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CONSIDERATION OF OTHER MEASURES FOR INCREASING THE  
EFFECTIVENESS OF ARBITRATION IN THE SETTLEMENT OF  
PRIVATE LAW DISPUTES (ITEM 5 ON THE AGENDA)

Note by the Secretary-General

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EFFECTIVENESS OF ARBITRATION IN THE SETTLEMENT OF  
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Note by the Secretary-General

Introduction

1. Resolution 604 (XXI) of the Economic and Social Council provides that in addition to concluding a convention on enforcement of foreign arbitral awards, the United Nations Conference on International Commercial Arbitration should consider, if time permits, other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes, and make such recommendations as it may deem desirable. Although some doubts were raised as to whether the time schedule of the Conference would permit it to enter into a thorough discussion of such additional measures, several Governments and organizations expressed themselves in favour of preparing at least an outline of a programme aiming at an improvement of the existing arbitration facilities and legislation. The convening of a world-wide conference attended by competent governmental representatives and experts in this field would constitute a unique opportunity for initiating such a programme.

2. On the basis of information obtained from Governments and from organizations interested in international commercial arbitration,<sup>1/</sup> as well as of the work done in this field by the Economic Commission for Europe and the Economic Commission for Asia and the Far East, a need for concerted action seems to be indicated on the following subjects:

- (a) creation of new arbitration facilities in certain geographic areas and branches of trade;
- (b) adaptation of some of the existing national arbitration centres to the requirements of international commercial arbitration;

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<sup>1/</sup> This information is contained in the comments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Official Records, ECOSOC, 21st session, a.i. 8, Document E/2822 and addenda 1 to 6 in the memorandum by the Secretary-General (*ibid.*, document E/2840); and in the Consolidated Report on Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration (E/CONF.26/4).

- (c) better co-ordination of the activities of various arbitration centres, harmonization of their rules of arbitral procedure, and wider use of joint standard arbitration clauses;
- (d) carrying out of educational programmes for promoting knowledge about existing arbitration facilities and for training potential arbitrators;
- (e) creation of impartial machinery for choosing neutral arbitrators and places of arbitration in disputes between nationals of different countries;
- (f) elimination of conflicts of laws and of other obstacles to the use of arbitration caused by differences or shortcomings in existing municipal law;
- (g) drawing up of model clauses to facilitate the adoption of adequate legislative standards on subjects such as validity of arbitration agreements, establishment and competence of arbitral tribunals, applicable procedural rules for arbitration and the procedures for enforcement of awards.

3. With these aims in view, the Conference might give consideration under item 5 of its agenda to the following measures:

- I. Collection and publication of information on existing arbitration laws and facilities
- II. Recommendations for improvement of existing arbitration facilities.
- III. Technical assistance in the development of arbitral legislation and institutions.
- IV. Convening of regional study groups or working parties on arbitration.
- V. Assistance in establishing impartial machinery for designation of neutral arbitrators and places of arbitration.
- VI. Preparation of model laws on arbitration.

I. Collection and publication of information on existing arbitration laws and facilities

4. The collection and publication of information on existing arbitration laws and facilities could serve a dual purpose: answer the need felt by the business community and by arbitral institutions for reliable, comprehensive and easily accessible data relating to the use of arbitration; and constitute an essential first step for any further activities aiming at the improvement of arbitration facilities and legislation.

5. Information on arbitral laws and institutions of a number of countries has been published by the International Chamber of Commerce, the Union Internationale des Avocats and other non-governmental organizations. Furthermore, the Economic Commission for Europe has collected and analysed information on this subject, and a similar project has been initiated by the Economic Commission for Asia and the Far East.

6. It would seem desirable that the relevant information on this subject be assembled in a unified and authoritative publication of world-wide coverage kept up to date by periodic supplements. This project would be partly based on the material available to the United Nations Secretariat both at Headquarters and in the regions, but in view of other claims on United Nations resources, the responsibility for publication would have to be left to other organizations.

7. A publication of this nature could, by way of example, include the following subjects:

(a) municipal laws, treaties, court decisions and administrative practice relating to arbitration of private law disputes; differences and similarities in the present national laws and practice governing arbitration; subjects and areas in which conflicts of laws are likely to occur or in which adequate legislative standards are lacking;

(b) statutes and rules of the various arbitration centres, facilities for impartial arbitration in disputes between nationals of different countries, arrangements for co-operation between various arbitration centres, and areas in which adequate practical facilities for arbitration do not as yet exist.

