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UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

COMMENTS ON DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Note by the Secretary-General

1. Resolution 604 (XXI) of the Economic and Social Council states that the draft Convention (E/2704, Annex) prepared by the Committee on the Enforcement of International Arbitral Awards shall serve as a basis for the conclusion of a convention on the recognition and enforcement of foreign arbitral awards, due account being taken of the comments and suggestions made by Governments and non-governmental organizations, as well as of the discussion at the twenty-first session (923rd meeting) of the Council. The comments and suggestions regarding the draft Convention are reproduced in documents E/2822 and addenda 1 to 6, and E/CONF.26/3[1/] and E/CONF.26/4.

2. A study of the comments and suggestions made by Governments and non-governmental organizations indicates their concern with several major problems relating to the drafting of a convention on the recognition and enforcement of foreign arbitral awards. These problems were also raised in the discussions held by the "Working Group on Arbitration" of the United Nations Economic Commission for Europe and in some of the replies received from Governments in connexion with a study of arbitration facilities made by the United Nations Economic Commission for Asia and the Far East. While no attempt will be made in this note to summarize all the comments and suggestions that were submitted on the

1/ E/CONF.26/3 and E/CONF.26/4 will be issued shortly.

draft Convention, it would nevertheless seem useful to draw the attention of the Conference to the following major problems which appear to exist in this connexion:

I. Scope of the application of the Convention;

II. Procedures for enforcement of arbitral awards;

III. Judicial control of the recognition and enforcement of arbitral awards; and

IV. Relationships between any new multilateral convention and other treaties or laws relating to the same subject.

I. Scope of the application of the Convention

3. With a few exceptions, the relevant comments indicate that the definition of the scope of application of the new Convention contained in Article I of the Committee's draft is considered preferable to the requirements under the 1927 Geneva Convention that, in order to be enforceable, an award must have been rendered not only in the territory of the Contracting States but also between persons subject to their jurisdiction. Some of the comments pointed out, however, that the provision in the Committee's draft limiting the application of the new Convention solely to awards made outside the territory of the State of enforcement might still be too restrictive, and favoured a further broadening of the scope of application of the Convention so as to include also certain other classes of arbitral awards relating to international commercial transactions.

4. Thus, it was suggested that the new Convention should apply also to arbitral awards rendered in the territory of the State in which the award is being enforced, provided that the dispute submitted to arbitration arose between parties domiciled (or having their main establishments) in the territories of different States.[2/] An extension of the scope of applicability of the new Convention to this class of awards would not be novel, as such awards were enforceable under the 1927 Convention, provided that they were made between persons subject to the jurisdiction of the Contracting States.

2/ Official Records ECOSOC, 21st session, agenda item 8, annexes: Document E/2822, pp. 5 (Switzerland), 11-12 (International Chamber of Commerce).

5. It was also suggested that the scope of the application of the Convention should be further extended to a third class of arbitral awards, comprising all arbitral awards "made in disputes involving legal relationships implemented in whole or in part in the territories of different states", irrespective of whether or not such awards were rendered abroad, and regardless of the domicile of the parties between which arbitration took place.[3/] In the ECE Working Group on Arbitration, several delegations expressed their preference for a similar proposal providing in arbitration cases for an exemption from ordinary national jurisdiction "for all disputes relating to foreign trade, on the understanding that foreign trade would be taken to mean a movement of goods, services or currencies across frontiers". The ECE Working Group on Arbitration felt, however, that this proposal should first be given close examination by Governments.[4/] The Conference may wish to consider the respective merits of these alternatives both from the point of view of best satisfying the requirements of international commerce and of compatibility with the existing principles of relevant national procedural laws.

6. The comments on the provisions of the second paragraph of Article I indicate that several countries would be prepared to accede to the Convention only if they could apply it on the basis of reciprocity.[5/] On the other hand, several Governments and organizations pointed out that the place where the arbitral tribunal meets is often chosen without relevance to the object of arbitration but only as a matter of convenience, and stressed the desirability of a provision which would make it possible to apply the Convention to arbitral awards rendered in any State, regardless of whether it was a Party to the Convention or not.[6/] In

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3/ Ibid., p. 12 (International Chamber of Commerce).

4/ "Report of the Working Group on its Fourth Session", ECE document TRADE/55, paragraph 16.

5/ Official Records, ECOSOC, 21st session, agenda item 8, annexes, Document E/2822, pp. 4 (Lebanon, Mexico), 18 (Egypt), 21 (United Kingdom) and 25 (Yugoslavia).

