in different countries; secondly, cases where disputes referred to arbitration arose from contracts qualified as international, not

because of the nationalities or residences of the parties, but because the contracts were likely to produce effects in a country foreign to both parties.

"In its Preliminary Draft, it was the desire of the ICC to extend the benefit of the Convention unreservedly to arbitral awards in these three cases, since they were all three encountered fairly frequently by Arbitration Centres called upon to determine disputes arising in the course of international trade.

"By taking only one of these three possibilities into account, the ECOSOC Committee's draft indirectly impaired the freedom of the will of the parties, which should be allowed full play in all these cases.

"Without wishing to anticipate the comments which will be made on the provisions of article IV (g) of the draft, sanctioning this freedom of will, and merely as an illustration of the foregoing remarks, the following comments are called for:

"Because of the limited scope of the Convention drafted by the ECOSOC Committee of Experts, the parties cannot exercise their freedom of will, unless they proceed to arbitration in a country other than that in which the award would fall to be enforced. Under this system, even if the parties to a dispute were of the same nationality, the rules of procedure of a given arbitral body might be applied, provided the said arbitral body was situated in a country other than the one where the award would have to be relied upon by the successful party. For example, the Convention could apply to an award made by an English arbitral body in a dispute between two French parties, this award normally having to be enforced in France. However, if the dispute was - as is typical of international commercial arbitration - between an English and a French party, and if it was determined by the same English arbitral body, the Convention would not be applicable, if the French party sought to enforce the award in England, whereas the said award would enjoy the benefits of the Convention if the English party sought to enforce it in France. Thus, the autonomy of the will of the parties and, consequently, the choice of the private rules of arbitration that would be applicable, are dependent on the often uncertain outcome of the dispute, which would seem contrary to the very aim of the draft. The Convention would thus not only jeopardize co-ordination, which the rules of the large Arbitral Centres are working towards in response to the urgent requirements of international trade, but would also be likely to hamper recourse to these Arbitral Centres.

"Since all national systems of law do not provide for a distinct commercial law, their dissimilarity makes it difficult to limit the scope of the Convention to commercial disputes. Consequently, abandoning the position taken in the ICC's Preliminary Draft, the Commission agreed to the solution recommended in ECOSOC Committee's Draft of article 1, para. 2, which allows Contracting States the possibility of limiting their commitments to disputes considered as commercial under their national laws.

"In accordance with the foregoing explanations, and to satisfy the requirements of international trade, the Commission considered that Article 1, para. 1 of the ECOSOC Expert's Draft might be worded as follows:

> 'The present Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state in which such awards are relied upon, as well as of awards settling disputes between parties having their main establishments or, failing this, their usual residences situated within the territories of different states. It shall equally apply to awards made in disputes involving legal relationships implemented in whole or in part in the territories of different states.'

"If, contrary to all expectations, the above text should not be adopted, in full, the Commission considers, that, in any case, article I, para. 1 should include the first two criteria of foreign elements, i.e. it should be worded as follows:

> 'The present Convention shall apply to the recognition and enforcement or arbitral awards made in the territory of a state other than the state in which such awards are relied upon, as well as of awards settling disputes between parties having their main establishments or, failing this, their usual residences within the territories of different states.'

"Article I, para. 2 of the ECOSOC Experts' Draft lays down two restrictions on the scope of the Convention, the first of which deals with the commercial nature of disputes, which has already been discussed above. The other restriction reserves the possibility of requiring territorial reciprocity: the ICC has already made all the criticisms provoked by this restriction, which is contrary to the legitimate interests of international trade. The Commission therefore welcomes the fact that the Committee of Experts had, in principle, accepted the arguments put forward, and it expressed the hope that, in the same spirit, the Contracting States would not make any use of this possibility."

International Law Association

"It is thought that the Geneva Protocol of 1923 should be expressly incorporated in the new Convention. Apart from any other reasons, the proposed new Convention is no doubt intended to extend to a great number of States which are not parties to the Protocol. They would not, therefore, be bound thereby."