8. Should the Conference be in favour of action along these lines, it could recommend that the Economic and Social Council consider (a) encouraging the interested organizations to co-operate with each other in making the necessary arrangements for publishing in appropriate form information on existing arbitration laws and facilities throughout the world and keeping it current by way of supplements; (b) inviting the United Nations organs concerned to support this project by appropriate means such as by furnishing for inclusion in this publication any relevant information that may be collected by them; and (c) inviting Governments to facilitate the execution of the project by furnishing the information that may be requested of them on the subject.

II. Recommendations for improvement of existing arbitration facilities

9. One of the factors which the interested organizations singled out as constituting a major obstacle to a greater use of arbitration<sup>2/</sup> was the lack of institutions which could provide adequate facilities for international commercial arbitration. It was suggested that the effectiveness of arbitration as a means of settlement of disputes affecting international trade could be greatly enhanced by the establishment of new arbitration centres in those countries (or branches of trade) where no institutional facilities for arranging arbitration are available at present, and by encouraging existing arbitral institutions to add foreign nationals to their panels of arbitrators and to adopt rules permitting the designation of a neutral site as the place of arbitration.

10. The Conference may also wish to take note of some of the other suggestions made by the interested organizations with a view to facilitate international commercial arbitration, such as their proposals for:

(a) improvement of co-ordination between the various arbitration centres for the purpose of achieving a greater uniformity in their rules of arbitral procedure;

(b) more precise drafting of standard arbitration clauses recommended by adoption by arbitral institutions or included in general conditions of sale; and

(c) conclusion of agreements between arbitration institutions for the adoption of Joint Standard Arbitration Clauses which would provide for the selection of a neutral place of arbitration and the designation of the applicable rules of procedure in disputes involving parties from different countries or from areas serviced by different arbitration centres.

11. It was further emphasized that the use and effectiveness of arbitration in the settlement of international commercial disputes could be enhanced through educational programmes carried out by arbitration institutions with the co-operation of schools and of associations representing the business community

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<sup>2/</sup> The views of inter-governmental and non-governmental organizations active in the field of international commercial arbitration on factors considered to stand in the way of the progress of arbitration, and their suggestions as to possible remedial measures, are summarized in paragraphs 48 to 59 of document E/Conf.26/4.

and the legal profession. Such educational programmes could fall into two categories: one for promoting among members of the business community knowledge about existing arbitration facilities and their use, and another for training and advising potential arbitrators in the principles and techniques of arbitration.

12. On the basis of the available data, the Conference may come to the conclusion that it could provide a useful stimulus by adopting, as a preliminary step, resolutions drawing the attention of the Governments and organizations concerned to the need for an improvement of existing arbitration facilities in some geographic regions or branches of trade, and suggesting, by way of example, the types of activities (such as those referred to in paragraphs 9 to 11 above) which might appear to be desirable in this connexion. The Conference may also wish to single out particular regions where there is in its view a pressing need for a creation or improvement of arbitration facilities, and recommend that the Governments concerned encourage the establishment of new arbitration centres and render all appropriate assistance to the organizations or institutions active in improving arbitration facilities in their territory.

### III. Technical assistance in the development of arbitral legislation and institutions

13. The need for creating conditions more conducive to the use of arbitration in the settlement of international commercial disputes arises in particular in economically less developed countries. Many such countries lack not only the appropriate institutional facilities but also the adequate laws necessary for a successful reliance on arbitration. On the other hand, the existence of such laws and facilities may remove the obstacles to economic development created by misgivings which - rightly or wrongly - arise when foreign traders or investors are faced with the need to submit to jurisdictions of other countries.

14. Governments which have not yet had the opportunity to gain practical experience with arbitration problems and which do not have in their territory an institution capable of organizing facilities for international commercial arbitration, may need technical advice and assistance in developing in their country a legislative and institutional framework for arbitration. In some instances, such help could be extended by one of the non-governmental institutions

which have the necessary experience and means for organizing international commercial arbitration facilities, such as the International Chamber of Commerce. In other cases the Government concerned may prefer to obtain assistance through other Governments or through an inter-governmental organization.

15. The technical assistance that may be required for the improvement of arbitration facilities in some countries could take the form of furnishing to or through the Government concerned experts competent to advise on the drafting of appropriate arbitration legislation and familiar with the problems relating to the setting up of arbitration institutions capable of providing adequate facilities for the requirements of international commerce. It would probably not be necessary to make available the services of such experts on a long term basis; their presence in the country concerned for a few weeks or months might be sufficient in most cases. It may also prove practical to arrange for fellowships which would enable officials responsible for the preparation of legislation or for supervising the establishment of arbitration facilities to gain the necessary experience in countries with more advanced arbitral institutions.

16. Should the Conference deem it useful to encourage the use of technical assistance as a means of improving arbitral legislation or of establishing more adequate facilities for international commercial arbitration, it could adopt a resolution to that effect and recommend to the Governments concerned to seek to obtain the relevant technical advice and assistance through such appropriate sources as may be available for this purpose.

