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# INTERNATIONAL COMMERCIAL ARBITRATION

## Note by the Secretary-General

At its second session the United Nations Commission on International Trade Law appointed Mr. Ion Nestor (Romania) as Special Rapporteur on the most important problems concerning the application and interpretation of the existing conventions on international commercial arbitration, and other related problems. After his election the Special Rapporteur stated that he would submit a preliminary report to the third session of the Commission.

The Annex to the present document reproduces the preliminary report of the Special Rapporteur.

ANNEX

# INTERNATIONAL COMMERCIAL ARBITRATION

Preliminary report by

ION NESTOR
Special Rapporteur

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# INTRODUCTION

1. At its second session (Geneva, 1969), the United Nations Commission on International Trade Law (UNCITRAL) had on its agenda (item 6) the following questions concerning international commercial arbitration:

(a) Steps that might be taken with a view to promoting the harmonization and unification of law in this field; and

(b) The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

For the discussion, the Commission had before it a report by the Secretary-General on international commercial arbitration (A/CN.9/21 and Corr.1), a bibliography on arbitration law (A/CN.9/24/Add.1 and 2), and a note on the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/22 and Add.1) indicating the position in respect of ratifications of that Convention and the replies of certain States indicating whether they intended to accede to it.

2. On the two questions mentioned under (a) and (b) above, the representatives of the countries which are members of UNCITRAL expressed the following views,[1/] which are recorded in the Commission's report:

- Most representatives considered that the Commission should not for the time being undertake to draft a new convention on international commercial arbitration since, in their view, the preparation of an international convention on commercial arbitration involved considerable difficulties and, to judge from the pace of the work which had led to the adoption of the existing conventions, was bound to be a long-term undertaking;

- For those same reasons, other representatives pointed out that, certain imperfections notwithstanding, it would be a mistake to tamper with the existing conventions, particularly the United Nations Convention on the Recognition and

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1/ Report of the United Nations Commission on International Trade Law on the work of its second session (Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), pp. 28 and 29).

Enforcement of Foreign Arbitral Awards of 10 June 1958 and the European Convention on International Commercial Arbitration of 21 April 1961, which had proved their value;

- Almost all the representatives considered that the best course, for the time being, was to concentrate efforts on information and research with reference to the 1958 Convention and to try to obtain the largest possible number of ratifications or accessions to that Convention;

- The general opinion was that the most effective course for the Commission would be to concern itself with problems of the practical application and interpretation of existing conventions. Some representatives considered that it would be helpful, in the effort to arrive at a uniform interpretation of the conventions, to have a compendium, or at least an abstract, of commercial arbitral awards, when the parties had no objection to their publication;

- This obviously did not mean that international commercial arbitration did not involve many other questions, and some representatives advocated setting up a small working party to consider those questions and submit practical suggestions at the next session;

- Other representatives suggested the appointment of a special rapporteur to undertake a thorough study of the most important problems relating to the application and interpretation of the existing conventions and of other related problems.

3. On 26 March 1969, the Commission unanimously adopted the following decision:

> "The Commission decides to appoint Mr. Ion Nestor (Romania) as Special Rapporteur on the most important problems concerning the application and interpretation of the existing conventions and other related problems. The Special Rapporteur should have the co-operation, for documentary material, of members of the Commission and various interested intergovernmental and international non-governmental organizations.
>
> "The Commission expresses the opinion that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States."

4. At the fourteenth meeting of UNCITRAL, the Special Rapporteur stated[2/] that he proposed to submit a preliminary report to the third session of the Commission, which would deal in particular with the problems of interpretation and application of the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

5. In response to the invitation extended by UNCITRAL to its members and to the various organizations concerned to co-operate with the Special Rapporteur by providing documentary material, the Organization of American States (OAS) - through the Director of its Department of Legal Affairs, Professor Francisco V. Garcia Amador - informed the Special Rapporteur on 25 April 1969 that a meeting had been held under the auspices of the Inter-American Commercial Arbitration Commission, which had been attended by representatives of the World Bank, the Inter-American Development Bank (IDB) and the Inter-American Bar Association, as well as members of the General Secretariat of OAS. There was a detailed discussion on the activities of OAS and of the inter-American international commercial arbitration system. A report on this meeting will be sent to the Special Rapporteur as soon as it is ready.

The Director of the Department of Legal Affairs of OAS also kindly notified the Special Rapporteur that, at the same meeting, Mr. Landau, who was the observer of the OAS General Secretariat at the second session of UNCITRAL, told the participants that the Special Rapporteur wished to be informed of commercial arbitration practice in Latin America, and that consequently documentary material might be received directly from the above-mentioned institutions.

In any case, the Special Rapporteur has already received certain information furnished in this connexion by the Inter-American Commercial Arbitration Commission and by other bodies, as a result of the work of the Inter-American Juridical Committee. Documentation on the organization and functioning of arbitration in the United States of America has been transmitted directly by the Vice-President of the American Arbitration Association, Mr. Domke. Furthermore, the Secretary-General of the Associazione Italiana per L'arbitrato, Mr. Mauro Ferrante, has sent us the Rassegna del Arbitrato for the past few years.

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2/ Report of the Commission, op. cit., para. 113.

The Special Rapporteur wishes to thank warmly the distinguished representatives of the above-mentioned organizations for the spirit of co-operation which they have displayed.

6. This preliminary report has been prepared on the basis of the documentation received and procured by the Special Rapporteur, making considerable use of the informative documents already prepared for the work on arbitration done under United Nations auspices. It is hoped that information will subsequently be furnished by the members of UNCITRAL and by the national and international organizations concerned. This report briefly traces the general outline of the final report, on the basis of which the Commission will be able to consider "Steps that might be taken with a view to promoting the harmonization and unification of law in this field".

7. On reflection, the Special Rapporteur decided that the subject should be put in its historical perspective, so that the final proposals and conclusions could be firmly anchored in the realm of the real and the possible and take into account the conditions of modern international life. For the past fifty years, virtually unceasing efforts have been made at various levels and in various contexts to develop and unify the rules of international commercial arbitration. It will be useful to retrace this process and highlight its essential features and the trends in various periods, in order to give a clearer picture of the problems which arise in this field.

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8. Part I of the report will therefore consist of a "General account of activities and results of the work on international commercial arbitration". It will be divided into two chapters, each dealing with a different period.

Chapter I, dealing with the first period, will describe the activities undertaken and the results achieved in the period 1920-1945.

9. The first paragraph will describe the activities undertaken within the framework of the League of Nations after the First World War, which culminated in the adoption of the first two important international conventions: the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

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10. The second paragraph will give an account of the activities undertaken in different parts of the world by a number of non-governmental organizations and institutions, which were to play an important role in the dissemination and promotion of arbitration techniques.

11. The third paragraph will contain a description of the attempts to unify the rules of arbitral procedure made before the Second World War by the Rome International Institute for the Unification of Private Law and the International Law Association. As is well known, even before the Second World War, it was felt that, although the League of Nations had done important work, culminating in the adoption of the two Geneva instruments of 1923 and 1927, it had not exhausted all the possibilities. It was thought that the results achieved were still incomplete and "that they could be considered only as a first step on the as yet ill-charted and uphill road to the unification of the laws on arbitration".3/

12. The fourth and last paragraph of this chapter provides an opportunity for some observations on the development of international commercial arbitration between the two world wars.

13. It was during this period that the institution of arbitration won international acceptance. Under the pressure of economic events and the requirements of international trade, States became increasingly interested in arbitration and aware of its usefulness and there was a move to improve the institution.

As early as 1935, at the Hague Académie de Droit International, Giorgio Balladore-Pallieri noted that "recent practice has shown a very marked shift towards arbitration, which is increasingly preferred to proceedings instituted by the State and conducted before judges of ordinary law".4/ There were movements both towards and away from arbitration, but all agreed "that the trend towards arbitration prevailed in municipal as well as international law".

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3/ René David, "Un projet de loi uniforme sur l'arbitrage", in Recueil d'Etudes en l'Honneur d'Edouard Lambert, fourth part - "Le droit comparé comme science internationale moderne", Paris, 1938, p. 885.

4/ Giorgio Balladore-Pallieri, "L'arbitrage privé dans les rapports internationaux", Recueil des cours, Académie de droit international, 1935, I, volume 51, pp. 291 et seq.

14. A new, favourable climate developed over the years, in business circles and on the national and international scene. Certain misgivings of States with regard to arbitration were overcome, at least so far as trade relations were concerned; this paved the way for a certain amount of legislative reform[5/] and created a trend towards court decisions favouring arbitration and even a movement towards the unification of arbitration law.

15. Even when the idea of arbitration had been accepted, a number of practical problems arose, particularly in international relations. As a result, it soon became necessary to study more attentively the rules which existed on the subject. There were found to be wide legislative and doctrinal differences as to the very nature of arbitration, the conditions for the validity of the arbitration agreement, capacity to submit to arbitration, arbitrability, judicial control, arbitral procedure, etc. The provisions of private international law and particularly the rules of conflict, the problems of definitions and public policy and other problems became the subject of a whole series of legal discussions in the most varied circles. However, the complete lack of publicity and the quasi-confidential nature of the proceedings (in general, information on arbitration cases is published only if there are judicial proceedings as well as actual arbitration proceedings) made it difficult to study in depth the real, specific problems raised by the use of arbitration in commercial relations.

16. The discussion centred on the provisions contained in the codes and other laws of civil procedure of different countries. Attention was also given to the general question of arbitral jurisdiction, which covered the variable but always broad subject of private law relationships, including both civil and commercial relationships at the national level and international commercial relations. In addition, arbitration was considered a strictly private matter and it was therefore thought preferable to avoid intervention by the State authorities as much as possible in the interests of promoting recourse to arbitration.

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5/ e.g.: Federal Arbitration Act of 1925 in the United States, Arbitration Acts of 1924, 1930 and 1934 in the United Kingdom, act of 1925 in France, German acts of 1924 and 1930, three Swedish acts of 1929.