6/ Ibid., pp. 4 (Austria, Japan), 5 (Switzerland), 12 (International Chamber of Commerce, Societé Belge d'Etudes et d'Expansion); see also Report of Committee on the Enforcement of International Arbitral Awards, document E/2704, paragraph 22.

view of these differences of opinion, the solution proposed in the draft Convention, namely, to open the way for enforcement of awards rendered in the territory of any foreign State but at the same time to provide expressly for the possibility of reservations limiting the application of the Convention on a reciprocal basis, may be the one which would receive most general acceptance.

II. Procedures for enforcement of arbitral awards

7. Some of the Governments and organizations pointed out the desirability of supplementing Article II of the Convention either (a) by including in it standard procedural rules that would be applicable to the enforcement of foreign arbitral awards, (b) by providing that arbitral awards should be enforced by a "summary procedure", or (c) by stipulating that the arbitral awards recognized pursuant to the Convention should be enforceable by the same procedure as that applied to domestic arbitral awards.7/ The object of such provisions would be to preclude the possibility that the enforcement of foreign awards may be delayed or rendered impractical because of unduly complicated enforcement procedures.

8. Each of the above proposals may give rise to some difficulties: (a) it may not be considered practical to attempt spelling out the applicable enforcement procedures in all detail in the text of the Convention itself; (b) a reference to "summary" enforcement procedures may not be given an identical meaning in countries with different procedural law systems; and (c) the procedures applicable to the enforcement of domestic arbitral awards may contain elements which, if applied to foreign awards, would make the enforcement too cumbersome or time-consuming. A possible solution of these difficulties may be to provide in Article II of the draft Convention that arbitral awards recognized pursuant to the Convention should be enforced in accordance with a simplified and expeditious procedure which, in any event, should not be more onerous than that applied to domestic arbitral awards.

7/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pp. 5 (Federal Republic of Germany), 13 (International Law Association, Society of Comparative Legislation).

III. Judicial control over the enforceability of arbitral awards

9. One of the central problems of the proposed Convention is to define the conditions under which the competent authorities of the country where the recognition and enforcement of an arbitral award is sought may refuse to grant such a request. It seems generally agreed that, on one hand, courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible with the public policy of the country of enforcement. On the other hand, if the enforcing authorities were to proceed in each case with a full re-examination of such awards, and, in particular if such re-examination would also deal with the substance of the awards, the purpose of the Convention might be defeated: in many cases, the enforcing authorities could not be expected to complete a full judicial examination of the award within reasonable time-limits required to make the Convention a practical expedient in international commercial life. Also, where the arbitral proceedings encompass several jurisdictions or where the differences submitted to arbitration have legal effects in a number of countries, it might be impossible to avoid inconsistencies between different judgements based on a variety of national legal systems. The extent of judicial control over the recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it.

10. The conditions for enforceability of arbitral awards are dealt with in Articles III and IV of the draft Convention. The provisions of these two articles seem to be largely inter-dependent, and before proceeding to the drafting of the texts, the Conference might wish to examine first the main aspects of the problem of judicial control over the enforcement of arbitral awards.

11. From the comments submitted on the draft Convention by Governments and organizations, it is clear that they are well aware of the considerations outlined in paragraph 9 above. While some of the comments do contain suggestions to the effect that certain additional or alternative conditions should be fulfilled before foreign arbitral awards can be recognized and enforced, the general tendency of

the comments is to seek a reduction of the grounds on which recognition and enforcement of an arbitral award can be refused, and to obtain greater clarity and simplicity in the provisions of Articles III and IV of the draft Convention.

12. First of all, it may be noted that all Governments and organizations which submitted comments on this point concurred that it would be desirable to eliminate sub-paragraph (f) of Article IV.[8/] This provision that the enforcement of an award may be refused if it is "so vague and indefinite as to be incapable of recognition or enforcement" was generally considered to be superfluous; and apprehension was expressed that such a provision may give the defendant an excuse for delaying tactics, while at the same time imposing on the enforcing authorities an undue burden of interpretation which could lead to a review of the arbitral award as to its substance.

13. A number of comments also concurred on the need to clarify the provisions of Article IV (g). Objections were raised against the requirement that the agreement of the parties as to the composition of the arbitral authority and the arbitral procedure need to be in accordance with the laws of the country where arbitration took place.[9/] It was pointed out that this provision could cause the frustration of awards if any differences, however small and insignificant, are found to occur between the arbitration procedure agreed upon between the parties and the laws prevailing in the territory where the arbitrators actually met. It was considered that a provision having such an effect would be a fortiori unjustified as in many cases the choice of the country where the arbitration tribunal gave its award may have been simply a matter of coincidence, without relevance to the object of the arbitration, and unknown to the parties at the time when they concluded the arbitration agreement and stipulated the applicable procedures.