#### IV. Convening of regional study groups or working parties on arbitration

17. Another method of removing the obstacles standing in the way of an increased use of arbitration may be the convening of regional study groups, seminars or working parties, in which Government officials and arbitration experts could study the existing legal and practical problems relating to arbitration and attempt to arrive at agreed solutions best suited to the needs of the various countries of the region. Such an approach was adopted, with considerable success, by the Economic Commission for Europe.

18. One of the advantages offered by such regional study groups or seminars sponsored by the United Nations or another appropriate international organization lies in the opportunity for personal contacts and exchange of views between the

competent Government officials and arbitration experts from the various countries. Such contacts may lead to a better understanding of the problems involved and accelerate the trend towards the harmonization of laws and the improvement of practical arbitration facilities within the region. Moreover, the conclusions and decisions reached by meetings in which governmental representatives participate carry greater weight and are more likely to be given practical effect. The convening of such study groups or seminars under the auspices of an international organization would not preclude the possibility of associating with their work representatives of leading arbitration institutions of the area and of other interested non-governmental organizations, if it was felt that they could furnish useful information or assist in the deliberations by providing a more practical insight into the problems involved.

19. There are, however, limits to the extent of assistance that can be provided by the United Nations in organizing such study groups and working parties. The regional commissions may not be able in all cases to undertake the analysis of documentation and other preparatory work required in connexion with this project. It might therefore prove necessary to seek the co-operation of other interested inter-governmental or non-governmental organizations in assuming some of the tasks involved in the preparation of such meetings.

20. The agenda for such regional working groups could follow the pattern established by the Working Party on Arbitration of the ECE,<sup>3/</sup> with such modifications as may be required on account of local needs and conditions. Subjects to be considered in such regional meetings may include problems relating to the improvement of supplementing or existing institutional facilities for arbitration (see paragraphs 9 to 11 above), the co-ordination of activities of organizations interested in international commercial arbitration, removal of obstacles created by differences in the laws governing arbitration and, possibly, recommendations for the adoption of certain basic legislative standards with a view of achieving an improvement and a greater uniformity of arbitration laws (see paragraphs 23 to 29 below).

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<sup>3/</sup> Documents E/ECE/TRADE/8, 17 and 55.



21. Should the Conference favour the convening, through the United Nations, of such regional meetings devoted to the study of arbitration problems, it could adopt a recommendation addressed to the Economic and Social Council for drawing the attention of the regional economic commissions to the advisability of such meetings.

V. Assistance in establishing impartial machinery for designation of neutral arbitrators and places of arbitration

22. The parties to a dispute, or the arbitration institutions to which they respectively wish to entrust its settlement, frequently do not agree on the choice of the place of arbitration and of the applicable law and rules by which the arbitral proceedings should be governed. The ECE Working Group on Arbitration foresaw that in such instances independent machinery may be useful in assisting the parties to resolve their difficulties.<sup>4/</sup> The need for such independent and impartial machinery may in particular be felt in the settlement of disputes arising out of commercial transactions between areas of free and of planned economies, or between less developed areas and highly industrialized countries. The Conference might wish to give further thought to the need for creating such a machinery which could assist the parties in the choice of an impartial arbitrator and a neutral place of arbitration, and to the role that could be played in that regard by organs of the United Nations.

VI. Preparation of model laws on arbitration

23. In paragraphs 13 to 21 above, reference was made to possible measures for improving arbitral legislation by means of technical assistance or regional study groups and seminars. In a more general way, activities aiming at an improvement of arbitration laws through adoption of uniform legislative standards have been carried out since two decades by several inter-governmental and non-governmental organizations,<sup>5/</sup> but so far the attempts at unification of arbitration laws have achieved no significant results.

4/ Document E/ECE/TRADE/55, paragraphs 39 to 47.

5/ E.g., the preparation of model uniform laws on arbitration by the Rome Institute, the Inter-American Council of Jurists and the Council of Europe, and the preparation of the so-called Copenhagen Rules by the International Law Association (E/CONF.26/4, paragraphs 38 to 41 and 43).

24. In their comments on the draft Convention<sup>6/</sup> and during the discussions of the Committee on Recognition and Enforcement of Foreign Arbitral Awards,<sup>7/</sup> some Governments stressed the need to achieve greater uniformity in the relevant provisions of municipal laws and to formulate a set of rules governing arbitration proceedings which might be adopted by the various countries of the world. There can be no doubt that a greater measure of uniformity in national laws governing arbitration would have a beneficial effect on the use of arbitration in settlement of international commercial disputes. By removing inconsistencies or conflicting provisions from arbitration laws, disputes having legal implications in several countries could be settled by arbitration without the risk that by following the law of one country, legal doubts as to the validity of the arbitration agreement, proceedings or award may arise in other countries.