17. This explains, to a large extent, why arbitration began to acquire a dual autonomy - from national rules of civil procedure and from State judicial courts. In the first place, this foreshadows the appearance of commercial arbitration centres. Large commodity exchanges and private associations (often closed groups) formed in various branches of trade followed a simplified arbitration procedure, usually with no requirement that reasons be given for the awards rendered. Enforcement of the awards was the responsibility of the parties themselves and of the groups of which they were members and provision was made for enforcement action.6/

In the second place, international arbitration organizations were endeavouring to formulate uniform rules of procedure governing, in the fullest detail, such matters as the selection of arbitrators, their removal, the duration of hearings and the rendering of awards, with a view to eliminating, as far as possible, all controversial problems which might be resolved differently depending on the national law applicable.

18. Some people already thought that an international approach to the problem was required and that national laws should not be taken into account. As Balladore-Pallieri wrote, also at The Hague in 1935: "The need for impartiality prevents us from studying arbitration in the context of the private international law legislation of a particular State. Our approach should be as international as possible and we should look at the international problem, independently of any national legal system."7/ This concept has gained currency but, in the opinion of the Special Rapporteur, has constituted a kind of congenital defect which postponed and sometimes perhaps even prevented the first attempts by States at the legislative level to modernize arbitration law.

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6/ This consists of corporate penalties in the event of voluntary non-compliance with the award, which authors have divided into three categories: financial penalties, moral penalties and penalties entailing loss of rights or standing (see Philippe Fouchard, "L'arbitrage commercial international", Paris, 1965, pp. 466-489).

7/ Giorgio Balladore-Pallieri, op. cit., p. 295.

19. As Frédéric-Edouard Klein has observed, the efforts of international arbitration organizations to formulate uniform rules of procedure succeeded in "bridging certain differences of legislation" but "this merely obscured a problem of law which remained intact".8/ Actually, at that time the only arbitration was national arbitration, which was acknowledged, subject to certain reservations, to have extraterritorial effects.

20. Lastly, it may be noted that between the two world wars the principal geographical area in which arbitration was used effectively consisted of the industrialized countries of Europe and America and corresponded closely to the centres of international trade. The decisive factor was obviously trade, as conducted in the first half of the twentieth century, which had generated a movement towards the institutionalization of commercial arbitration and the beginning of a decline in the use of ad hoc arbitration in commercial relations. In addition, the appearance of the first arbitration centre in a socialist country (the USSR) created an awareness of the problems involved in arbitration between organizations in countries with different social and economic structures: socialist countries with planned economies, where trade is organized on the basis of a State monopoly, and capitalist countries with market economies.

21. Chapter II will be devoted to a second period and will describe: the activities undertaken and the results achieved in the period 1945-1970.

22. The first paragraph deals with the activities undertaken under the auspices of the United Nations, which culminated in the formulation and adoption of two important conventions - the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the European Convention on International Commercial Arbitration (Geneva, 1961), which was supplemented by the Arbitration Rules of the United Nations Economic Commission for Europe of 1966 and the Rules for International Commercial Arbitration prepared by the United Nations Economic Commission for Asia and the Far East in 1966.

23. A second paragraph will be devoted to the activities undertaken under the auspices or with the direct assistance of other international organizations, which

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8/ Frédéric-Edouard Klein, Considérations sur l'arbitrage en droit international privé, Basle, 1955, p. 12.

have resulted in the adoption of international conventions or other rules concerning international commercial arbitration. A study will be made of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965) prepared by the International Bank for Reconstruction and Development, the arbitral system established by the General Conditions for Delivery of Goods between Organizations of the Member States of the Council for Mutual Economic Assistance, the European Convention providing a Uniform Law on Arbitration (Strasbourg, 1966) prepared by the Member States of the Council of Europe, the draft Inter-American Convention on Commercial Arbitration prepared by the Inter-American Juridical Committee and the draft Protocol on the Recognition and Enforcement of Arbitral Awards prepared by the Council of Europe.

24. The third paragraph will describe work on the unification and harmonization of the rules concerning international commercial arbitration - both the earlier efforts already mentioned in chapter I and new efforts such as those of the Institute of International Law (sessions at Amsterdam in September 1957 and Neuchâtel, in September 1959, on "Arbitration in international private law").

25. The fourth paragraph will deal with other activities connected with the promotion of international commercial arbitration and with the discussions held at conferences, symposia, seminars, etc., on the various practical problems involved in arbitration. The main purpose of this paragraph will be to draw attention to commercial arbitration problems in the context of the efforts aimed at the expansion of trade and world development and, as proposed by the organizers of the New Delhi seminar in 1968, "to better identify the problems in the field of arbitration and the evolving of a common policy and mutually acceptable and viable norms for the promotion and development of international commercial arbitration".[9/]

This paragraph will cover the work of: the International Association of Legal Science, under the auspices of UNESCO (1958 Rome colloquium on the legal

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9/ International Seminar on Commercial Arbitration, New Delhi, 18 and 19 March 1968, Indian Council of Arbitration, Federation House, New Delhi, Foreword, p. 1.

aspects of trade with the centrally planned economies); the First International Arbitration Congress, organized in Paris in May 1961 by the Comité français de l'arbitrage; the Second International Arbitration Congress, organized at Rotterdam in 1966 by the Netherlands Arbitration Association, on the topic "Arbitration and the Common Market"; and the Third International Arbitration Congress, organized at Venice in 1969 by the Associazione Italiana per l'Arbitrato, where the question of co-operation between arbitration organizations was discussed.

The report will also refer to the work of the International Seminar on Commercial Arbitration, organized at New Delhi in 1968 by the Indian Council of Arbitration. An account will be given of the work of the International Law Association, whose Committee on International Commercial Arbitration discussed the problem of arbitration between government-controlled bodies and foreign business firms at its recent meetings in 1966 at Helsinki and in 1968 at Buenos Aires. This subject will probably also be discussed at the Conference of the International Law Association, at The Hague in 1970.

26. The fifth and last paragraph of this chapter provides an opportunity, as did the last paragraph of chapter I for some observations on the development of commercial arbitration in the period 1945-1970, in the context of the new social, political, economic and technical conditions prevailing after the Second World War, which undoubtedly created new trends and phenomena in the use of arbitration and new legal and organizational problems.

27. This period witnessed, firstly, the emergence of the world economic system of the socialist countries, organized on a planned-economy basis, the development of international commercial relations based on State monopoly. Secondly, there was the appearance of the third world, composed of developing States which have recently acceded to political independence. Thirdly, the scientific and technological revolution has over the past few years placed contemporary world relations in a new setting, radically altering the pattern of industrial production and the conditions of participation in the international division of labour and in international trade. It has become necessary to adopt certain organizational measures at the international level to deal with economic co-operation and exchanges of goods between the different regions of the world,

between the different economic systems and between the developing countries and the industrialized countries. Many countries in different regions are trying to organize themselves in various economic and political forms and structures in order better to defend their interests, in a world where complexities and contradictions abound. In these circumstances, State participation in economic life is becoming increasingly direct, even in market economy countries where the means of production are privately owned.

Lastly, it should be noted that, despite all the periods of economic stagnation, cold war and political tension, and despite the restrictions and barriers or discrimination imposed, international trade has expanded and developed constantly. It has almost doubled in the past ten years, reaching a total of almost $500,000 million. International commercial relationships (in the wide sense of the term) constitute a special separate category of social relationships and, with interdependence as the keynote, bring the most varied State and social structures into contact, despite the distance involved.

The United Nations, which was created after the Second World War in order "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" is to be "a center for harmonizing the actions of nations" for the maintenance of international peace and security and to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

All these historical factors are reflected in the development of international commercial arbitration, which is the subject of this report.

28. One stage in that development witnessed the initiation and completion of the process of clarifying the nature of the arbitration systems operating in the Eastern European countries, which have different economic systems. Commercial arbitral bodies with exclusive jurisdiction in respect of international trade relations have been established in those countries. These bodies are institutions of public interest; they were erroneously deemed to be organs of the State, and their system of organization and operation was often considered to be incompatible with the nature of arbitration and to resemble that of judicial organs. This situation gave rise to a definite crisis of confidence, the reasons for which were

psychological rather than real,[10] as was evident at the colloquium organized by the International Association of Legal Science in Rome in 1958; this crisis of confidence adversely affected the development of East-West trade for a long period. Continued contacts were needed to enable both sides to become more familiar with each other's arbitration systems. As Mr. Kopelmanas of the European Office of the United Nations at Geneva has said:

> "It took determination and faith for a small group, centred around Gunnar Myrdal, in the United Nations Economic Commission for Europe, to continue believing that the decline and the intermittent stoppages in East-West trade were primarily due to political circumstances and not to any real incompatibility between the two economic systems into which the countries of Europe were divided." [11]

29. Once that crisis had passed, the pressure of events led to progress: in a world marked by economic interdependence, the need for co-operation induced States to work together at the world level to improve both the organization and the functioning of arbitration machinery.

We have described the period between the two world wars as the era of international acceptance of arbitration; the following period, which began after the Second World War, is the era of the growth of arbitration - growth in a dual sense: geographical, since it spread to other major regions of the world (the Far East, Latin America), and technical, since it is embodied in all form contracts, and indeed in all the forms used in every branch of international trade relations. It is also the era of the emergence and development of various types of specialized, permanent, institutional arbitration designed to meet the requirements of international trade and new requirements arising out of international economic co-operation. As Professor Lalive has rightly observed, "the most striking feature of modern international arbitration is undoubtedly

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10/ cf. Paul van Reepinghen, "L'Arbitrage dans les différends commerciaux entre organisations des pays à économie planifiée et contractants de pays à économie libre", in "Aspects juridiques du commerce avec les pays d'économie planifiée", Paris, 1961, p. 231.

