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UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

RECCGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards

1. The Secretary-General transmits herewith further comments received from the Government of the Netherlands on the draft Convention on the recognition and enforcement of foreign arbitral awards.[1/] Comments previously received have been circulated in documents E/2822 and addenda 1 to 6, and E/CONF.26/3.

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

Netherlands

1. In its initial comments on the draft-convention on the recognition and enforcement of foreign arbitral awards (document E/2822/Add.4) the Netherlands Government confined itself to ascertaining whether the draft contained anything it could not accept. The Government was of the opinion that it would be premature at that time to furnish detailed comments on the draft. Since then ECOSOC has decided to call a conference of plenipotentiaries with the object of preparing a new convention on this subject. The Netherlands Government considers that the time has now come to present further detailed comments on the draft-convention which will serve as the basis for the work of the conference.

2. Under the terms of article I, section 1, the convention will apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement are sought. The Netherlands Government can accept this system. It cannot agree, however, to the proposals which aim at also including within the sphere of operation of the convention the recognition and enforcement of certain arbitral awards in the country where these awards have been made. In the Government's opinion the recognition and enforcement of arbitral awards in the country where these awards have been made should remain subject to the laws of that country. For this reason it considers it right that the title of the draft-convention refers to the recognition and enforcement of "foreign arbitral awards".

3. The Netherlands Government deems it desirable that the first sentence of article I, section 2, should be included in the convention. Although it is in the interest of international trade that the convention should find the widest possible application, it will be difficult for many a State to accept an obligation to recognize and enforce arbitral awards made in a country which has not accepted a similar obligation in respect of arbitral awards made in the State concerned. The liberty to make the reservation set out in article I, section 2, should therefore, in the view of the Netherlands Government, be maintained.

The reservation mentioned in the second sentence of article I, sentence 2, has no relevance for the Netherlands as Netherlands law does not distinguish between commercial and non-commercial contracts.

4. In the conception of the Netherlands Government the convention should not exclude the possibility of testing the validity, under the applicable law, of a special agreement or arbitral clause underlying an arbitral award. On this point the draft-convention is not clear. On the one hand, it is declared necessary in article III sub (a) that the award should be based on an "agreement in writing". From this it may be deduced that the question whether there really was an "agreement" in the legal sense should be decided according to the applicable law. The Committee's comments on this provision, however, are rather vague, whereas in the initial draft of the International Chamber of Commerce the opposite view was explicitly maintained. On the other hand, it may be inferred from the wording of the introductory part of article IV that the validity of the arbitral clause or agreement under the applicable law can only be tested in the cases enumerated in that article, more particularly in the cases mentioned sub (g). The Netherlands Government considers it important that it be laid down, either in the convention itself or in the explanatory memorandum accompanying it, that the convention is not to be construed as if it excluded the possibility of testing the validity of a special agreement or arbitral clause under the applicable law.

5. In respect of the formal requirements to be met by the special agreement or arbitral clause, the Netherlands Government holds that the provision of article III sub (a) is satisfactory. Under Netherlands law no formal requirements other than that of an "agreement in writing" are necessary.

6. In article III sub (b) it is stipulated that the award should have become "final and operative" in the country where it was made. The Netherlands Government is not certain of the exact content of this concept. Is the word "final" intended to indicate that there are no ordinary legal means available against the award, and does the term "operative" apply to the possibility of enforcing the award? Only if such are the meanings of these words can the intent of the further stipulation "that its enforcement has not been suspended" be understood. That stipulation then refers to the case where, although an arbitral award must be considered "operative" in the sense here indicated, it can nevertheless not be enforced abroad on account of a suspension of its enforcement which has subsequently occurred in the country where the award was made, e.g. through an injunction to stay execution obtained on summary application, or as the result of an action for nullity. If this is the sense of the provision, the Netherlands Government considers the provision

necessary but would like to see it clarified, either in the convention or in the explanatory memorandum.

7. Under the terms of article V sub (b) the party seeking recognition or enforcement of an arbitral award must prove that the conditions laid down in article III sub (b) have been fulfilled. Under such a rule the party relying on an arbitral award would be charged with the onus of proof of mostly negative facts. A more equitable distribution of the onus of proof would be achieved if the party contesting the recognition or the enforcement of an award were to be charged with proving that in the country where the award was made facts have occurred which stand in the way of the recognition or the enforcement. There would then be no reason for demanding that the party relying on the award should posit that the conditions in question have indeed been fulfilled. The Netherlands Government therefore would consider it preferable to transfer the provision of article III sub (b) to article IV sub (e). In making this suggestion the Government bears in mind that, in virtue of the wording of the introductory part of article IV, the competent authority is also entitled to determine ex officio the existence of the grounds for refusal of recognition or enforcement mentioned in that article.

On the basis of these considerations, and in connexion with the proposals for amendment to be made in paragraph 11 of these comments, the Netherlands Government suggests that article IV sub (e) should be read as follows: "either the award is not final or has not become operative, or if it has been annulled or its execution suspended in the country in which it was made".

It may be remarked in passing that the Netherlands Government sees no reason why the draft-convention refers in article IV sub (e) to "the award the recognition or enforcement of which is sought". These words seem superfluous and have rightly been omitted from the text of the other sub-sections of article IV.