14. Another provision which was commented upon as requiring omission or at least further clarification was the possibility foreseen in Article IV (h) that

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8/ Official Records, ECOSOC, 21st session, agenda item 8, Annexes, document E/2822, pp. 7 (Austria, Belgium), 8 (Federal Republic of Germany, Japan, Switzerland, USSR), 15 (International Chamber of Commerce), 16 (Society of Comparative Legislation), 18 (Sweden).

9/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pp. 7 (Austria), 8 (Federal Republic of Germany, France, Switzerland), 15 (International Chamber of Commerce), 16 (International Law Association, Society of Comparative Legislation), 19 (Greece).

enforcement of an award may be refused if it was "incompatible ... with fundamental principles of the law" of the country where the award is being relied upon. It was pointed out that compatibility with "public policy" was a sufficiently broad criterion and that the additional requirements of compatibility with fundamental principles of the law may give rise to difficulties of interpretation and open the question of a revision of the award as to its substance.10/

15. Several Governments and organizations foresaw practical difficulties in applying the provisions of Article III (b) requiring the party seeking enforcement of an arbitral award to show that in the country where the award was made it has become "final and operative" and that its enforcement has not been suspended. First of all, it would be normally impossible for the party seeking enforcement to submit a negative proof that the enforcement of the award has not been suspended or that no appeal has been lodged against the award, and it seemed therefore illogical to impose the burden of such a proof on the person seeking enforcement. Objections were also raised against the requirement of showing that the award had become "operative", in particular in view of the fact that the draft Convention combines this requirement with that of the finality of the award.11/ It was stressed that unless this provision was further clarified, the enforcement authorities might interpret it as requiring a prior exequatur or other form of ratification of the award by the competent judicial authorities of the country where arbitration took place, and thus make it necessary to duplicate enforcement action both in the country where the award was made and in the country where the award is to be relied upon. It was also pointed out that in

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10/ Ibid., pp. 7 (Austria), 8 (Japan, USSR), 15 (International Chamber of Commerce), 16 (International Law Association, Societe Belge, Society for Comparative Legislation), 18 (Sweden), 22 (United Kingdom).

11/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pp. 5 (Austria, Belgium), 6 (Federal Republic of Germany, Switzerland), 13-14 (International Chamber of Commerce, International Law Association, Society of Comparative Legislation), 22 (United Kingdom).

practice the determination by enforcement authorities as to whether or not an award was final might require the examination of a possibly complex set of legal provisions of a foreign country under which actions for appeal from, or annulment of, arbitral awards may be taken; and that the time-limits for such actions may be so extensive that the need to wait until all opportunities for appeals lapse and the award becomes "final and operative" may effectively preclude any practical application of the enforcement machinery under the Convention.

16. Should the Conference find these objections justified, it may wish to re-examine the language of Articles III and IV of the draft Convention and look for possible alternatives by which the above-described difficulties could be avoided. One such alternative might be to provide that the sole judicial control over the regularity of an arbitral award to which the Convention applies would be exercised by the competent authorities of the country of enforcement. A second alternative may be to divide the judicial control between the authorities of the countries where the award was rendered and where it is being relied upon, by enumerating the grounds on which an award could be, respectively, annulled before the first forum or refused enforcement before the second forum. A third alternative could provide that the competent authorities of the country of enforcement would retain full judicial control over the regularity of arbitral awards to which the Convention applies, but that under certain circumstances some of the grounds for voiding the award may be presumed not to be applicable unless they had been invoked within a set time-limit before the courts of the country where the award was rendered.

17. Taking into account the comments submitted by Governments and by the interested organizations, as well as the views of governmental experts who participated in the ECE Working Group on Arbitration and of other authorities on the subject, consideration should be given to, at least, the following grounds on which the recognition and enforcement of arbitral awards to which the Convention applies should be refused:

(a) If the parties have not agreed in writing to submit to arbitration the matters dealt with in the award.

(b) If the composition of the arbitral authority or the arbitral procedure was not in accordance with the written agreement of the

parties or, failing such agreement, with the applicable laws of the country where arbitration took place.

(c) 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 sufficient time to enable him to present his case or if, being under legal incapacity, he was not properly represented.

(d) If the subject matter of the award is not capable of settlement by arbitration under the laws of the country in which the award is sought to be relied upon.

(e) If the arbitral award would have the effect of compelling the parties to act in a manner contrary to public policy in the country of enforcement.