11/ L. Kopelmanas, "Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différents", report submitted to the Third International Arbitration Congress, Venice, 1969, p. 2.

its 'institutionalization', that is, the proliferation of arbitration bodies of every type and appellation".[12] Institutional arbitration was earlier referred to by Charles Carabiber, at the First International Arbitration Congress,[13] as "an institution whose irreversible nature is no longer in dispute". Many commentators hold that the future of arbitration lies in institutionalization and that we are witnessing the decline of ad hoc arbitration, which has become merely a poor relation of institutional arbitration. What was a trend in the first period is now established fact.

30. The historical circumstances described above also explain the success of the New York Convention of 1958, which not only marks an advance, from the technical and other standpoints, over the Geneva Protocol of 1923 and the Geneva Convention of 1927 but also reflects the trend towards world-wide participation in trade, since it recognizes at the international level the arbitral character of all permanent arbitration centres throughout the world. Article 1, paragraph 2, of that Convention is considered to be, so to speak, the epilogue to the Ligna v. Baumgartner case, as the Swiss delegate[14] observed during the 1958 Conference.

The European Convention of 1961 was the first important convention to contain a clear recognition of the tendency to treat international trade relations individually, as a separate category of relations - even its title mentions international commercial arbitration. It may also be noted that commentators have taken the same approach.[15] Moreover, the European Convention states unequivocally that the term "arbitration" encompasses settlement by permanent arbitral institutions.

Lastly, the 1958 General Conditions for the Delivery of Goods of the Council for Mutual Economic Assistance (CMEA) and those of 1968, which contain provisions

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12/ P.A. Lalive, "Problèmes relatifs à l'arbitrage international commercial", Recueil des Cours, Académie de droit international, The Hague, vol. II/1967, p. 694.

13/ Charles Carabiber, Exposé introductif, Revue de l'arbitrage, Proceedings of the International Arbitration Congress, Paris, 1961, p. 45.

14/ Cf. Philippe Fouchard, "L'Arbitrage commercial international", Paris, 1965, p. 206.

15/ See, for example, the works by Prof. Fouchard and Prof. Lalive mentioned in previous foot-notes.

on the creation of a system of international commercial arbitration for member countries of CMEA, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States all reflect, in different ways, the same needs for international co-operation in economic development.

31. Two important problems relating to international commercial arbitration have become more acute in recent years as a result of new factors in the development of the world economy.

One of them is the question of organizing arbitration in trade relations between countries at different levels of development. Professor Minoli,16/ pointing out that,

> "While it is true that differences in economic development may offer occasions for stronger economies to exploit the weaker, and arouse in the latter the urge to defend themselves and to organize for defence",

a situation which has sometimes led to the repudiation of international commercial arbitration or the adoption of inoperative clauses, expresses the view that:

> "the major difficulty involved in fitting business dealings of the kind here referred to within efficient international commercial arbitration schemes is due mostly to the limited experience of such dealings, and to the almost total lack of participation in their organization and implementation by qualified persons from the less developed countries, where the uneasy feeling prevails that such arbitration schemes are 'thought up' by the developed countries, and are manipulated by them in their own interests, and are, in fact, one more factor of their domination".

The second problem is that of so-called mixed arbitration, in which one of the parties is a State; although such arbitration will probably become increasingly common as a result of the frequency of direct State involvement in international trade and economic relations, it seems for the moment to be largely confined to investments but its use is increasing in other forms of collaboration.

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16/ Eugenio Minoli, Keynote Report, Third International Arbitration Congress, Venice, 1969, pp. 2 and 3.

32. Since international commercial arbitration is itself an effective means of peaceful co-operation among nations[17/] within the framework of world economic development, regardless of the level of development or the social and political system of the countries of the world, the problem is how to make it as efficacious an institution as possible and bring it into general use. The possible role in solving these problems of the United Nations or the other national or international governmental or non-governmental organizations concerned, and the technical means for achieving these ends, will be dealt with in part III of the report, when complete information has been received on these matters. What must be stressed now is that the action required will involve the concerted efforts of the United Nations, of Member States and of all the national and international organizations concerned, because international commercial arbitration is one of the fundamental elements in the planning of a steady expansion of world-wide economic, technical and scientific co-operation. Without wishing to look too far ahead, the Special Rapporteur feels that the direction in which these efforts should first be applied is in organizing co-operation among commercial arbitration institutions, including any which may be established in the future. This would be one practical way of fulfilling the general international obligation of economic co-operation, which is now accepted as one of the essential conditions for lasting peace.

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33. Part II of the report will be devoted to Problems concerning the application and interpretation of existing multilateral international conventions on international commercial arbitration. It will therefore be, primarily, a description and analysis of judicial practice on the subject in various countries which are parties to the conventions in question.

In view of the preliminary nature of the report and of the circumstances in which it was prepared, we shall try in the following paragraphs to present in a systematic form the material made available, with specific examples, in order to

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17/ See René David, "La technique de l'arbitrage, moyen de coopération pacifique entre les nations de structures différentes", in "Problèmes contemporaines de droit comparé", I, Tokyo, 1962, p. 22 et seq.

identify more clearly the problems encountered in the practice of the various judicial or arbitral organs; further material on practice is expected to be received as a result of the co-operation mentioned in the resolution on international commercial arbitration adopted by UNCITRAL at its second session.

34. As the report is a preliminary one, the Special Rapporteur thought it would be premature at this stage to make a critical analysis of the judicial precedents selected. No final judgements on judicial practice can be made and no conclusions drawn until the documentation is complete.

The material which follows relates mainly to cases expressly involving the provisions of the international conventions under discussion. However, reference has also been made to the judicial practice of countries which are parties to the conventions and may therefore be assumed to bear those provisions in mind, given the circumstances of the case, even if there is no explicit statement to that effect. Moreover, in some instances cases have been included because they resolve legal problems which are posed in the same way in the conventions, even if the provisions of the conventions were not invoked for the purpose and only the application of certain provisions of municipal law was involved.

For the sake of clarity, we decided that the material so far assembled should be divided, for the time being, into the following four chapters, each referring to one general category of problems: chapter I - problems concerning the arbitration agreement; chapter II - problems concerning arbitral procedure; chapter III - problems concerning arbitral awards; and chapter IV - problems concerning foreign arbitral awards. It was thought useful to devote a separate paragraph, wherever possible, to one specific problem in the general category concerned and to identify the legal problem discussed in the heading of each paragraph.

## Chapter I

## Problems concerning the arbitration agreement*

35. Law applicable to the arbitration agreement. In German judicial practice, the existence of a valid arbitration agreement is determined according to the law of the country in which the arbitral institution has its seat.18/

The same view was taken in Swiss judicial practice in the case of an arbitral clause concluded between a company having its seat at Zurich and its Spanish trade partner. In the clause in question it was agreed to set up an arbitral tribunal at Zurich composed of two arbitrators, one appointed by each party, and a presiding arbitrator elected by the two arbitrators. Under the clause, if one of the parties failed to appoint its arbitrator, the other could request the President of the Swiss Federal Court to make the appointment.

A dispute having arisen, the Spanish party refused to appoint an arbitrator, claiming that the arbitral clause was void because it was contrary to Spanish public policy. The Swiss party requested the President of the Swiss Federal Court to appoint the arbitrator.

The ruling was that, under article 2 of the 1923 Geneva Protocol, which governed the arbitral clause in question, the law of the country in whose territory the arbitration takes place was applicable, namely Swiss and not Spanish law.19/

Belgian judicial practice also takes the view that, within the framework of the 1923 Geneva Protocol and the 1927 Geneva Convention, the validity of the arbitral clause of commercial contracts is determined in accordance with the law

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* Translator's note: "Convention d'arbitrage" covers both the "clause compromissoire" and the "compromis". The term "arbitration agreement" therefore covers both an arbitral clause and a separate arbitration agreement.

18/ Hamburg Civil Court, 12 November 1967, in Revue de l'Arbitrage, No. 4/1959, pp. 126-128.

19/ President of the Swiss Federal Court, Judgement of 7 July 1962, in Journal du droit international (Clunet), No. 1/1966, p. 173. The President of the Swiss Federal Court has not yet taken a decision on the request for the appointment of an arbitrator, because under Swiss law he is not competent to determine the validity of the arbitral clause. The ordinary Swiss courts must first rule on the validity of the clause.

of the State in which the dispute is arbitrated. Czechoslovak law has been applied to the same effect.[20]

36. Law applicable in establishing whether it is necessary to conclude a separate arbitration agreement or whether an arbitral clause suffices. When an application was made for the enforcement in France of an arbitral award made in the State of New York, it was submitted that the award was not valid, because it was based on an arbitral clause and not on a separate arbitration agreement.

The court to which the application for enforcement was made, in its interpretation of the content of the arbitral clause, held that since that clause provided that any dispute between the parties was subject to arbitration in the United States of America, the parties had referred implicitly to New York State law.

New York State law was considered as the lex causae applicable to the case. That law does not require the conclusion of a separate arbitration agreement, so that the existence of the arbitral clause was sufficient to render the arbitral award valid.[21]

In another dispute, the parties, having concluded a chartering agreement, agreed that English law would apply, inasmuch as they referred to the Centrocon Arbitration Clause. An arbitral award made in the United Kingdom was submitted for enforcement in France, where the absence of a separate arbitration agreement was invoked. It was ruled, however, that "the applicable texts do not require the signatories of the arbitral clause to conclude a separate arbitration agreement, but allow each party to inform the other of the difficulty by registered letter, under the Arbitration Act, 1950, and the Geneva Convention of 26 September 1927, which requires only that the award should be made on the basis of an arbitral clause or a separate arbitration agreement."[22]

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20/ Belgian Court of Cassation, 16 January 1958, in Revue critique de droit international privé, No. 1/1959, p. 122. The Court held, however, that it was not competent to determine whether the Belgian court to which application was made for an enforcement order had correctly interpreted Czechoslovak law in the case mentioned.

21/ Paris Appeals Court, First Chamber, 30 May 1963, in Revue de l'Arbitrage, 1963, No. 3, p. 93.