8. The Netherlands Government objects to the provision of article IV sub (f). It is to be feared that parties wishing to eschew the consequences of arbitral awards may use this provision as a pretext for delaying tactics, and that the competent authority may find in it an encouragement to refrain from applying the rules of the convention. Moreover, even without such a provision, the competent authority will refuse to grant enforcement of an award which, in its opinion, "is so vague and indefinite as to be incapable of recognition or enforcement"; it cannot be assumed that the competent authority will feel compelled by the

convention to co-operate in something which it regards as impossible. For these reasons the Netherlands Government proposes to strike out the said provision.

9. Under the terms of article IV sub (g) the competent authority in the country where recognition or enforcement is sought should determine whether the agreement of the parties concerning the composition of the arbitral authority and the arbitral procedure was lawful in the country where the arbitration took place. The Netherlands Government considers this provision to be correct. In particular, the Government cannot agree to the conception that the determination referred to should be left to the competent authority in the country where the award was made. In that case, in order to prevent the enforcement of an arbitral award, the party concerned would be compelled, first to institute an action for annulment of the award in the country where the award was made, and subsequently to invoke the suspending force of that action in the country where enforcement was sought. Such a double procedure would be complicated and costly. In the view of the Netherlands Government the interests of the parties are best served by the procedure envisaged in the draft-convention, according to which the competent authority before which an action for recognition and enfofcement is brought determines the validity of the arbitral clause or agreement.

10. If the proposal made in paragraph 7, to transfer the provision of article III sub (b) to article IV sub (e), should be accepted, that would mean more than just an alteration in the distribution of the onus of proof. In that case a legal presumption would be created, to wit that an arbitral award shall be regarded as "final and operative" until the contrary has been proven. The force of this presumption, however, is mitigated by the fact that, as is to be seen from the text of the introductory part of article IV and from points 51/53 of the Committee's comments, the competent authority is entitled to determine ex officio whether one of the grounds for refusal of recognition and enforcement mentioned in article IV exists.

The Netherlands Government wonders whether the text of the convention ought not to be clarified in this respect. In the Government's opinion the draft does not distinguish sufficiently between, on the one hand, the legal facts on which the recognition and enforcement or the refusal of the recognition and enforcement should be based, and, on the other hand, the manner in which the existence of these facts should be proved. This has resulted not only in the difficulty

already indicated, that, under the terms of article III sub (b) and article V sub (b), the party relying on the arbitral award has been charged with the onus of proof of negative facts, but also in the introduction, by the words "is satisfied" in article IV, of a rule of evidence which, in the system of the draft, is out of place in that context, and furthermore in the transformation, by the insertion in article V sub (b) of the words "documentary or other evidence to prove", of a rule which need not contain more than a practical provision into a formal rule of evidence.

These remarks are not intended as a criticism of the manner in which the distribution of the onus of proof has been regulated in the draft-convention, but only as an indication that in the draft-convention the rules of substantive law and the rules of evidence have not been sufficiently separated.

11. On the basis of what has been said in the preceding paragraph the Netherlands Government proposes:

firstly, that article IV should be read as follows:

> "Without prejudice to the provision of Article III, recognition and enforcement of the award may only be refused if
>
> (a) the subject matter of the award..." etc.
>
> (b)/(h) the word "that" at the beginning of each sub-section and where appropriate in the rest of the sentences should be struck out.
>
> For the text of article IV sub (e) see paragraph 7.

secondly, that article V sub (b) should be read as follows:

> "(b) the valid written special agreement or arbitral clause on which the award was based or a duly authenticated copy thereof".

thirdly, to insert after article V a new article conceived as follows:

> "The party seeking recognition or enforcement of the award shall be deemed to have proved prima facie the existence of the award and the special agreement or arbitral clause on which it was based by the supply of the documents mentioned in Article V.
>
> Until proof of the contrary the award shall be deemed to be final and operative.
>
> The party contesting the recognition or the enforcement of the award shall prove the facts or circumstances which gave rise to the application of one or more of the paragraphs (a) - (h) of Article IV,

unless the competent authority in the country where recognition or enforcement is sought is satisfied, after ex officio investigation, of the presence of such facts or circumstances."

12. Even if the proposals made under paragraph 7 should not be accepted, there would, in the view of the Netherlands Government, be grounds for clarifying the convention in respect of the distinction between rules of substantive law and rules of evidence. In that case too there would be grounds for insertion of an article in the sense of the proposal made in the preceding paragraph, except for the second clause contained in the proposed new article, and article V sub (b) should then be amended in a manner which would make it clear that that provision can no longer be regarded as a formal rule of evidence.

13. Under the terms of article VI of the draft the new convention will not affect the validity of other international agreements entered into by the contracting States. Consequently, the existing Geneva convention will also remain in force between States becoming parties to the new convention. The result will be that a claimant who wishes to proceed to enforcement can base his right to obtain an exequatur cumulatively on the Geneva convention as well as on the new convention. The contestant will only be able to avert enforcement if he succeeds in preventing enforcement in virtue of both conventions by exceptions based on either of the two conventions separately.

Although the situation which will have thus been created may be somewhat complex, the Netherlands Government nevertheless does not consider it unfair; it should be remembered that one of the principal motives for the renewed study of this subject-matter was the desire to grant to the party relying on an arbitral award more ample possibilities in respect of recognition and enforcement than were laid down in the Geneva convention. For this reason the Netherlands Government can agree to the parallel existence of the two conventions.

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