Société Belge d'Etudes et d'Expansion

"Paragraph 2. States are given the option of limiting the application of the Convention strictly to arbitral awards made in the territory of another Contracting State. It is also provided that the application of the Convention may be limited to disputes considered as commercial under their national law.

"These two restrictions seem regrettable.

"If the aim is to make the Convention accessible to all countries it appears wrong to begin by indicating that there is an option of refusing to apply it to arbitral awards not made in the territory of a Contracting State. Such a provision might conceivably operative against the interests of nationals of Contracting States.

"For example: let us suppose the case of a commercial transaction between a United Kingdom national and a United States national which is to be carried out in the territory of a non-contracting State. A dispute arises, and the parties agree to refer it to an arbitral tribunal of the country in which the transaction is carried out.

"If the United States and the United Kingdom limit the application of the Convention to awards made in the territory of a Contracting State, it will be impossible to enforce the award even if it complies with the provisions of the national law of the country which has limited the application of awards under article I, paragraph 2, of the draft convention.

"There is something paradoxical in this situation.

"Furthermore, the draft text gives countries the option of limiting the application of the Convention to disputes which are considered as commercial under their national law.

"The reason for this limitation is not apparent, for the aim is to secure the widest possible recognition of foreign arbitral awards.

"In Belgium, both in civil and in commercial matters, rights which can be freely disposed of may be the subject of arbitration.

"This is also the case in many other countries.

"Hence it would seem the proper course to make the validation of any foreign arbitral decision, on any matter whatsoever, mandatory in all cases in which arbitration is permitted under national law.

"In conclusion we would suggest that article I, paragraph 2, should be amended to read as follows:

> 'Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in disputes arising between nationals of Contracting States. The Convention shall apply to disputes arising out of rights which may, under the national law of the country in which the award is to be enforced, be submitted to arbitration.'"

Society of Comparative Legislation

"The following words should be added after the words 'persons whether physical or legal' at the end of paragraph 1: 'this expression to include States, public bodies and undertakings (collectivités publiques), public establishments and establishments serving the public interest, on the condition that the said differences arose out of a commercial contract or a private business operation (acte de gestion privée).'

"/N.B. It should be noted at this point that there have been cases in the past in which even States and public bodies or undertakings - State Railways and municipalities - have undertaken to refer disputes arising out of international contracts to private arbitration, have resorted to the prescribed arbitral procedure and have given effect to the arbitral awards made. This has happened several times, for example in cases dealt with by the Court of Arbitration of the International Chamber of Commerce. In our view it would be wholly desirable to encourage this practice by including the clause proposed, as the Belgian representative has requested (paragraph 24 of the report)./

"Proposed text of article I:

'1. This Convention shall apply to the recognition and enforcement of arbitral awards made abroad, whether they arise out of disputes between persons who have their principal establishment, or their habitual residence, in the territory of different States, or are concerned with legal relationships which produce their effects wholly or partly in the territory of different States. The Convention shall apply to States, public bodies and undertakings, public establishments and establishments serving the public interest, on the condition that the disputes affecting them arose out of a commercial contract or a private business operation.

'2. Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. Similarly, any Contracting State may declare that it will apply the Convention only to disputes arising out of contracts which are considered as commercial under the national law of the Contracting State making such declaration.'"

ARTICLE II

International Law Association

"In view of the many difficulties which are being experiences in the application of the existing Geneva Convention, owing to cumbersome rules of procedure and to the Revenue laws in many Contracting States, it is suggested that the new Convention should embody provisions on the following lines:

(a) Applications for enforcement to be by ordinary summons, to be heard on a date fixed forthwith, leaving the Respondent sufficient time to appear and to put forward his objections, but without any unnecessary delay.

(b) Such applications to be heard by a single judge, judge adjunct or other officer (Master, Registrar, Rechtspfleger, etc.) (hereinafter called, for the sake of brevity, the enforcement judge).