22/ Appeals Court of Aix-en-Provence, 29 September 1959, in Journal du droit international (Clunet), No. 1/1961, p. 168.

37. Autonomy of the arbitral clause and the separate arbitration agreement with respect to contract to which they relate. The close link between a contract and the arbitral clause it contains or an arbitration agreement contained in a separate document relating to the contract raises the problem of the effects of the invalidity of the contract on the arbitral clause or the separate arbitration agreement. For example, when an application was made for the enforcement of an English arbitral award in France, it was submitted that the nullity of the contract of sale concluded by the parties rendered the arbitral clause - and hence the arbitral award - invalid. French judicial practice does not take this view and rules that in international commercial arbitration "an arbitration agreement concluded separately or embodied in the legal document to which it refers always has - save in exceptional circumstances, which are not invoked in in this case - absolute legal autonomy and is not affected by the possible invalidity of the document".23/ Even in cases in which the contract is declared null and void for reasons of public policy, this ruling applies and the arbitral clause remains valid. In support of this it is generally argued that, since disputes may arise when the contract is declared null and void on grounds of public policy and since the parties nevertheless have the right to conclude an arbitration agreement with regard to those disputes, the existence of that right proves that that agreement is valid.24/

In another dispute it was likewise decided that "in determining the validity of the arbitration agreement... the judge in the enforcement proceedings is not required to rule on the validity of the contract to which the agreement relates, because of the invalidity of its provisions". The validity of the arbitration agreement cannot be affected even by the considerations on which the arbitrator's award is based: "As the arbitration agreement is the basis of all arbitration, its prior validity must be determined independently of the considerations which led the arbitrators to make the award".25/

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23/ Orlèans Appeals Court, 15 February 1966, Revue de l'Arbitrage, No. 4/1966, p. 109.

24/ Ibid.

25/ Paris Appeals Court, 9 January 1962, in Revue de l'Arbitrage, No. 1/1962, p. 12.

United States judicial practice has also held that the arbitral clause is independent of the contract in which it is incorporated. The problem arose in connexion with a contract for the sale of wool which the buyer contended had been concluded by fraud. The contract contained an arbitral clause by virtue of which any dispute, other than those concerning the condition or quality of the goods, was to be submitted to the American Arbitration Association. The court of first instance rejected the application for a suspension of judgement until such time as the issue of fraud had been decided. The Second Circuit Court quashed that judgement on the ground that the arbitral clause was separate from the other provisions of the contract, was not alleged to be fraudulent and was worded in terms broad enough to cover even the case of fraud.[26/]

It should be noted, however, that in United States judicial practice one cannot speak of consistent decisions along the lines mentioned above. In fact, it has been decided in other cases that a defence based on fraud may not be the subject of arbitration.

38. Requirement that arbitration agreements shall be in writing. The provisions of article II (2) of the New York Convention of 1958, which requires the arbitration agreement to be in writing and may therefore affect the validity of an arbitration agreement, have given rise to discussion as to the exact meaning to be given to them.

For example, a Geneva court refused to enforce in Switzerland, under the United Nations Convention, an arbitral award rendered in the Netherlands, on the ground that the words "an exchange of letters" in article II (2) of the Convention required that the proposal to submit disputes to arbitration, made in the form of a written offer, should be accepted expressly, and not tacitly by the opening of a letter of credit.[27/]

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26/ Revue de l'Arbitrage, No. 4/1959, pp. 128-130.

27/ Martin Schwartz, "La forme écrite de l'article II, alinéa 2, de la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères du 10 juin 1958", in Revue suisse de jurisprudence, 1968, vol. 64, p. 49; for text of the decision of 8 June 1967 in the Walsum v. Chevaliers case, ibid., p. 56.

In French judicial practice, however, another and less rigid view has been taken regarding the written form of the arbitration agreement, as required by the United Nations Convention of 1958. A court has, in fact, decided that

> "when the acceptance of a commercial transaction results from its execution and the (French) seller has not protested against the clause stipulating that in the event of dispute the parties shall submit to arbitration, it also implies acceptance of the said clause and requires the seller to conform to it. This applies even when the clause providing for arbitration in the country of the foreign buyer (English) is printed on a form contract which the buyer has sent by way of confirmation to his French supplier after the conclusion of the transaction by verbal agreement". 28/

A similar attitude is adopted in Italian judicial practice. In one dispute, for example, an application was made in Italy for an order for the enforcement of an arbitral award rendered at New York by virtue of an arbitral clause in a chartering agreement, also concluded at New York, between a Norwegian shipowner and an Italian charterer. In the arbitral clause, jurisdiction was assigned to an arbitral body in New York. The clause had, however, not been approved in writing, as required by article 1341 of the Italian Civil Code. The Italian court held that the requirement of approval (confirmation) in writing is a question of form, governed by the law of the place in which the contract is concluded, and not a question of procedure, which is governed by the law of the court to which application for enforcement was made. In New York State, where the contract was concluded, no written approval of the arbitral clause is required, and the clause was therefore ruled valid, on the ground that article 1341 of the Italian Civil Code embodies a provision of domestic - not international - public policy. 29/

A similar decision had been taken previously by an Italian court to which an application had been made for the enforcement of an arbitral award rendered in Czechoslovakia by virtue of a contract concluded in Czechoslovakia which

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28/ French Court of Cassation, Civil-Commercial Chamber, 17 October 1961, in Revue critique de droit international privé, No. 1/1962, pp. 129 and 130.

29/ Italian Court of Cassation, 2 May 1960, in Journal du droit international (Clunet), No.3/1961, p. 860.

contained an arbitral clause which had not been confirmed in writing - in favour of the Czechoslovak arbitral body.30/

According to the practice of the Arbitration Commission of the Chamber of Commerce of Romania, when the claimant submits a dispute to the Arbitration Commission without having previously concluded an agreement in writing with the respondent regarding the Commission's jurisdiction, the respondent mentioned in the request for arbitration must express his agreement before the proceedings can be initiated. For example, in one case where the claimant (an enterprise in Prague) had not attached to its request a copy of the arbitration agreement, the Arbitration Commission asked the respondent (an enterprise in Bucharest) whether it agreed that the Commission should settle the dispute. The Arbitration Commission did not initiate the proceedings until that agreement had been given (case 6/1965).

In another case, a New York firm submitted a request for arbitration against a Bucharest firm, without having concluded an arbitration agreement with the latter (case 7/1955). The Arbitration Commission proceeded in the same way; before initiating the arbitral proceedings, it invited the respondent to indicate whether he considered the Commission competent to arbitrate the dispute.

It may thus be concluded that the Arbitration Commission of the Chamber of Commerce of the Socialist Republic of Romania cannot settle disputes unless the parties have agreed that it has jurisdiction and the agreement has been expressly set out in writing, irrespective of whether the agreement was reached before or after the dispute was submitted to the Commission.

In German judicial practice, the question of the form of arbitration agreement is posed in the context of article 1027 of the German Code of Civil Procedure. Although this text is a regulation of municipal law, it is nevertheless of some interest in relation to article II (2) of the New York Convention.

According to article 1027 (1) of the German Code of Civil Procedure, the arbitration agreement must be expressed and in writing and contain only clauses relating to the arbitration. That formal requirement was not fulfilled in an agreement providing for the settlement of certain disputes by the arbitral tribunal of the Association of Grain Merchants of the Hamburg Commodity Exchange.

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30/ Trieste Appeals Court, 13 July 1956, in Journal du droit international (Clunet), No. 3/1961, p. 864.

It was, however, argued that in that particular case the form of the arbitration agreement was regulated not by article 1027 (1) but by article 1027 (2), which imposes no special formal conditions when the agreement between the parties is a bilateral act of commerce between merchants.

This raised the subsidiary problem whether the French party, an agricultural co-operative, was a merchant. If German law, particularly article 17 (2) of the German Act on Co-operatives, had been applicable, the respondent would have been considered a merchant because it was a co-operative. However, it was decided that the question whether the respondent was a merchant must be decided according to French law, not German law, for according to German private international law, the quality of merchant is determined according to the law of the place in which the professional establishment is situated. According to French law the respondent was not a merchant, since it was an agricultural sales co-operative. Consequently, article 1027 (1) of the German Code of Civil Procedure was applied in this particular case, the arbitration agreement concluded by the agents of the parties (who had written notes to that effect which were transmitted to the parties concerned) having been deemed invalid from the point of view of form.[31/]

39. Difference not contemplated by or not falling within the terms of the arbitration agreement. In view of the special importance of the arbitration agreement, which constitutes the basis of arbitral competence, it is essential to establish the existence of these agreements and to define their content.

For example, although it is true that the Arbitration Commission of the Bucharest Chamber of Commerce possesses general jurisdiction with regard to foreign trade relations, the parties may, by agreement, limit that jurisdiction to certain categories of foreign trade relations. The Commission can only exercise the jurisdiction which empowers it to give a ruling within the limits provided for by the parties, as defined in the relevant clause of their agreement. This clause must express not only the will of the parties to resort to arbitration, but also the categories of relations they intend to submit to arbitration.

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31/ Hamburg Civil Court, Commercial Chamber, 12 November 1957, in Revue de l'Arbitrage, No. 4/1959, pp. 126-128.

For example, in a recent dispute[32] the claimant requested the Arbitration Commission to establish the price and specification of the goods which were the subject of the contract and to change the delivery periods. In giving the reasons for its decision, the Commission declared that it could in principle accept those requests if the arbitration agreement between the parties empowered it to do so. However, on studying the arbitral clause, the Commission found that the parties had not given it that right: "Only the parties, by agreement, could have empowered a third party or an arbitral body to establish the price and specification. However, that agreement should have been expressly stated, for it cannot be deduced from a clause, which, as in this case, provides on the contrary that the price and specifications shall be determined by the parties themselves". The Commission therefore decided that it did not have jurisdiction.