18. If the first of the alternatives referred to in paragraph 16 above was adopted, the competent authorities of the country where the award is being relied upon could refuse to grant its recognition and enforcement on any of the above grounds (or for such other reasons as may be set forth in the Convention). But if they found that none of the grounds for refusal of enforcement stipulated in the Convention were present, they would not need to examine further whether or not the award has been duly sanctioned and has become operative in accordance with the laws of the country where arbitration took place. If the award satisfies the conditions set forth in the Convention, a request for its enforcement would be granted without requiring a proof that no further opportunities for appeal or annulment proceedings against the award exist in the country where it was rendered. Such a solution would take into account the considerations that an arbitral tribunal does not necessarily meet and render its award in a country where any of the legal relationships involved in the dispute that gave rise to arbitration are to be implemented; that arbitral tribunals are not judicial organs of the State where they meet and do not derive their authority from its laws; and that an arbitral award may be of no inherent public interest to the country in which it was rendered unless it is also to be given legal effect in that country.

19. The concentration of judicial control in the hands of the competent authorities of the country of enforcement would avoid any need to duplicate enforcement action both in the country where the award was made and in the country

where the award is to be relied upon, and would obviate the danger that an arbitral award may be refused recognition because it had not become "final and operative" in the country where it was rendered for reasons which may be irrelevant for the recognition of the award in the country where it is to be given legal effect. This alternative solution would also avoid the uncertainties and delays that could arise if the enforcement of an award depended on the proof that the losing party has exhausted all opportunities for appeal in the country where the arbitral tribunal met.

20. While from the practical point of view of facilitating the settlement of disputes by arbitration the concentration of judicial control of awards in the country of enforcement would undoubtedly present important advantages, this alternative would also have the effect of withholding from the authorities of the country where the award was rendered the right of scrutiny over the award (except in cases where enforcement of the award was also applied for in that country). In the ECE Working Group on Arbitration, where several governmental experts had stressed the advantages of this alternative,[12/] some delegations raised objections against it for that very reason.

21. Under the second alternative solution referred to in paragraph 16 above, an arbitral award would be contestable in the country where it was rendered on the "procedural" grounds covered by paragraph 17(a) to (c) above, i.e. that the arbitrator was incompetent to hear the dispute or that the arbitration procedure was irregular. In the country of enforcement, the recognition of the arbitral award could then be refused only on the grounds referred to in paragraph 17 (d) and (e) above, namely, that in the country where the award is sought to be relied upon the subject matter of the award is not capable of settlement by arbitration, or that the effects of the award would be contrary to public policy in the country of enforcement. In the opinion of some governmental experts, such a solution would reduce "the existing inconveniences of the system of double control ... by the differentiation between the matters which could be covered by the respective controls exercised in the country of origin and in the country

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12/ Report of the ECE Working Group on Arbitration on its 4th session, ECE document TRADE/55, paragraphs 27-29.

of enforcement."[13] The question may arise, however, whether the Contracting Parties would be prepared, on a world-wide basis, to accept as conclusive and final the decisions made by authorities of another country on the questions of the competence of arbitrators and the correctness of the arbitration procedure, and whether all Contracting Parties would be willing to undertake to enforce foreign arbitral awards without retaining the right to examine themselves these aspects of the regularity of the award.

22. The solution of divided judicial control would not by itself avoid the difficulties and delays which may be caused by the uncertainty as to whether all the opportunities for appeal on the grounds invokable in the country where the award was rendered had already been exhausted. Consequently, the members who favoured this solution of the ECE Working Group on Arbitration linked it with a proposal to provide, in a multilateral convention, that an arbitral award could be contested in the country where it was made only during a short time-limit and that "on the expiring of this time-limit an award which was not set aside by the competent judge would become final and could be enforced in all the Contracting States, except where the award had the effect of compelling the Parties to act contrary to the public policy of the country of enforcement."[14] A similar solution for avoiding the danger that "an unsuccessful party might indefinitely delay the enforcement of an award by lodging purely obstructive appeals", is also included among the comments submitted on the draft Convention. One of the Governments proposed that "an award should become enforceable either when the time fixed for appeals by the domestic law has passed or after, say, two months from the delivery of the award (unless proceedings have been instituted to upset or amend the award), whichever happens first."[15]

23. Thus, a third alternative solution to the difficulties mentioned in paragraph 15 above could be to provide in Articles III and IV of the Convention

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13/ Ibid., paragraph 32.

14/ Report of the ECE Working Group on Arbitration on its 4th session, ECE document TRADE/55, paragraph 32.