25. On the other hand, the limited success of past attempts at unification of arbitration law may well lead the Conference to conclude that the time is not yet ripe for measures aiming at a uniform regulation of all the aspects of arbitration proceedings, and that a more thorough study of the subject would be required before taking any action in that direction. The Conference may, however, wish to single out some of the areas in which the preparation of model provisions could be of particular importance as a guide to countries which have not as yet enacted adequate arbitration laws or which plan to amend and improve their existing arbitral legislation.

26. One such area where there appears to be a need for greater consistency in the existing legislation is with regard to the law governing the validity of arbitration agreements. It might be recalled that there was considerable discussion on this point in the Committee on Recognition and Enforcement of Foreign Arbitral Awards<sup>8/</sup> and that some Governments, in submitting their comments on the draft Convention, stressed the importance of removing existing conflicts of law under which the validity of arbitration agreements is to be put to the test.<sup>9/</sup> It was also pointed out that the 1923 Protocol on Arbitral Clauses has

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<sup>6/</sup> E/2822, Annex I, General Observations (Austria, Federal Republic of Germany).

<sup>7/</sup> Report of the Committee on Enforcement of International Arbitral Awards, E/2704, paragraph 69.

<sup>8/</sup> E/2704, paragraphs 18-19.

<sup>9/</sup> E/2822/Add.1, 2, 4 and 5.

not obtained sufficiently wide acceptance to provide a satisfactory solution to the problems of the recognition of validity of arbitration agreements and of the exemption from the normal jurisdiction of courts of disputes which parties agreed to participate.

27. Another area where greater uniformity of law may be desirable are the rules of arbitral procedure. The differences in municipal procedural laws are of particular importance to international commercial arbitration which may involve jurisdictional issues in several countries, as for instance in the case where nationals of two different countries submit their dispute to arbitration in a third country and rely upon the enforcement of the award in still other countries. There seems little hope, however, that within the near future a sufficiently significant number of States would be ready to adopt uniform rules of arbitral procedure, mainly because of the reluctance of Governments to engage the difficult process of replacing the existing procedural law of the country. Conflicts of procedural law could, however, be largely avoided if more countries would recognize the validity of arbitral proceedings based on procedural rules chosen by mutual agreement of the parties, and provide that their municipal law shall be applicable only in cases where the parties have failed to agree on procedural rules of their own choice. There seems to be a trend towards a more general recognition of this principle which may be found to provide a more practical and readily acceptable solution than efforts to obtain the unification of national procedural laws.

28. A somewhat similar situation prevails with regard to the applicable law governing the substance of arbitral awards. Conflicts of law could be avoided by a more general acceptance of the principle, admitted under the laws of many countries, that arbitrators may base their awards on commercial usage or on considerations of equity, common sense and natural justice, without the need to refer to the applicable provisions of municipal law. There is, however, a strong opposition against giving such latitude to arbitrators in some countries which recognize the validity of awards only if they are based on applicable provisions of their national laws. It would appear that this point might usefully be further explored and studied with a view to finding some generally acceptable rules for avoiding conflicts of laws and permitting arbitrators sufficient flexibility in seeking practical means of settlement of disputes.

29. The need for universal adoption of a set of simple and expeditious rules governing the procedural aspects of enforcement of arbitral awards was also mentioned in the comments submitted on the draft Convention on the Recognition and Enforcement of Arbitral Awards.<sup>10/</sup> The question of enforcement procedures involves, however, the broader question of judicial control of arbitration awards and the Conference may therefore feel that the problem requires more thorough consideration.

30. The examples mentioned in paragraphs 26 to 29 above indicate that considerable preparatory work might be necessary in developing generally acceptable standard provisions which could serve as models for the enactment of uniform arbitration legislation. The scope of this preparatory work would seem to exceed the limits set by the available staff which the United Nations could provide for such a project. Moreover, the need to avoid duplication of work being done in the field of unification of arbitration law by other organizations should also be kept in view. On the other hand, the work of these organizations may be furthered and facilitated by an exchange of relevant documentation with the United Nations in matters of common interest, and by arrangements enabling Members of the United Nations to be apprised of any significant results of the studies and other preparatory work undertaken in this field.

31. Consequently, should the Conference wish to encourage further activities in the field of preparation of model laws on arbitration, it could express its support for the work carried out by inter-governmental organizations and scientific institutions already active in the field, and its hope that appropriate practical steps may be taken to further and facilitate the achievement of their aims.

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<sup>10/</sup> E/2322, Annex I, Article II (Federal Republic of Germany) and Annex II, Article II (International Law Association, Society of Comparative Legislation).