In other cases, the Commission was obliged to determine whether the subject of the request - payment of an amount representing the equivalent of defects - could be included in the category of disputes which the parties had intended to submit to arbitration. The arbitral clause provided that the Bucharest Arbitration Commission could not give a ruling on disputes concerning the quality of the goods, since quality control was to be carried out by the buyer's expert, whose decision was final and binding upon the parties.[33]

The respondent had raised a plea relating to jurisdiction, contending that the act of claiming payment of the amounts in question constituted a dispute concerning quality, which, as such, was outside the jurisdiction of the Bucharest Commission. The Commission decided that the claimant's claim to payment of a sum of money representing the equivalent of the defects found by the expert designated in the contract between the parties could not be considered a dispute concerning quality; it therefore agreed to arbitrate the case.

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32/ Case 245/1954, in which the claimant was a firm in the Federal Republic of Germany and the respondent Exportlema (Socialist Republic of Romania). The case was settled by decision No. 9 of 19 March 1965.

33/ Award No. 38 of 19 September 1966 (case 367/1966: claimant, a Romanian firm; respondent, a firm in Aleppo).

In another dispute,[34] settled in 1966, the Commission had occasion to state that the content of the arbitral clause should be clear and unequivocal. Special attention should be paid to this clause, for although it is usually inserted in a contract, it retains its own autonomous character and produces special effects.

The Commission was obliged to disseize itself specifically because the contractual clauses concerning the competent arbitral body seemed equivocal:

> "Whereas the arbitration agreement, when it consists of a clause inserted in the contract, retains its own autonomous character, with its special juridical effects of a jurisdictional nature, thus imposing on the parties the obligation to pay special attention to this clause in order to avoid possible misunderstandings;
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> "Whereas the documents and the pleas of the parties show that in this case they did not act in this manner and that they did not conclude an agreement regarding the jurisdiction of the Bucharest Arbitration Commission; since there are two arbitral clauses which are contradictory, one providing that the Arbitration Commission attached to the Chamber of Commerce of the Socialist Republic of Romania shall have jurisdiction, and the other that the arbitral body H.J.A. or Privates shall have jurisdiction, and it is impossible to establish that the parties expressed a preference for the Bucharest Commission. The two clauses...."

This is followed by a detailed statement of the reasons why the Commission considered that the parties had not agreed that it had jurisdiction to settle their dispute, and decided to disseize itself of the case.

40. Capacity to conclude the arbitration agreement. In practice, this problem arose in connexion with the capacity of an Italian commercial company, having its seat at Milan, which had agreed to submit to the Bucharest Arbitration Commission any dispute which might arise concerning a contract to deliver goods concluded with a Romanian foreign trade organization. The capacity of the Italian party to conclude such an arbitral clause gave rise to discussion, because "according to article 2 of the Italian Code of Civil Procedure, the jurisdiction of the Italian courts may not be derogated from by agreement in favour of the jurisdiction of foreign courts or arbitrators who render their decisions abroad, except in the

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34/ Case 322/1965, award No. 28 of 19 March 1966 (claimant, a Romanian enterprise; respondent, a firm in Vaduz, Liechtenstein).

case of obligations between aliens or between an alien and an Italian citizen who is neither resident nor domiciled in Italy, provided that the derogation is in writing".

It was nevertheless decided that since Italy and Romania were parties to the 1923 Geneva Protocol on Arbitration Clauses, ratified by Italy on 8 May 1928 and by Romania on 21 March 1925, the capacity of the Italian party should be established in accordance with article 1 of the Protocol, which had been incorporated in Italian law following its ratification by the Italian State, and not in accordance with article 2 of the Italian Code of Civil Procedure. In view of the provisions of article 1 of the Protocol, it was decided "that the respondent enterprise could conclude a valid arbitral clause derogating from the jurisdiction of the Italian courts in favour of the Romanian arbitral body.35/

A similar view has been taken in Italian judicial practice with regard to applications for the enforcement of foreign arbitral awards. It has been decided that article 2 of the Italian Code of Civil Procedure is no longer applicable if the jurisdiction of the Italian courts has been derogated from by an international convention, either the 1923 Geneva Protocol or the 1927 Geneva Convention.36/

The Italian courts have also decided that article 1 of the 1923 Geneva Protocol is applicable (by derogation from article 2 of the Italian Code of Civil Procedure), even if the arbitral award has been rendered in a State which is not a party to this international agreement (in the case in question, the State of New York), provided that the parties to the dispute (in this case, an Italian and a Norwegian) are nationals of States which are parties to the Convention.37/

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35/ Bucharest Arbitration Commission, award No. 34 of 29 November 1958, cited by I. Nestor and O. Căpătînă, Chronique de Jurisprudence roumaine, Journal du droit international (Clunet) No. 2/1968, pp. 419-422.

36/ Italian Court of Cassation, Joint Civil Section, decision No. 466 of 2 March 1964; Milan Appeals Court, 23 April 1965; both decisions recorded in the Journal du droit international (Clunet), No. 3/1966, p. 702.

37/ Italian Court of Cassation, 2 May 1960, in Journal du droit international (Clunet) No. 3/1961, p. 860.

France and Belgium do not allow public entities to submit to arbitration. This interdiction still exists with regard to problems relating to municipal law, but in France the obstacle which it constituted has recently been removed in the case of international law, as a result of a welcome development in judicial practice.38/

Since 1957, judges of the merits have on several occasions refused to accept a plea by the French State, which contended that it could not validly be committed by an arbitral clause inserted in an international contract.39/

The Court of Cassation took the same view40/ in a decision of 14 April 1964, explaining that the legal provision prohibiting public establishments from subscribing to arbitration agreements relates to municipal and not to international public policy and does not prevent a public establishment, like any other contractant, from submitting a private law agreement to which it is a party to a foreign law when the contract in question has the characteristics of an international contract. In 1964 and 1966, the same Court of Cassation decided that the prohibition in question related to the law of contract and not to the personal law of the contracting parties:

> "But whereas the prohibition deriving from articles 83 and 1004 of the Code of Civil Procedure does not raise a question of capacity in the sense of article 3 of the Civil Code;
>
> "Whereas the Appeals Court was called upon only to decide whether this rule, drawn up for domestic contracts, should also be applied to an international contract concluded for the requirements, and in conditions which conform to the usage, of maritime trade;
>
> "Whereas the contested decision rightly states that the aforementioned prohibition is not applicable to such a contract, and whereas the Appeals Court, by declaring valid the arbitral clause

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38/ See Maurice André Flamme, L'Arbitrage dans les relations entre personnes de droit public et personnes de droit privé, Report to the International Arbitration Conference, p. 21.

39/ Paris, 10 April 1957, JCP II - 10078, note Motulsky and D.1958, 702, note Jean Robert; 21 February 1961, Revue de l'Arbitrage, 18, Aix, 5 May 1959, Revue de l'Arbitrage, 1960, p. 28.

40/ Revue de l'Arbitrage, 1964, pp. 82 et. seq.

thus subscribed to by a legal person of public law, setting aside all other reasons which may be regarded as superfluous, legally justified its decision."

## Chapter II

## Problems concerning arbitral procedure

41. Law applicable to arbitral procedure. Interpretation of the will of the parties. An arbitral institution in London complied with the English legislation relating to procedure (Arbitration Act, 1950). One of the parties, a Franco-Tunisian shipping company, opposed the enforcement in France of the arbitral award thus rendered, arguing that it had contested the application of the English law in a letter. However, it was decided, "that the parties had accepted the procedure provided for in the English law, in application of the Geneva Convention of 24 September 1923, when they provided for arbitration according to the Centrocon Arbitration Clause", with the appointment of "two arbitrators at London... members of the Baltic, who could appoint a referee".41/

42. Jurisdiction of the arbitral tribunal dependent on the validity of the arbitration agreement. A challenge to the validity of the arbitration agreement or the arbitral clause calls in question the jurisdiction of the arbitral body which has been seized of the case on that basis to settle the dispute. It has been decided that "the clause in question produces effects with regard to the jurisdiction of the arbitral body in so far as it is valid in the terms of the law which is applicable to it".42/ From this was deduced the procedural corollary that the plea regarding the invalidity of the arbitral clause must be resolved in advance, in order to establish whether the arbitral body has jurisdiction. Under Romanian legislation, the Bucharest Arbitration Commission is empowered to rule on its own competence.

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41/ French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, in Revue de l'Arbitrage, No. 2/1964, p. 46.

42/ Arbitration Commission of Bucharest, 29 November 1953, in Journal du droit international (Clunet), No. 2/1968, p. 419.

43. Constitution of the arbitral tribunal when one of the parties fails to appoint an arbitrator. A Japanese firm, which had been invited to appoint its arbitrator in connexion with arbitration which took place in London, did not respond to that invitation and subsequently opposed the enforcement in Japan of the award rendered, contending that the arbitral body had not been validly constituted. That view was not accepted and it was decided that "applying the English law as the law of procedure, the failure of one party to appoint its arbitrator made it legitimate for the arbitrator appointed by the other party to act as sole arbitrator".[43/]

44. Nationality of arbitrators. Selection from an official list. It has been decided that the obligation to choose an arbitrator from the list of the Chamber of Commerce of Czechoslovakia, which contains only arbitrators of Czechoslovak nationality domiciled in Czechoslovakia, is not contrary to the public policy of Switzerland.[44/]

45. Possibility of setting aside the arbitral award when the arbitrator and the representative of one of the parties belong to the same organization. Other grounds for setting aside the award. An arbitral award was rendered in Sweden by an arbitrator who worked for the Comité Central des Assureurs Maritimes de France. One of the parties, a French commercial company, was represented at the hearings by a representative who worked for the Comité des Assureurs Maritimes de Paris, who presented the case of the French party to the dispute. After the award had been rendered its enforcement in France was applied for. At that point the other party, a Polish firm, opposed the enforcement, contending that the rights of the defence had been violated because the arbitrator and the representative of one party belonged to the same organization.