(c) Evidence to be by documents and affidavits only. In particular evidence on foreign law should be by affidavit of a lawyer of repute practising, or having practised, in the country concerned.

(d) Documents, in particular the foreign award, the submission and/or the Contract or letters containing the same, to be excempt from 'enregistrement', stamp or other duties, except perhaps small fixed duties not exceeding a certain maximum.

(e) Diplomatic or Consular legislation of documents to be unnecessary if the documents or affidavits are issued,or certified by a foreign judicial or other Authority, Notary Public, Chamber of Commerce or well-known Trade Association or Organization.

(f) No ad valorem Court fees to be charged, except perhaps small fixed duties not exceeding a certain maximum.

(g) The enforcement judge to have power to make an interim Order authorizing enforcement of the award, wholly or in part, with or without security, pending the proceedings if he is satisfied that Respondent's objections are not well founded, or are founded only partly.

(h) No appeal against such interim Order or at least execution not to be suspended pending such appeal.

(i) Appeal against the enforcement judge's final decision only on points of law to the superior Court or judge (or other superior officer) but execution not to be suspended pending such appeal."

Society of Comparative Legislation

"The concluding words of this article, beginning with the words 'in accordance with the rules of procedure', should be amended to read as follows: 'in accordance with the rules of summary procedure of the country where the award is relied upon, if there is prima facie evidence that the undermentioned conditions are fulfilled.'

/N.B. The International Law Association recommends the adoption of more detailed provisions concerning the time limit, jurisdiction, the nature of supporting documents, the authentication of documents, exemption from registration, stamp and other duties, etc.; the power of the enforcement judge to order immediate enforcement of the award, with or without security; addition of the right to appeal against such interim order; the regulation of appeal against the enforcement order - such appeal to refer only to points of law - while execution is not to be suspended pending such appeal; etc.

The inclusion of such detailed provisions, however pertinent, would tend to overburden the text, and might provoke objections based on considerations of national law and lead to lengthy discussion. It seems preferable to concentrate on achieving progress which, while more limited, is practicable in the immediate future, and to continue the work of simplification and unification already begun./

"Proposed text of Article II:

'In the territories of any Contracting State to which the present Convention applies, an arbitral award shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the country where the award is relied upon, if there is prima facie evidence that the undermentioned conditions are fulfilled.'"

ARTICLE III

International Chamber of Commerce

Re para. (a)

"The Commission's comments on this provision were concerned only with the wording, since there is agreement on the underlying principles of the two texts.

"First of all, in the French text, it is suggested that 'soient convenues' be substituted for 'aient convenu'.

"Next, it would be preferable to use the expression 'separate agreement' instead of 'special agreement', to distinguish it more clearly from the arbitration clause in the parties' contract, at the same time reversing the order of the two cases. Paragraph (a) would therefore read as follows:

'(a) That the parties shall have agreed in writing, either by an arbitration clause in a contract, or by a separate agreement, to determine their disputes by means of arbitration.'

Re para. (b)

"The Commission's comments on this paragraph extend somewhat further and go to the root of the matter.

"(a) the ECOSOC Committee's report states that the expression 'final and operative' was inserted so as to protect the rights of the losing party. But if the first result of this should be to give rise to proceedings which could

be avoided precisely through arbitration, and to encourage delaying tactics, the reform would be likely to miss an essential part of its object.

"As a matter of fact, in all justice and fairness, it was essential to start from the principle that an arbitral award in proper form constituted a document of a title in the hands of the party seeking its enforcement, i.e. that 'prima facie', the enforcement should be granted, whether sought in the country where the award was made or elsewhere.

"Consequently, it is difficult to see how it would be possible to require that the party seeking enforcement should supply the negative evidence of the other party's failure to apply for the award to be set aside or its enforcement to be stayed.

