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COMMITTEE ON THE ENFORCEMENT OF
INTERNATIONAL ARBITRAL AWARDS

Comments received from Governments regarding the Draft Convention
on the Enforcement of International Arbitral Awards

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INTRODUCTORY NOTE

1. This document contains the replies of governments to a note verbale sent by the Secretary-General on 7 May 1954, regarding resolution 520 (XVII) adopted by the Economic and Social Council on 6 April 1954 which took note of the draft convention* on the enforcement of international arbitral awards submitted by the International Chamber of Commerce and established an ad hoc committee to study the question. The discussion in the Council had indicated that Members of the United Nations should be given the opportunity to submit their views on the question of the enforcement of international arbitral awards prior to the meeting of the ad hoc committee.
2. The replies contained in this document are those which were received by the Secretary-General by 15 January 1955. Any further replies will be issued as addenda to this document.

* See document E/C.2/373

GREECE

Original: French

The value of arbitration in the settlement of international commercial disputes is now widely recognized. Evidence of this is seen in the fact that arbitration is coming more and more to be preferred to the slow and costly procedure of the civil courts. Nevertheless it should be noted that the success of arbitration depends entirely on the possibility of simple and prompt enforcement of the award, and in this respect the existing provisions of international law are still inadequate. The Royal Greek Government considers that the draft Convention submitted by the International Chamber of Commerce will remedy this shortcoming because its purpose is to facilitate and expedite as much as possible the enforcement of arbitral awards.

This Government, while recognizing the merits of the draft Convention in general, yet wishes to make certain reservations with respect to the two ideas contained in article I:

The Government considers that, in the interests of reciprocity, the Convention should only be applied if all the parties concerned are nationals of States which are bound by the Convention.

It also considers that in the case of an arbitral award which, in conformity with the Convention, settles a dispute between Greek nationals, the award should be enforced in accordance with the provisions of Greek law governing the enforcement of Greek arbitral awards, even if it should have legal implications affecting the jurisdiction of other States.

INDIA

The Minister for External Affairs...has the honour to state that the principles contained in the draft convention are in accordance with natural justice and the Indian Law. The Government of India have no objection to its being accepted.

LEBANON

Original: French

The Lebanese Government supports the drafting of an international Convention of this kind. The text of this draft Convention is broadly in conformity with the spirit of Lebanese legislation.

Lebanon would be prepared to sign a Convention of this kind when it is opened to the signature of States.

LUXEMBOURG

Original: French

Arbitration is becoming an increasingly important factor in international economic relations. Arbitration clauses have become a regular feature of many commercial agreements. They frequently vest competence in arbitral authorities established under the auspices of the Chambers of Commerce.

So far as legal relations are concerned, Luxembourg has as yet remained relatively unaffected by this trend. This circumstance is attributable to the country's economic structure, which is characterized by the predominance of the iron and steel industry and by bulk exports which only rarely give rise to disputes. Metallurgical enterprises often stipulate in their contracts of purchase and sale that disputes should be brought before the court of Luxembourg; they tend not to use arbitration clauses except in contracts with firms with which they maintain very good relations.

Accordingly there is some reluctance, possibly more pronounced in a small than in a large country, to resort to arbitration. It should be recalled in this connexion that the legal force of undertakings to arbitrate entered into between Luxembourg nationals was not recognized until 1939 (Act of 20 April 1939), although Luxembourg had ratified the international instruments relating to arbitration, dated Geneva 24 September 1923 and 26 September 1927, as early as 1930 and had thereby recognized the validity of the arbitration clause in international commercial relations.

In April 1953 the International Institute for the Unification of Private Law completed its draft uniform law on arbitration in international relations. However, so long as the international unification of the municipal law relating to arbitration is not a reality, the application of arbitration clauses and the enforcement of arbitral awards will continue to raise certain problems in private international law.

Discussions concerning conflicts of law in the matter of arbitration are materially influenced by the question of the place where an arbitral award is made. According to the maxim locus regit actum, the locus of the award decides what law is to be applied for the purpose of determining whether the award is in good and due form; this condition must be fulfilled before it can be enforced in a particular country. Conceivably, other factors, such as the nationality of the parties and of the arbitrators might be taken into consideration for the purpose of determining what law is applicable.

In the past, treaties between different European States concerning the enforcement of arbitral judgments and awards have stipulated that the award was to be governed by the law of a specified country for the sole reason that the award was made on the territory of that country. This rule was of course conducive to uncertainty in the many cases where the arbitrator resided in a country other than that in which the dispute had originated. The legal validity of the award is determined according to the national laws of different States, and because of the difference between them this question inevitably produces difficulties.