It was nevertheless decided that the rights of the defence had not been violated, because there was no professional relationship between the arbitrator and the representative which would make the former dependent on the latter or deprive the arbitrator of the independence and impartiality necessary for the

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43/ Tokyo Appeals Court, Second Civil Section, in Revue de l'Arbitrage, No. 3/1964, p. 102.

44/ Swiss Federal Court, decision of 12 February 1958, in Revue de l'Arbitrage, No. 1/1959, pp. 26-31.

performance of his functions. Furthermore, there was no connexion between the interests of the French party and those of the institutions by which the representative and the arbitrator were employed. It was also noted that the Polish party had not challenged the arbitrators, although it could have done so before the hearing began.45/

The United States Supreme Court has ruled that the fact that an arbitrator has not disclosed his former business relationship with one of the parties to the dispute justifies the setting aside of the arbitral award in accordance with article 10 of the United States Arbitration Act. The fact that an arbitrator has had a business relationship with one of the parties does not imply automatic disqualification, provided that the parties are informed in advance of an existing business relationship or, if they are not aware of it, that the relationship is of little importance.

In a dissenting opinion it was contended that the fact that an arbitrator did not disclose his business relationship with one of the parties could lead to an application for an inquiry to determine whether the arbitrator was impartial, but that if the arbitrator was not proved to have acted incorrectly, the simple fact of having failed to disclose his relationship with the parties was not enough to disqualify him.

46. Right of the umpire to take a decision without consulting the arbitrators. Conditions. In a dispute between two parties who, in an arbitral clause, had accepted the application of English law, the claimant informed the respondent in a registered letter of the appointment of his arbitrator. The respondent accepted arbitration and in turn appointed his own arbitrator. The arbitrators could not agree and an umpire was appointed, who rendered an award alone. When an application was made for leave to enforce the award in France, it was contended that the award was not valid because the umpire had not consulted the arbitrators in conformity with article 1028 of the French Code of Civil Procedure. It was nevertheless decided that since English law and not French law was applicable, the umpire was not obliged to consult the arbitrators because he had been appointed

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45/ Roven Appeals Court, Second Civil Chamber, 21 October 1965, in Revue de l'Arbitrage, No. 1/1966, p. 22.

in conformity with English law, which specifies that in case of disagreement the umpire "shall replace the two arbitrators", which does not oblige him to consult them. Consequently, the arbitral award was considered valid and the application for leave to enforce accepted.46/

## Chapter III

## Problems concerning arbitral awards

47. Arbitral awards for which no reasons are given. Most legislations - especially those of continental Europe - require that reasons shall be given for the decisions of all jurisdictional bodies (including arbitral bodies), but some common law systems do not require that the reasons for the solution be stated in the decision.

Of course, decisions containing a statement of reasons are considered fully valid in countries whose legislation does not include that requirement, for quod abundat non vitiat.

In the States which require decisions to contain a statement of reasons - a requirement whose non-fulfilment generally entails the annulment of the decision concerned - certain difficulties have arisen with regard to the validity of foreign arbitral awards for which no reasons are given. After some hesitation, French judicial practice has concluded that "the fact that a foreign arbitral award does not contain a statement of reasons is not in itself contrary to French public policy in the sense of private international law".47/ In other words, this opinion indicates that although the foreign award for which no reasons are given violates a legal provision of the State in which it is invoked, such a derogation can be tolerated, because the requirements of public policy in private international law are less rigid than the requirements of public policy in

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46/ Appeals Court of Aix-en-Provence, 29 September 1959, in Journal du droit international (Clunet), No. 1/1961, p. 168.

47/ French Court of Cassation, First Civil Chamber, 22 November 1966, Revue de l'Arbitrage, No. 1/1967, pp. 9-11. See also a similar decision by the same Chamber, 14 June 1960, Revue critique de droit international privé, No. 3/1960, p. 393.

municipal law, which would have rendered the foreign award null and void. It should be noted, however, that this liberal solution is not possible if the party against whom the award is invoked claims that "the failure to give reasons for the award concealed a violation of the rights of the defence or a substantive solution which was contrary to public policy".48/

It has also been decided in France that "although under French law the statement of reasons for arbitral awards, and for any decision by a court, is a matter of public policy, this is not a requirement of international public policy when the English law applicable to the contract does not require the arbitrators to give reasons for their awards".49/

Similarly, it has been ruled that "French international public policy does not require reasons to be given for a foreign award when this is not required by the law regulating that award".50/

It has also been decided that "the lack of a statement of reasons for an award, which is in principle contrary to the French procedure, is not contrary to French international public policy when it is in conformity with the applicable foreign law".51/

Swiss judicial practice is more exacting. It states that public policy "opposes the enforcement of a foreign arbitral award for which no reasons are given, even if the award was rendered validly according to the competent lex fori (in this case, California law), at least when the award was rendered in a State which is not linked to the Swiss Confederation or the Canton concerned by a treaty guaranteeing enforcement".52/ As an exception, however, the arbitral award for which no reasons are given may be considered as not violating Swiss

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48/ French Court of Cassation, 22 November 1966.

49/ Paris Appeals Court, 27 March 1962, Revue de l'Arbitrage, No. 2/1962, p. 45.

50/ Paris Appeals Court, 30 May 1963, Revue de l'Arbitrage, 1963, No. 3, p. 93.

51/ Nancy Appeals Court, First Chamber, 29 January 1958, Revue de l'Arbitrage, No. 4/1968, p. 122.

52/ Swiss Federal Court, Public Law Chamber, 11 November 1959, Revue de l'Arbitrage, No. 3/1960, p. 105.

public policy if it can be shown "that at the time of agreeing to submit to arbitration, the two parties knew that no reasons would be given for the award, or if they had waived the statement of reasons".53/

According to Italian judicial practice, article 1 of the 1927 Geneva Convention constitutes a derogation from the provisions of the Italian Constitution, which requires that reasons be given for all judicial decisions; consequently, a foreign arbitral award can be enforced in Italy, even if it does not contain a statement of reasons.54/

48. Renunciation of means of recourse against an arbitral award. Its effects. It has been decided that renunciation of appeals against an arbitral award cannot be considered as acquiescence in the award rendered. The renouncing party is in the same position as if he had allowed the time-limit for the submission of an appeal to pass without having appealed, and his position is not aggravated.

From this, it has been deduced that renunciation of appeal "does not prevent the renouncing party from opposing the enforcement abroad of the arbitral award, on the basis of article 2 of the 1927 Geneva Convention".55/

49. Assumption implying that the parties intend to acknowledge the finality of the arbitral award. Conditions. When an application was made in France for leave to enforce an arbitral award rendered in England by an umpire in accordance with the Arbitration Act 1950, it was contended that the award was not final. However, it was decided, in accordance with the applicable law on arbitral procedure (article 16 of the Arbitration Act) that "unless a contrary intention is expressed therein, every arbitration agreement shall... be deemed to contain a provision that the award to be made by the umpire shall be final and binding on the parties". Since in the case in question "no contrary intention has been expressed, the sentence must be considered final and binding".56/ Consequently,

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53/ Ibid.

54/ Florence Appeals Court, 7 March 1957, Journal de droit international (Clunet), No. 3/1961, p. 864.

55/ Geneva Court of Justice, First Section, 5 July 1963, Revue de l'Arbitrage, No. 4/1964, p. 152.

56/ Appeals Court of Aix-en-Provence, 29 September 1959, Journal de droit international (Clunet), No. 1/1961, p. 168.

after the court had ascertained that the legal requirements had been fulfilled, it issued an enforcement order in accordance with the 1927 Geneva Convention.

50. Operative part of the award expressed in the currency of the country in which arbitration takes place. Limits of the arbitral clause not exceeded. An arbitral body in London called upon a Franco-Tunisian shipping company to pay a sum in pounds sterling, although the claimant had claimed the sum due in French francs. This raised the problem whether in so doing the arbitral body had taken a decision ultra petita, which would have rendered the award null and void. It was decided that the limits of the arbitral clause had not been exceeded because "one of the headings in the request was expressed in pounds, and since the arbitration took place in London and was entrusted to English arbitrators, they naturally converted the sums awarded into pounds at the rate of exchange prevailing on the date when the award was rendered".57/

## Chapter IV

## Problems concerning the enforcement of foreign arbitral awards

51. Refusal of enforcement based on the nullity of the arbitration agreement. Public policy. A French company, against whom the enforcement of an English arbitral award was invoked, contended that the arbitral clause was null and void, because French law prohibits submission to arbitration in the case of matters concerning public policy (article 1020 of the French Code of Civil Procedure).

That view was accepted by the French court to which application was made for an enforcement order. Basing its decision on the 1927 Geneva Convention, which was applicable to that particular case, the court refused to issue an enforcement order because the arbitral clause and, hence, the arbitral award, were contrary to French public policy. The court noted that the arbitral award called upon the French company to pay damages to the Danish claimant for failure to deliver a quantity of cereals which it had sold him. However, the failure to perform the obligation resulted from suspension by the competent French administrative body,

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57/ French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, Revue de l'Arbitrage, No. 2/1964, p. 46.

and the court therefore considered that the dispute "could be solved only by applying the rules of public policy of the French economic organization which regulated the performance of the contract". It therefore deduced "that the dispute concerns public policy and the arbitral agreement is null and void whenever the solution resulting from the arbitration implies the interpretation and application of a rule of public policy".58/

52. Refusal of enforcement based on delay in notification. Pursuant to article 2 (b) of the Geneva Convention of 26 September 1967, the enforcement in Switzerland of a French arbitral award was refused because of the delay in notifying the Swiss firm that it should appoint an arbitrator (24 May for 12 May 1960) and of the date of the substantive hearing (the Swiss firm was informed on 17 November 1960, the day on which the hearing was held).59/

53. Refusal of enforcement based on the fact that the limits of the arbitral clause have been exceeded. Pursuant to article 2 (c) of the 1927 Geneva Convention, the enforcement in Switzerland of a French arbitral award was refused because the arbitral body had exceeded the limits of the arbitral clause, "by annulling the agreement, on the ground that one party was at fault, and awarding damages, when its task was merely to settle 'new difficulties' which might arise in the application of the agreement".60/

54. Authorization to enforce an award rendered by default. A Japanese firm, validly summoned to attend arbitration proceedings held in London, failed to appear and subsequently opposed the enforcement in Japan of the award rendered, arguing that its right of defence had been violated. That argument was rejected; it was decided that "the failure of the party, which had been duly notified of the date and place of the arbitral hearing, to appear before the arbitrator justified the continuation of the arbitration proceedings in its absence. The party cannot,

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58/ Orleans Appeals Court, 15 May 1961, Journal de droit international (Clunet), No. 1/1962, p. 140.