"Further, in order to prove that the periods within which recourse to legal proceedings must be exercised had lapsed, it would generally be necessary, if the award was to be relied upon in another country, first of all to apply for an enforcement order from the courts in the country where the award was made. Consequently, in the case under consideration, the text proposed would constrain the parties to obtain two orders of the courts by which the arbitration award might be enforced - a formality likely to involve heavy stamp duties in certain countries, and to be useless if enforcement were not sought in the country where the award was made. Thus, instead of being facilitated by the Convention, the enforcement of an award would only be impeded in relation to the national system in each country.

"(b) If, on the other hand, it is considered that the award is in itself a title which should be treated as executory, the burden of proof of the non-existence of this power to proceed to execution must lie with the party making this allegation.

"This transfer of the burden of proof means first of all that this provision must be displaced from article III (relating to the positive conditions to be fulfilled by the award for it to be recognized and enforced) to article IV (relating negatively to the cases in which recognition and enforcement may be refused).

"As regards the contents of the provision, the party opposing enforcement could supply evidence for either of two classes of facts:

- that the award has been set aside in the country where it was made, which would definitely rule out enforcement;

- that enforcement of the award has been suspended in the same country; this has only a provisional effect and includes cases where the party concerned has simply instituted proceedings, such as an appeal, which imply a stay of execution.

"(c) The foregoing remarks tend to place full value on article IV (e) of the draft, whose coexistence with article III (b) seems hardly justified and which it would be sufficient to complete.

"Consequently, the Commission proposed:

- that article III (b) of the draft be deleted;

- that article IV (e) of the same draft be supplemented to include cases where enforcement of the award has been suspended."

International Law Association

"Sub-para. (a).

Submission should be required to be in writing and to state the territory where the arbitration shall be performed; failing this, where the submission is to arbitration under the rules of a permanent organization, the arbitration should be performed in the territory provided by those rules.

"It should be provided that the essential validity of a submission should be governed by the law of the territory in which the arbitration shall be performed. The capacity of the parties to submit and the formal requirements of a submission should be governed by the law of the territory in which the submission or the contract containing the same is made, provided it is made inter praesentes; otherwise the law of the territory in which the arbitration shall be performed should govern also capacity and formal requirements.

"Sub-para. (b).

The words 'and operative, and in particular, that its enforcement has not been suspended' should be deleted and replaced by the addition to Article IV (e) suggested below. It is suggested that a further sub-para. (c) be added, reading as follows:

'That the arbitration has been duly performed in accordance with the said agreement of the parties.'"

Société Belge d'Etudes et d'Expansion

"Paragraph (b). If the article is adopted as drafted, what becomes of preliminary provisional and prejudicial awards? Such awards are not final. Let us take the case of an arbitral award which, without prejudice to the rights of the parties, calls for an expert opinion, an inquiry, the appearance of a particular person or a detailed interrogation as to fact.

"These are not final awards.

"Does this mean that they cannot be enforced?

"The Belgian Code of Civil Procedure provides, inter alia (article 451), that an appeal shall not lie against a preliminary judgement until after the delivery of the final judgement (the appeal then relating to the final judgement).

"If a foreign arbitral award, before the substance of the case is dealt with, calls for an expert opinion or for an examination to be carried out in another country, that award is preliminary and therefore not final.

"If the proposed text is adopted, how can such an award be enforced?

"Furthermore, there seems no point, in a text concerned with an arbitral award ruling on the substance of a dispute, to add the words: 'and, in particular, that its enforcement has not been suspended'. If the enforcement of an operative award has been suspended, that award is not final, and what happens to it will depend on the outcome of the moves made to resist its enforcement.

"Article 1028 of the Belgian Code of Civil Procedure mentions five cases in which the parties, without being required to lodge an appeal, may apply to the court which made the enforcement order for a stay of execution and ask for the annulment of the decision described as an arbitral award.