In order to remedy these shortcomings the International Chamber of Commerce (ICC), in its preliminary draft, which is intended to further the objects of the Geneva instruments of 1923 and 1927, proposes that all statutory rules should be dispensed with and that only a contractual rule should be followed, an approach which is in essence based on an extension of the idea of the autonomy of the will. The compromis or the arbitration clause would in that event be completely divorced from any specific body of legislation and would be "internationalized" or rather denationalized. To ensure that an international award had legal force it would be sufficient if it conformed with the procedure laid down in the agreement (article III of the preliminary draft).

Such an anarchial state of affairs in the law hardly seems consistent with the traditional conception of the autonomy of the will, and it remains to be seen whether this interesting and extremely bold idea can be effectively and suitably translated into juridical reality. There is reason to doubt that this can be accomplished. It is comparable to the conception of the "statelessness" of individuals, which is of advantage at times, but nevertheless produces an abnormal, and in the final analysis, undesirable situation.

It is true that even at the present time the contractual character of the compromis produces certain effects in that both by learned authorities and by case law foreign arbitral awards are recognized as having intrinsically the force of res judicata. Nevertheless, this recognition is contingent (that is, of course, unless the question is governed by treaty) on the fulfilment of certain conditions. It is unthinkable that the will of the parties should create a novum, with provision down to the last detail. Some reference to the positive laws of a specified State or to a body of international law (which in any case does not now exist) is indispensable.

A. A prerequisite for the recognition of a foreign award is that it must be made in an authenticated form, attesting to its validity abroad. This form will obviously be determined by the statutory provisions in force in a particular country, viz. the country whose law is to be applicable to the award.

The Geneva Convention of 1927 apparently wishes to avoid the difficulty by requiring the production of the "original" award or, alternatively, of a copy thereof duly authenticated according to the requirements of the country in which it was made. It is only too evident that this provision simply shifts the difficulty.

The ICC draft proposes a remedy: it merely requires the production of a copy of the award, duly authenticated according to the law of the country in which it is sought to be relied upon, and not of country in which the award was made. But this provision is no more effectual than the 1927 text in disposing of the difficulty of the authenticity of the original. So far as copies are concerned, the maxim locus regit actum is disregarded completely, and instead, quite illogically the question of validity is to be determined not by the law of the country in which the award was made, but by the law of the country in which it is sought to be relied upon.

B. The validity of the award for internal purposes, which has to be determined before an enforcement order can be made, will depend on other circumstances the existence of which cannot be ascertained without reference to the rules borrowed from the legislation, or at least the customary law, of a particular country. This is true as regards questions relating to the composition of the arbitral authority and the arbitral procedure, but above all as regards the question of validity and the interpretation of the arbitration clause (including the question whether the dispute in general is within the scope of the arbitration clause), and more particularly as regards the classification of the dispute as a civil or as a commercial matter, for the prevailing trend is to restrict the application of arbitration treaties to commercial disputes only. The same would only not hold true in a case in which the recognition of a foreign award is contested on the grounds that the rights of the defence had not been respected. In any such case the principles of natural law could to some extent compensate for the absence of specific rules.

C. The ICC draft itself proposes yet another condition in stipulating that the award must not have been set aside by a court order (article IV (e)). Foreign authorities are required to prove that this (negative) condition is fulfilled. This means that the award is subject to one or more specific national laws.

All this sufficiently illustrates the vagueness of a conception that lacks a definite basis in law.

Consequently, the ICC preliminary draft tends to weaken the influence of municipal law and to strengthen that of the agreements concluded between the parties. But the full development of the scope of the proposed convention involves the establishment of an entire system of arbitral authorities and tribunals, forming a judicial system divorced from the State, removed from the control of the political authorities and often operating abroad.

Whereas the purpose of the ICC draft is to make the autonomy of the will a virtual source of law, the opinion expressed during the recent international meeting on arbitration appears to be less ambitious. An "International Meeting for the Reform of Arbitration" sponsored by the Italian Government was held from 3 to 6 June 1954 at Truneggio and Milan. The first of the recommendations there adopted states:

"In the rules of private international law relating to arbitration, the principal criterion for determining which particular system of law is to be applicable should be the will of the parties; other factors may be taken into account, in particular the locus of the arbitration."

Accordingly, this recommendation by no means reflects a desire to dissociate the rules relating to arbitration drastically from the application of a particular law; it merely provides that this law should be designated by the will of the parties even if in doing so they do not conform to the rules concerning conflict applied by the judicial authority. It should also be noted that the recommendations adopted at the "Meeting" restate the condition which traditionally governs the making of an enforcement order, viz. that the arbitral award must not contain "any provisions which are repugnant to public policy in the State in which its recognition is applied for." Moreover, these recommendations were adopted without any express objection on the part of the accredited ICC representative.