59/ Geneva Court of Justice, First Section, 5 July 1963, Revue de l'Arbitrage, No. 4/1964, p. 152.

60/ Ibid.

therefore, validly invoke the violation of its right of defence in order to oppose the enforcement in Japan of the award thus rendered in its absence".61/

55. System of enforcement, when there are no relevant internal regulations. In Japan, the law relating to civil procedure contains no provisions relating to the enforcement of foreign arbitral awards, but only provisions on the enforcement of domestic awards, whose effects in that respect are similar to those of judicial decisions. In those circumstances, it was decided that "the fact that Japan has signed the Geneva Protocol and Convention and the New York Convention obliges it to give foreign awards the same treatment as domestic awards, in so far as the latter satisfy the conditions set out in those Conventions".62/

56. Authorization of enforcement provided that the award concerns a dispute capable of settlement by arbitration. An application was made in Japan for leave to enforce an arbitral award rendered in England. Since both States were parties to the 1927 Geneva Convention, the court ascertained whether all the conditions required by that Convention had been fulfilled. It was found that the subject of the dispute was capable of settlement by arbitration according to English law. The same verification was made from the point of view of Japanese law. When it was found that the latter admitted arbitration, enforcement was authorized.63/

57. Priority of bilateral conventions over the 1927 Geneva Convention with regard to the enforcement of foreign arbitral awards. When an application was made for the enforcement in France of an English arbitral award, there was some discussion as to whether to apply the 1927 Geneva Convention or the 1934 Convention between the United Kingdom and France providing for the Reciprocal Enforcement of Judgements in Civil and Commercial Matters. It was decided that since the legal force of the English arbitral award derived from the authorization of the English High Court of Justice, the arbitral award could be treated in the

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61/ Tokyo Appeals Court, 14 March 1963, Revue de l'Arbitrage, No. 3/1964, p. 102.

62/ Tokyo Appeals Court, Second Civil Section, 14 March 1963, Revue de l'Arbitrage, No. 3/1964, p. 102.

63/ Tokyo District Court, 20 August 1959, in Quarterly of the Japan Commercial Arbitration Association, No. 26-27/1967.

same way as a judicial decision. Consequently, the 1934 Convention between the United Kingdom and France was applied and not the 1927 Geneva Convention.[64]

58. Irrevocability of the substance of foreign arbitral awards. An arbitral award rendered in Romania in the absence of the respondent, an Italian company, was submitted for enforcement proceedings in Italy. The respondent invoked article 798 of the Italian Code of Civil Procedure, which admits review of the substance of foreign judgements rendered by default. However, that defence was rejected, because the arbitral award was based on the 1927 Geneva Convention, which prohibits review of the substance. Since Italy was a party to that Convention article 798 was considered inapplicable. Consequently, the application for leave to enforce was admitted without a review of the substance.[65]

A similar decision was taken in Italy in connexion with an arbitral award rendered at Hamburg (Federal Republic of Germany) against an Italian citizen. The refusal to apply article 798 of the Italian Code of Civil Procedure was based on the provisions of the 1927 Geneva Convention. It was explained that "this Convention is mentioned in the notes exchanged between Italy and the Federal Republic of Germany which refers to all agreements reactivated by the two countries".[66]

59. Need for foreign arbitral awards to be provided with an order for enforcement in order to have the authority of a res judicata in France. A final English arbitral award was invoked in France as having the authority of a res judicata. The court ruled otherwise, for "an arbitral award rendered abroad which has become final in the country in which it was made and thus fulfils the conditions set out in article 1, paragraph 2, of the 1927 Geneva Convention, is nevertheless still a private jurisdictional decision and will not have the authority of a res judicata, will not be enforceable and cannot be invoked in France until an order for its enforcement in that country has been obtained".[67]

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64/ Paris Appeals Court, First Chamber, 20 October 1959, Revue de l'Arbitrage, No. 2/1960, p. 48.

65/ Milan Appeals Court, 23 April 1965, Journal de droit international, No. 3/1966, p. 702.

66/ Italian Court of Cassation, 9 May 1962, Journal de droit international, No. 2/1964, p. 356.

67/ Paris Appeals Court, Fifteenth Chamber, 4 January 1960, Revue de l'Arbitrage, No. 4/1960, p. 123.

60. Law applicable to the enforcement of a foreign arbitral award not covered by an international agreement. It has been decided that the enforcement in Switzerland of an arbitral award rendered in California (United States) is regulated by the legislation of the Canton in which it was applied for - in the case in question, the Code of Civil Procedure of Geneva - for there is no agreement between Switzerland and the United States concerning the enforcement of these awards. Furthermore, the United States is not a party to the 1927 Geneva Convention.68/

61. Authorization to enforce the arbitral award, provided it has become final. In England, the Arbitration Act 1950 permits the enforcement of foreign arbitral awards to which the 1927 Geneva Convention is applicable. In one case, an application had been made for the enforcement in England of an arbitral award rendered in Denmark. Since the award was not open to appeal or to an application for review, it could be considered final in the sense of articles 37 and 38 of the Arbitration Act 1950; its enforcement was therefore authorized.69/

62. Means of recourse against orders for enforcement. The Belgian courts have decided, on the basis of the provisions of article 1 of the 1927 Geneva Convention, that Belgian legislation is applicable with regard to means of recourse against orders for enforcement issued in Belgium. It was observed, however, that article 1028 of the Belgian Code of Civil Procedure allows recourse against the arbitral award, and not against the order for enforcement. Since that recourse may lead to the annulment of the order for enforcement, the remedy provided for in article 1028 may also lead to the withdrawal of the order, so that recourse "is not precluded by the 1927 Geneva Convention".70/

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68/ Swiss Federal Court, Public Law Chamber, 11 November 1959, Revue de l'Arbitrage, No. 3/1960, pp. 105-109.

69/ Court of Appeal, 13 March 1959, Journal de droit international (Clunet), No. 4/1961, p. 1177.

70/ Belgian Court of Cassation, 16 January 1958, Revue critique de droit international privé, No. 1/1959, p. 122.

63. Part III of the report deals with "Possible measures for increasing the effectiveness of international commercial arbitration and general conclusions". As in parts I and II, the Special Rapporteur will merely give certain information, without discussing the problems mentioned in detail, since they will be reviewed and analysed in the final report, when the documentation has been completed by the information collected in the interim. For the same reason, part III will contain only very brief general conclusions or, more exactly, the preliminary general conclusions will merely evoke the problems which the Special Rapporteur wishes to draw to UNCITAL's attention.

64. Chapter I will therefore deal with possible measures for increasing the effectiveness of international commercial arbitration. In the first paragraph the Special Rapporteur will outline the measures recommended by the United Nations, and in the second paragraph, the problems of co-operation among arbitral bodies.

65. In 1958, the United Nations was not concerned solely with promoting the adoption of a multilateral convention on the recognition and enforcement of foreign arbitral awards.

Economic and Social Council resolution 604 (XXI), adopted in May 1956, shows that the United Nations intended to support and recommend much wider and more complex action in the future in the field of commercial arbitration. The Economic and Social Council envisaged the stimulation of the activities of the regional economic commissions and various intergovernmental organizations active in the field of arbitration, with a view to promoting international trade. For that reason, it was decided that, if time permitted, the 1958 Conference of Plenipotentiaries should consider "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".

66. In order to prepare for the discussions at the Conference, the Secretary-General drew up a report, dated 24 April 1958 (E/CONF.26/4), which was followed by a note (E/CONF.26/6) on other possible measures for increasing the effectiveness of international commercial arbitration. On 26 May 1968 a Committee on Other Measures was established, open to any of the forty-five Governments wishing to participate. On 6 June 1968, the Committee adopted unanimously a resolution which was subsequently discussed by the full Conference and incorporated in paragraph 16

of the Final Act of the Conference. In accordance with the resolution adopted on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, the subject of arbitration was included in the agenda of the twenty-seventh session of the Economic and Social Council, held at Mexico City, which on 17 April 1959 adopted resolution 708 (XXVII). In volume II of International Commercial Arbitration, published by the International Union of Lawyers and edited by P. Sanders, Martin Domke describes clearly the work done and the essential content of the resolutions adopted concerning the principal measures to be taken to promote international commercial arbitration in general.[71/]

67. As a first measure, the Economic and Social Council recommended the wider "diffusion of information on arbitration laws, practices and facilities", in order to facilitate access to arbitration and at the same time constitute an essential first step towards any further activities aiming at the improvement of arbitration facilities and legislation. The International Chamber of Commerce,[72/] the International Association of Lawyers,[73/] the Economic Commission for Europe[74/] and the Economic Commission for Asia and the Far East have already done a great deal of work in these fields. It has rightly been observed that mere publication of the text of arbitration statutes, even in translation, and of rules of procedure of agencies administering arbitration, is not sufficient. It is also necessary to be informed about the interpretation of statutory law in court decisions and administrative practice. Information on this practical aspect is still not sufficiently available despite the efforts of the national and international bodies which issue arbitration publications that include references to the court

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71/ See Martin Domke, "Possible measures for increasing the effectiveness of international commercial arbitration", in International Commercial Arbitration, International Association of Lawyers, 1960, pp. 329 et seq.