"We therefore propose that the article should be amended to read as follows:

> 'To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary:
>
> '(a) That the parties named in the award have agreed in writing, either by a special agreement or by an arbitral clause in a contract, to settle their differences by means of arbitration;
>
> '(b) That, if the award is of a preliminary, provisional or prejudicial nature, it has become operative and its enforcement has not been suspended in the country where it was made;
>
> '(c) That, if the award deals with the substance of a dispute, it has become operative and final.'"

Society of Comparative Legislation

"The following observations are made on paragraph (b):

"Whereas the Geneva Convention provided that the enforcement of an award could not be obtained unless it had become final (for the sense in which this term was used, see article I (d)) and no proceedings for the purpose of contesting its validity were pending, the present draft adds a further condition, namely that the award should be not only final but also 'operative' (exécutoire), and that 'its enforcement has not been suspended'.

"It has already been pointed out that the term exécutoire is not the exact equivalent of the term 'operative' used in the English text, which means 'capable of being enforced' (workable, or fulfilling the conditions necessary for effectiveness).

"But to confine our attention to the French text (with which we are concerned), we would point out that the words added in the new draft impose a twofold obligation: the award must have become final on the expiration of the time limits for opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist), and its enforcement must have been ordered by the competent court of the country where it was made before being ordered by the enforcement judge of the country where its enforcement is sought.

"This twofold condition represents a serious obstacle in view of the difference in the time limits for the respective proceedings and of the fact that in some countries, such as France, there is no time limit for appeal against an enforcement order.

"The condition has a further disadvantage in that, if the enforcement order has to be obtained in the country where the award has been made, a registration fee must be paid - in France, within one month from the issue of the order - irrespective of the fee payable in the country where it is sought to enforce the award.

"Conditions of this kind are inappropriate in such fields as international commercial arbitration. They are based on considerations which in turn stem from a misconception of the nature and purpose of arbitration, an institution provided for exceptional cases, to be resorted to only in matters not strictly reserved and as between parties who not only possess legal capacity but also, for reasons related to the needs of international trade, are resolved to avoid the formality and complications of adjective law.

"In our view the following wording would suffice for article III (b):

'That, in the country where the award was made, the award is not the subject of an appeal or other appellate remedy permitted by statute and, in particular, that the award has not been annulled or its enforcement suspended by the court.'

"This would entail, as a consequential amendment, the deletion of article IV, paragraph ( ).

"The operation of this provision would be greatly facilitated by the assurance that the arbitral award had been made under the auspices and supervision of arbitral authorities which possessed recognized authority, and whose seal of approval, affixed to the award, would in itself be a guarantee of the propriety of the arbitral procedure followed.

"Proposed text of article III:

'To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary that the parties named in the award have agreed in writing, either by an arbitral clause included in the contract or by a separate agreement, to settle their differences by means of arbitration.'"

ARTICLE IV

International Chamber of Commerce

Re (a), (b), (c), (d) and (h)

"Commission has no comment to make on the subject of the above-mentioned provisions, though it will suggest below a lighter version of article IV.

Re (e)

"The Commission has given its comments on this provision, in connection with article III. There is thus no need to give them here.

Re (f)

"The ECOSOC Committee's Draft here introduces the idea that recognition or enforcement may be refused if the award is so vague and indefinite as to be incapable of enforcement.

"While appreciating the intention of this provision, the Commission nevertheless considers that it has the drawback of allowing the competent authorities dangerous latitude of interpretation which, in certain cases, would enable support to be given to refusal of enforcement, based on quite different reasons.

"In any case, it would seem to be superfluous.

"The Commission accordingly proposes the deletion of (f).

Re (g)

"The Commission appreciates the wording of this provision.

"The ECOSOC Committee of Experts agrees with the ICC's Preliminary Draft in that they consider that enforcement may be refused only if the composition of the arbitral body and the arbitration procedure were not in accordance with the agreement of the parties or - failing such agreement between the parties - in accordance with the law of the country where the arbitration took place. This is a very sound and classical application of the rule of autonomy of the will.