15/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, p. 22 (United Kingdom), paragraph 8.

that the competent authorities of the country where the award is sought to be relied upon may refuse its recognition and enforcement if they satisfy themselves that any of the five grounds referred to in paragraph 17 above (or such other grounds as may be stipulated in the Convention) are present; provided that in the case of awards rendered in the territory of another Contracting Party, they would presume that the grounds referred to under paragraph 17 (a) to (c) above are not applicable if the validity of the award has not been set aside on these grounds by the competent authorities of the country where the award was rendered or if no appeal on these grounds was lodged by the losing party within the time-limit set forth in the Convention.

24. Should a proposal along these lines find general acceptance, the party claiming that the arbitral award should be set aside because of lack of competence of the arbitrators or irregularities in the arbitration procedure could appeal within the time-limit provided for in the Convention to the courts of the country where the award was made and seek to obtain its annulment. If no such appeal was lodged within the period set forth in the Convention (which should be counted as from the time when the award was communicated to the losing party) or if the validity of the award was not set aside, the arbitral award could be presumed to have become final; its enforcement in the territory of any other Contracting State could then be refused only if in the country where the award is sought to be relied upon the subject matter of the award is not capable of settlement by arbitration, or if the effect of the award would be contrary to public policy in the country of enforcement. Such a solution would considerably shorten and simplify enforcement proceedings without, it would seem, substantially detracting from the judicial safeguards available to the losing party or from the controls over the consistency of an arbitral award with public policy of the country of enforcement. While the country where the award was rendered would retain judicial control over those aspects of the regularity of the award which can be appropriately examined in that forum, the authorities of the country of enforcement would also maintain the right to scrutinize the competence of the arbitral tribunal and its procedures in those instances where it could not be presumed that the absence of grounds for refusal of enforcement of the award on these accounts has been conclusively established.

IV. Relationships between any new multilateral convention and other treaties or laws relating to the same subject

25. The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, in force at present, applies only to awards made pursuant to arbitration agreements covered by the 1923 Protocol on Arbitration Clauses which in turn provides for the recognition of validity of arbitral agreements and for the exemption of disputes subject to such agreements from the normal jurisdiction of courts. Moreover, the 1927 Convention is open for signature solely to parties to the 1923 Protocol. The new draft Convention does not contain any express reference to the 1923 Protocol, and some Governments commented on the omission in the draft Convention of a provision which would recognize the validity of arbitration agreements or which would prevent a party to an arbitration agreement from "sabotaging" that agreement by bringing the dispute before a regular court of justice.16/ There might, however, be some difficulty in including a clause containing provisions along these lines into the context of the draft of the new Convention. It may be recalled that a proposal to reproduce in the draft Convention the substance of the provision contained in Article I of the 1923 Protocol had been placed before the Ad Hoc Committee on the Recognition and Enforcement of Arbitral Awards, and that the Committee was divided on this issue.17/

26. Should the Conference come to the conclusion that it would not be appropriate to include in the new Convention a provision affirming the validity of arbitration agreements and exempting the disputes covered by such agreements from the normal jurisdiction of courts, but nevertheless consider that a more general recognition of the principles embodied in the 1923 Protocol could increase the effectiveness of arbitration in the settlement of private law disputes, it may wish to deal with these problems under item 5 of its Provisional Agenda, with a view of making a recommendation on this subject to those States which are not Parties to the 1923 Protocol.

16/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pp. 3 (Japan), 9 (Austria), 18 (Sweden), 19 (Greece), 23 (United Kingdom), 24 (Norway).

17/ "Report of the Committee on Enforcement of International Abritral Awards", Official Records ECOSOC, 19th session, agenda item 14, annexes, document E/2704, paragraphs 18-19.

27. The view was also expressed that the new Convention should contain a provision terminating the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, and that there is a need to define more clearly the relationship between the obligations arising from these two instruments.[18] In a more general way, the same problem may arise in connexion with the application of other international agreements. While no objection was raised against the principle embodied in Article VI of the draft that the Convention shall not deprive an interested party of any relevant rights available to it under existing national laws or treaties, some Governments and organizations felt that the present language of Article VI may need further clarification. It was pointed out that in its present formulation, this Article could have the effect of allowing the application of more restrictive provisions of other international agreements or of national laws instead of the corresponding provisions contained in the new Convention. It was therefore suggested that Article VI might be redrafted so as to provide that other international agreements or national laws may be relied upon to the extent that they stipulate more liberal conditions governing the recognition and enforcement of arbitral awards.[19]

18/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pages 3 (Japan) and 9 (Austria, Belgium, India).

19/ Official Records ECOSOC, 21st session, agenda item 8, annexes, document E/2822, pp. 9 (India, Switzerland), 17 (International Chamber of Commerce, Society of Comparative Legislation).