72/ Commercial Arbitration Throughout the World (1949), with Supplements 1951 and 1958.

73/ International Commercial Arbitration, vol. I (1956), vol. II (1960) and vol. III (1965).

74/ Handbook of National and International Institutions Active in the Field of International Commercial Arbitration, Trade W/orking/ P/arty/ 1/15.

practice in the various countries. This raises the problem of a publication with world-wide coverage, the expansion of the activities of existing publications and the creation of arbitration publications in areas where they do not yet exist.

68. There is also the problem of the "establishment of new arbitration facilities and the improvement of existing facilities", which is of special importance to some geographic regions and certain branches of trade. Effective commercial arbitration could be greatly enhanced by the establishment of new arbitration centres in those countries where they do not exist. It has also been suggested that the adaptation of existing national arbitration centres to the requirements of international trade should be encouraged by appropriate measures such as adding foreign nationals to the domestic panel of arbitrators and permitting the designation of an arbitration locale in a third country. Other useful steps would be the achievement of greater uniformity in the rules of procedure of arbitration institutions and more precise drafting of standard arbitration clauses which are recommended by arbitral institutions for inclusion in form contracts and general conditions of trade. The movement to conform the arbitration rules of the leading commercial agencies administering arbitration in the various countries to a standard procedure should be encouraged.

69. Technical assistance in the development of effective arbitral legislation and institutions should be provided for countries that lack adequate institutional arbitration facilities or need modern arbitration laws. This could be done by furnishing experts to advise on appropriate arbitration legislation and to aid in the creation of adequate arbitration machinery. It has also been recommended that "regional study groups, seminars or working parties" should be organized and should attempt to arrive at agreed solutions best suited to the needs of the various countries. An exchange of views and personal contact may well lead to practical results. This report has already mentioned many activities which have taken place throughout the world with and without United Nations assistance. The problem now is to intensify such activities and organize more sustained and systematic action. Some people have advocated the use of educational programmes.75/

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75/ The British representatives rightly considered that one urgent arbitration problem was that of "educating businessmen in the spirit and practice of arbitration - a necessarily slow process", E/CONF.26/C.2/SR.2, p. 4.

70. Lastly, there is the need for greater uniformity of national laws on arbitration, a movement whose various stages have been described in this report. A greater measure of uniformity in arbitration law would undoubtedly contribute to the development of this juridical institution. This could be done by amending the rules relating to arbitral procedure contained in the various Codes of Civil Procedure so as to make them uniform, a step which would greatly aid in the expansion of international commercial arbitration. The Special Rapporteur is thinking here particularly of the limitation of court review of awards and in general the reduction of extraordinary means of recourse against the same award. This calls to mind the passage in which Mr. Fouchard, citing an article by Mr. Bredin, uses France as an example to demonstrate the need for a legislative reform that would co-ordinate and limit the means of recourse in respect of arbitration at both the national and international levels, since that would "suffice to discourage from the outset abusive resistance to enforcement". He cites the example of the Orleans Court, which admits no less than five means of recourse against the enforcement order or the award itself. Under these circumstances, one can justifiably speak of a certain "paralysis of foreign arbitral awards through the abuse of means of recourse".[76/]

71. The second paragraph of this chapter deals with the very important and topical problem of co-operation among arbitral bodies. In view of the role played by the United Nations in the development of multilateral international co-operation, it seems quite natural that the Organization should also be concerned with co-operation in the field of arbitration. From the earlier part of this report, it is clear that the need for co-operation has been felt for some time and that some progress has been made, especially with regard to co-operation among States for the adoption of international conventions. The United Nations has played a leading role in arranging contacts between the parties concerned, organizing the work, and so on.

At the end of his study on possible measures for increasing the effectiveness of international commercial arbitration, on which this part of the report is

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76/ See Philippe Fouchard, op. cit., pp. 523 and 524.

largely based, Martin Domke expresses the hope that the encouragement given by the resolutions adopted by the United Nations Conference on 10 June 1958, and by the Economic and Social Council of 17 April 1959 will largely facilitate the development of international commercial arbitration, not only by co-ordinating the efforts of Governments interested in the settlement of international trade disputes but also through the co-operation of arbitration institutions. There is thus a need for complex multilateral co-operation at two levels, between States and between arbitration centres, which must be organized between States and between different regions of the world. However, the elements of its complexity are becoming increasingly numerous.

72. As Professor Minoli observed in his excellent keynote report to the Third International Trade Arbitration Congress, "The arbitration organizations are the natural meeting points for social forces that exert pressure to strengthen the international commercial arbitration network, and extend it to world areas that still remain uncovered and, above all, to bring it to the 'standard' of full working efficiency." Reference has already been made to the agreements concluded between various arbitration centres for co-operation at the international level.77/ But the efforts of one or several arbitration institutions are no longer sufficient; what is needed is practical co-operation among arbitration bodies throughout the world.

International economic relations are becoming increasingly complex, and "from straightforward trade we have now got to the stage of commercial relations which involve stationing the primary productive organizations of one country in the territory of another; bilateral relations have given place to multilateral ones, and to those that come under so-called 'trans-national' organizations, which are linked from the beginning to more than one State". In order to reduce the negative effects of the remains of the old nationalism of the pre-war period and, even more, of the new nationalism, bearing in mind the fact that "economic relations are far

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77/ For example, the agreements concluded by the International Chamber of Commerce, the American Arbitration Association, the Inter-American Commercial Arbitration Commission, the Japan Commercial Arbitration Association, the Federation of Indian Chamber of Commerce and Industry and the Pakistan Federation of Chamber of Commerce and Industry.

more complex than they were in the period immediately following the First World War, when the International Chamber of Commerce promoted international commercial arbitration for the first time", and bearing in mind also the needs and desires of the developing countries and other considerations mentioned in his report, Professor Minoli advocates the organization of arbitration organizations into an International Commercial Arbitration network (ICA), which would make it possible to use all arbitration organizations as promotion centres for close co-operation that would be the real driving force towards progress, in order to achieve in the field of arbitration "valid uniform results all over the world or at least over vast areas of it". This idea is a just and generous one, and the Special Rapporteur feels that it deserves to be considered by UNCITRAL.

73. With regard to the organization of world-wide co-operation in respect of commercial arbitration, it is interesting to note some of the conclusions and observations made by Mr. Donald B. Straus, President of the American Arbitration Association, in his report to the Third International Arbitration Congress. In dealing with the question of co-operation among arbitration organizations in the Americas, he makes a number of comments on co-operation among arbitral bodies in general.

Mr. Straus observes that so far, many opportunities to create the conditions necessary for the growth of international commercial arbitration have been missed. He refers to the gap between theory and practice and says that the technical differences in the rules and procedures of the various organizations are of more interest to arbitration professionals than they are to the businessmen who use arbitration services. In his view, the obstacles to co-operation and interchange of facilities have been greatly exaggerated by arbitration professionals, a fact which partly explains the delay in the progress of arbitration.

He refers to the problem of adapting existing arbitration bodies to meet the growing needs of the multinational corporations and notes the existence of certain facts which run counter to the need for co-operation among existing arbitration organizations. He concludes that co-ordinated but decentralized arbitration organizations can strengthen arbitration and make it more widely acceptable, and suggestions that a world-wide network of national and regional arbitration organizations could best serve the dispute settlement needs of multinational corporations.

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Mr. Straus advocates an organization that would simplify matters, so as to avoid waste of time in the consideration of technicalities and legal subtleties that are mainly theoretical in nature, since arbitration is essentially a simple concept which should be based on a few basic principles and a simplified set of arbitration rules.

He proposed that a committee should be established to develop a simplified set of rules that could be used by any arbitral body; the committee would submit a report on the question to the third session of UNCITRAL. The American Arbitration Association offered to make its facilities available for the meetings of such a committee.

74. Chapter II of this last part of the report deals with general conclusions. For the reasons explained at the beginning of the report, the Special Rapporteur will mention here only those problems which he considers should be discussed with a view to taking a decision concerning possible proposals and steps which might be taken under UNCITRAL's auspices. These important problems, which are both theoretical and practical in nature, are listed below, but no attempt has been made for the time being to rank them in order of importance among them:

- Definition of international commercial arbitration. The role of national arbitration bodies, the need to strengthen them and organize co-operation among them;
- The need to render international commercial arbitration autonomous; the scope and purpose of that autonomy;
- The interpretation of existing multilateral international conventions relating to commercial arbitration. The need to make them universal;
- Adoption of uniform rules. The need to adopt certain basic arbitral principles;
- The unification and simplication of national laws concerning arbitration;
- Authorization for legal persons of public law to conclude valid arbitration agreements;
- Extent of arbitrability;
- Unification and simplification of national rules concerning the enforcement of arbitral awards. Limitation of judicial control of arbitral awards. Reduction of means of recourse against enforcement orders;

- Arbitration as a factor in the unification of law and the elimination of conflicts of law. Autonomy of the will of the parties;

- Amiables compositeurs and arbitrators deciding according to the rules of law;

- Publication of arbitral awards, educational programmes, conferences of arbitral bodies, etc.

- Ad hoc arbitration and institutional arbitration.

The Special Rapporteur intends to ponder all these questions, together with others mentioned by the members of UNCITRAL, in the light of the documentation already available and that which he will obtain through co-operation with other bodies. On that basis, he will prepare a final report containing his views on the various problems raised by the organization of commercial arbitration throughout the world and by the unification and harmonization of its rules.

Arbitration is often regarded as a substitute for a real international commercial jurisdiction, which flourishes in the shade and dies in the sun, which is always, or almost always, ahead of the law or on the fringe of the law, which defies analysis and is somewhat mysterious.

The Special Rapporteur thinks it would be useful to analyse the tenor and exact value of all these considerations, in order to be in a better position to evaluate existing possibilities and the methods that should be used in order to enable UNCITRAL to fulfil its functions in this field in the best possible conditions. The path to this goal may be arduous, but in order to succeed we must also remember that it is an effective and meritorious path.

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