"The Commission, furthermore, fully agrees with the ECOSOC Committee in admitting that an award cannot be completely 'independent of national laws'. Thus, national law cannot be ignored as regards the formation of the agreement of the parties and their legal capacity, as well as many other matters. The contractual rules which are to be safeguarded will always be limited to the composition of the arbitral tribunal and to that part of the arbitration procedure which may be left to the will of the parties so as to ensure the development of arbitral practice in accordance with the requirements of international trade.

"The Commission nevertheless considers that the addition of the phrase 'to the extent that such agreement was lawful in the country where arbitration took place', calls for express reservations. This restriction supplies an excuse for delaying tactics, by encouraging the defendant to maintain that the composition of the arbitral body or the arbitration procedure, or both, were not licit in the country where arbitration took place. Moreover, when enforcement is sought outside the country where the award was made, the text proposed would qualify the judge relied upon for enforcement to assess the validity of an agreement in relation to a law which is foreign to him or perhaps even to estimate the scope of foreign public policy.

"The Commission therefore considers that the Draft Convention would gain in effectiveness without the judicial control of arbitration being affected, if the words, 'to the extent that such agreement was lawful in the country where arbitration took place', were deleted from (g).

Suggestions for the Drafting of Article IV

"In accordance with the foregoing comments and to lighten the wording of article IV, the Commission considered that the following text might be adopted:

'The recognition and enforcement of arbitral awards fulfilling the conditions laid down in the preceding article may not be refused by the competent authority in the country where they are sought, except in the following circumstances:

'(a) if the dispute determined by the award is not capable of submission to arbitration under the law of the country in which the award is sought to be relied upon;

'(b) if the party against whom the award is invoked was not given notice of the appointment of the arbitrator or of the arbitration proceedings in due form or in sufficient time to enable him to present his case;

'(c) if the party against whom the award is invoked, being under a legal incapacity, was not properly represented;

'(d) if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if decisions on matters referred to arbitration can be separated from those not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognized and enforced;

'(e) if the award, the recognition or enforcement of which is sought, has been annulled in the country in which it was made, or its enforcement has been suspended therein;

'(f) (formerly (g)) if either the composition of the arbitral body or the arbitration procedure was not in accordance with the agreement of the parties, or, failing any agreement between the parties on these matters, if they were not dealt with in accordance with the law of the country where the arbitration took place;

'(g) (formerly (h)) if recognition and enforcement of the award are clearly incompatible with public policy in the country where the award is sought to be relied upon.'"

International Law Association

"Sub-para. (a)

"Delete. So far as this exception applies, it should come under (h).

"Sub-para. (b)

"It might be well to state by the standard of what law this requirement of due notice is to be gauged. Presumably it will be inevitable to apply the standard of the law obtaining in the territory where enforcement is sought.

"Sub-para. (c)

"Incapacity would be covered by the suggested new sub-para. III (c) so far as it relates to the submission. Capacity to be a party in the arbitration proceedings should be governed by the law of the Territory in which the arbitration is to be performed, in the meaning explained above as Article III, sub-para. (a). In most cases this will be the same law governing capacity to submit.

"Sub-para. (e)

"The expression 'in the country in which it (i.e. the award) was made' should be replaced by 'in the territory in which the arbitration shall be performed according to Article III(a)'. Here it might be added 'provided that enforcement may also be refused if an action for the annulment of the award is pending in the territory in which the arbitration was performed and in the meantime the competent Court of that territory has suspended the enforcement of the award'. This would replace, within a manageable measure and in its proper place, that part of Article III(b) of the draft, the deletion whereof has been recommended above.

"Sub-para. (g)

"This would be covered by the new Article III(c) suggested above.