PHILIPPINES

The Permanent Representative of the Philippines to the United Nations... has the honour to submit the following comments of his Government regarding the draft Convention proposed by the International Chamber of Commerce on the enforcement of international arbitral awards:

1. It is clearer than, and is an improvement over, the 1927 Geneva Convention;
2. It is precise as to the matters subject to arbitration;
3. It recognizes the supremacy of the will of the parties regarding the composition of the arbitral authority and the establishment of the arbitral procedure; and
4. It eliminates petty causes for the non-enforcement of the award.

SWEDEN

Original: French

The Swedish Government considers that a more effective instrument than the Geneva Convention of 1927 for the enforcement of foreign arbitral awards is desirable in the interests of international trade. Accordingly, the initiative of the International Chamber of Commerce in the matter should be welcomed. Nevertheless, some points in the preliminary draft Convention require clarification.

1. The Geneva Convention of 1927 applies only to arbitral awards made in the territories of contracting States. Article II of the preliminary draft Convention of 1953 does not apparently contemplate a limitation of that kind. If so, the new Convention would then be applicable to all arbitral awards covered by article I, irrespective of the locus of the arbitration proceedings. In any event, it would be desirable if this important point were clarified.

2. The 1927 Convention, by virtue of a reference to the 1923 Geneva Protocol on Arbitration Clauses, is applicable only to arbitral awards affecting parties which are respectively subject to the jurisdiction of different contracting States. This provision is not quite clear. It may mean either that the parties must be citizens of different contracting States or that they must be domiciled in different contracting States. If the latter interpretation is correct, the Convention means that the parties must have their forum générale in the territory of contracting States. On the other hand, this provision cannot be interpreted to mean that the Convention would be applicable in a case in which the parties, for reasons other than domicile, are subject to the jurisdiction of different States, for example because they possess property in these States.

If the 1927 Convention is construed as meaning that the parties must be citizens of two different contracting States, then it follows that the Convention is not applicable to arbitral awards affecting parties only one of which is a national of a contracting State, nor would it be applicable to awards affecting parties both of which are nationals of the same contracting State. It is clear from article I of the ICC's preliminary draft that the

latter's object is to remove at least some of the limitations of the 1927 Convention in this respect. Still, it is not sufficiently clear what the proper interpretation should be. For example, would the Convention apply if neither party to a dispute is subject to the jurisdiction of a contracting State?

3. The authors of the preliminary draft did not think it necessary to define the expression "international arbitral award"; they preferred to specify only what disputes should be the subject of arbitral awards enforceable under the Convention. In this connexion, the wording of article I seems inadequate. In particular, it is not clear whether the stipulation that the parties should be subject to the jurisdiction of different contracting States is independent of the stipulation that disputes should involve legal relationships arising on the territories of different States. Does this clause mean that, where the second condition is fulfilled, the parties may be subject to the jurisdiction of a single State? As it is very important to avoid any doubt concerning the scope of the Convention, the words "involving legal relationships arising on the territories of different States" should be clarified. Furthermore, the passage just quoted ("involving...States") probably does not accurately reflect the French version. If, on the other hand, the intention is to stipulate that the parties must be subject to the jurisdiction of different States, then some more precise wording must be employed, for, as mentioned above, the provision as it stands is too vague. In any event, it should be specified at what point the parties have to be subject to the jurisdiction of different States - whether the decisive point is the date of the signing of the agreement to arbitrate, or that of the request for arbitration, or else that of the request for enforcement.

In this connexion it should be emphasized that, in principle, there does not appear to be any objection to giving the Convention a relatively wide application. If the enforcement of foreign arbitral awards is ensured by a simple and swift procedure which affords reasonable guarantees to the losing party, it is less material whether an arbitral award, at the enforcement stage,

is regarded as national or foreign. Accordingly, it might perhaps be contemplated to make the Convention applicable to all arbitral awards given in the contracting States; that would be in accordance with article IV of the draft Convention on the enforcement of arbitral judgments and awards, prepared by the Conference of Private International Law of the Hague in 1925.

4. Under article III (a) the enforcement of an arbitral award is conditional on the existence, between the parties named in the award, of a written agreement stipulating settlement of their differences. The preliminary draft does not, however, explain according to what canons of construction the State in which the enforcement of the arbitral award is applied for is to decide whether a valid agreement to arbitrate in fact exists.

5. Moreover, under article III (v) it is a condition of the enforcement of an arbitral award "that the composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties, or failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place." This provision does not apparently allow for cases (and they are frequent) in which the parties have not stipulated any agreed terms concerning the composition of the arbitral authority or the rules of procedure, or for cases in which, as often happens, they are not in agreement about the locus of the arbitration proceedings. Does the preliminary draft mean that, if one of the parties succeeded in obtaining an arbitral award in such a case in a certain State, then the law of that State will definitively be applicable in the settlement of the dispute? Such a solution is scarcely equitable, and one consequence might be that a State would be expected to enforce two different arbitral awards relating to the same dispute, one in conformity with the law of one State and the other in conformity with that of another State.