"Sub-para. (h)

"The words 'or the subject matter thereof' and 'or with fundamental principles of the law ('ordre public')' should be deleted. They convey no precise idea and would only be apt to encourage unwilling debtors. In view of the fact that by far the largest number of arbitral awards are British or American and that the same do not as a rule give reasons, it is of the utmost importance to guard against the danger that such awards might be held to be against the public policy of the territory in which enforcement is sought. Obviously neither the United

Kingdom nor the United States of America can have any interest in a Convention which would compel them to enforce foreign awards that would prevent the enforcement of the bulk of their own awards. On the other hand, if any serious question of law is involved, the respondent in an English arbitration can always require a special case to be stated pursuant to section 21 of the Arbitration Act, 1950. This will result in a 'speaking award', in the shape of the special case, and enable the respondent to have the question of law decided by the (English) Court. If he fails to ask for the special case, he has only himself to blame and it would not be fair to allow him to plead in the enforcement proceedings that the absence of reasons in the award renders its enforcement contrary to public policy."

Société Belge d'Etudes et d'Expansion

"Paragraph 34 of the Committee's report says that the conditions laid down in article III must be fulfilled in all cases. We therefore suggest that the article should be amended in the following respects:

First clause

'Even where the essential conditions laid down in article III are fulfilled, recognition and enforcement of the award may only be refused if the competent authority in the country where recognition or enforcement is sought is satisfied... etc.'

Clause (b)

"In order to leave no alternative open we suggest the following wording:

'That the party against whom the award is invoked was not given notice of the arbitration proceedings and of the appointment of the arbitrator in due form or in sufficient time to enable him to present his case;'

Clause (d)

"To forestall what might become endless debate, the word 'may' in the last line of the clause should be replaced by 'shall'.

Clause (e)

"This clause seems redundant in that it duplicates draft article III (b), under which the recognition and enforcement of the award may only be applied for if, 'in the country where the award was made, it has become final and operative and, in particular, its enforcement has not been suspended'.

Clause (h)

"We suggest that this clause should be amended to read as follows:

'That the recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law (ordre public) of the country in which enforcement is sought.'"

Society of Comparative Legislation

"We propose the following wording:

'Recognition and enforcement of arbitral awards which fulfil the conditions laid down in the preceding article may not be refused by the competent authority in the country where they are sought except in the following circumstances:

'(a) If the dispute settled by the arbitral award is not arbitrable under the law of the country where enforcement of the award is sought; 1/

'(b) If the party against whom the award is invoked was not given notice of the appointment of the arbitrator or of the arbitration proceedings in due form or in sufficient time to enable him to present his case;

'(c) If the party against whom the award is invoked, being under a legal incapacity, was not properly represented;

'(d) If the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be redognized and enforced;

'(e) If the award, the enforcement of which is sought, has been annulled in the country in which it was made, or its enforcement has been suspended;

'(f) If either the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties and if, the latter not having made provision for and settled these questions, they have not been settled in accordance with the law of the country where the arbitration took place;

1/ It would also be advisable to provide that an enforcement order may not be refused except where the dispute is held not arbitrable by reason of public policy (ordre public); it should be impossible to deny enforcement on grounds of mere expediency, for example in cases relating to patent rights.

'(g) If the recognition and enforcement of the award would be manifestly repugnant to public policy (ordre public) in the country in which the award is sought to be relied upon.'

"The new words concerning the fundamental principles of law should be deleted. Either they are redundant, in that they coincide with the notion of public policy (ordre public), or else they invite the risk of mischievous proceedings. At this point it should be noted that in commercial matters, with which the Convention is chiefly concerned, public policy and the fundamental principles of public law are rarely at stake, as is demonstrated by the fact that, in France, for example, State Counsel is not represented in the commercial courts.

"/NB. The following explanatory notes are made on the suggested amendments:

The wording proposed for the opening paragraph of article IV is as clear as, and shorter than, that of the draft Convention.

The same applies to clauses (a), (b), (c) and (d).

Clause (e) may be deleted for the reasons stated above.

The new clause (e) is less cumbersome. The new clause (f) embodies a change in wording, the chief difference being the deletion of the passage: 'to the extent that such agreement was lawful in the country where the arbitration took place'.

The presence of this passage would produce serious disadvantages. In the first place, it would encourage challenges and procedural moves contesting the lawfulness of the agreement. Those who practice arbitration know how vulnerable this institution is to procedural moves the sole object of which is often to hold up a case when the party resorting to such moves has reason to expect an adverse decision.

Furthermore the enforcement judge does not seem the right authority to determine the lawfulness of the agreement. This question should, in principle, fall within the jurisdiction of the arbitral tribunal or, if it affects public policy, within that of the ordinary courts.

If the arbitral award presents a problem of nullity of the agreement, it would be unusual not to raise it before the arbitrators or before the ordinary courts. Motions for the annulment of an award on the ground that the agreement to which it was made is void are of very frequent occurrence.

Hence it does not seem advisable to encourage a tendency to resort to procedural devices by providing loopholes for litigants pleading in bad faith./"

ARTICLE V

Société Belge d'Etudes et d'Expansion

"We suggest that the last paragraph should be amended to read as follows:

'A duly certified translation of the award and of the other documents may be required. The said translation shall be provided in the official language of the court which hears the application for enforcement.'

"The proposed wording is designed to make provision for countries which have several official languages but where the use of a particular language is confined to a certain area."

ARTICLE VI

International Chamber of Commerce

"While approving the idea behind article VI, which was also behind the same article of the ICC's Preliminary Draft, the Commission proposes that the following be added, so as to define the scope of the article:

"... if this law or these treaties contain provisions more favourable to the recognition or enforcement of arbitral awards.'"

Society of Comparative Legislation

"Proposed text:

'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of the right to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon, if the law or treaties in question contain provisions more favourable to the enforcement of awards.'"

ARTICLE VII

Société Belge d'Etudes et d'Expansion

"1. The apparent object of the proposed text is to limit the scope of the Convention from the outset, whereas surely the aim should be to work out rules of arbitral procedure capable of being adopted by every country in the world.

"We therefore suggest the following wording:

'This Convention shall be open for signature and ratification on behalf of any Member of the United Nations and of any other State wishing to accede thereto.'"

ARTICLE XI

Société Belge d'Etudes et d'Expansion

"We consider that a third paragraph, worded as follows, should be added:

'3. Awards made within ninety days after the date of deposit of the instrument of ratification or accession may be enforced as from the date on which the accession takes effect.'"

ARTICLE XII

Société Belge d'Etudes et d'Expansion

"We again suggest the addition of a third paragraph, worded as follows:

'A denunciation shall only affect awards made after the period of notice of denunciation has expired.'

"If arbitral proceedings are in progress at the time when a State denounces the Convention and the arbitral award is made before the denunciation has taken effect, then the parties will, under our suggested clause, be able to obtain enforcement of the award even after the denunciation has taken effect."

ARTICLE XIII

Société Belge d'Etudes et d'Expansion

"We consider the terms of paragraph 2 regrettable, for it leaves States free to reject the jurisdiction of the International Court of Justice in a dispute between them where they have not agreed to another mode of settlement.

"The objection raised by the USSR is entirely irrelevant.

"The USSR argues that this article tends to violate the sovereign rights of States with respect to the principle of the voluntary recognition of the jurisdiction of the International Court of Justice and, secondly, that it would limit the sovereign right of States to make reservations to any article of the Convention.

"The USSR forgets, however, that:

"(a) the very purpose of the draft Convention is to establish general rules applicable in all countries of the world;

"(b) the rights of States are safeguarded, for only if they do not agree on some other mode of settlement are disputes between States concerning the interpretation or application of the Convention to be referred to the International Court of Justice for decision.

"We therefore consider that paragraph 2 should be deleted."

Society of Comparative Legislation

"It would be desirable to delete paragraph 2."