6. To avoid any improper use of the public policy clause in article IV (a) it might perhaps be provided that it should apply in obvious cases only. It is also desirable that during the preparatory discussions it should be laid down whether this clause covers (among others) the case where a dispute dealt with by the arbitral awards has already been disposed of by a decision of the competent authorities of the country in which enforcement is applied for, after the conclusion of the agreement to arbitrate.

7. To avoid any delay in enforcement, article IV (e) provides that an arbitral award should be enforced if it has not been set aside in the State in which it was made. It is, of course, very important that the parties should not be able to delay the enforcement of the arbitral award. Nevertheless, this rule might be liberalized in cases in which the unsuccessful party offers a guarantee equal to the sum he is ordered to pay by the authorities of the State in which enforcement is applied for. Perhaps the authorities of the country in which enforcement is sought might also be allowed a discretionary power to consider whether the award should be enforced in any case in which the unsuccessful party can prove that he has instituted proceedings for the setting aside of the arbitral award in the country in which it was made. It should be noted in this connexion that the preliminary draft convention does not, in its provisions, take into account the argument set forth on page 11 of the report ("It may be argued...").

The Swedish Government reserves the right to offer more specific comments on the preliminary draft convention during debate in the ad hoc committee.

YUGOSLAVIA

The Government of the Federal People's Republic of Yugoslavia welcomes the idea of drafting a Convention on the Enforcement of International Arbitral Awards, emphasizing that the drafting of an International Convention on the recognition and enforcement of the execution of Arbitral Awards on a wide international plan is necessary for the further development of international collaboration and trade among nations, as laid down in the United Nations Charter. However, in order that this collaboration should contribute to the development of friendly relations between nations and to the security of growing trade between them, it is necessary in passing the Convention to guarantee also the other basic principles governing international relations contained in the Charter.

We consider that the present proposal does not guarantee the essential provision for the respect of these principles, especially the principles of the equal rights of nations and their internal public order.

In the present stage of preparatory work on the proposed Convention we confine ourselves only to the most general remarks, namely, that the proposal does not sufficiently guarantee the principles of reciprocity and equal rights of nations. This can be seen particularly from the following:

1. According to the draft proposal there exists an obligation for the enforced execution of arbitral awards on the part of signatory States in cases where it benefits persons who do not belong to any state party to the Convention. The opposite is not guaranteed.

2. There is no guarantee of reciprocity either, since, according to the draft, any of the litigating parties has the possibility of taking advantage of procedure provided for by national law or other international agreements, even if the law of the state of the claimant does not offer such privileges to citizens of the state in which the claim is made.

3. Even in the case of the setting aside of arbitral awards, equal rights between states and the principle of reciprocity are not guaranteed in the material sense, in view of the fact that neither time-limits for setting aside awards nor the conditions for doing so are universal.

4. Article 3a is too widely conceived, for it offers the possibility for the validity not only of a compromise, but also of a compromise clause, even a general compromise clause, which would be, of course, detrimental to the interests of citizens, legal persons of economically under-developed countries.

From the above it appears that the adoption of the Draft in its present form would impair the position of economically under-developed countries. Insufficient guarantees of reciprocity and insufficient provisions for actual equality between states are not in accordance with the United Nations Charter. Under such conditions the prospect of equal co-operation between States in this field would be lessened and, in the final analysis, it would be hardly possible to achieve any progress in the strengthening of the national independence of the economically under-developed countries.

On the basis of the above, the Government of the Federal People's Republic of Yugoslavia, while welcoming the initiative for the solution of this question, considers it its duty to recommend that the working party again take under discussion the proposed Convention and that they revise it so that the interests

of individuals be brought into accord with the interests of the signatory States, so that the equal rights of States and the equality of their obligations be implemented. In this sense we consider that one of the inadequacies of the present draft is that it does not solve the question of material conditions for the enforcement of arbitral awards and leaves the possibility for the most varied procedural systems from which emerges the inequality of the parties, which would naturally be to the detriment of those States which would implement the Convention conscientiously, as well as those which are economically less developed.

From this would arise the necessity that before completing the work of the new draft, the working party should complete its study of the comparative laws of all territories and should propose the unification of those rules which can guarantee equal rights.

The Government of the Federal People's Republic of Yugoslavia is willing to help in this work, reserving its right to submit, even at a later stage - in the case it is not represented in the working party, concrete remarks, suggestions and proposals which will depend on the progress of the working party's labours. It is understood that the final attitude of the Government of the Federal People's Republic of Yugoslavia will depend on the results of this work.
