III. INTERNATIONAL COMMERCIAL ARBITRATION

Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters: report by Mr. Ion Nestor (Romania), Special Rapporteur (A/CN.9/64)*

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* 1 March 1972 [Original: French].

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Introduction

1. At its second session (Geneva, 1969), the United Nations Commission on International Trade Law 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. After a broad exchange of views[1] among the representatives of the countries which are members of UNCITRAL on the two questions mentioned under (*a*) and (*b*) above, the Commission unanimously adopted, on 26 March 1969, 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."

At the 14th meeting, during the 1969 session, the Special Rapporteur stated 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 and other related problems.

3. On the basis of the documentation received[2] and procured by the Special Rapporteur, making use of the informative documents already prepared for the work on arbitration done under United Nations auspices, the Special Rapporteur drafted a preliminary report (A/CN.9/42), which he submitted to the Commission at its third sesion.

The Special Rapporteur explained at the third session the manner in which he intended to pursue his study of international commercial arbitration, and referred to the problems which he intended to study in his final report with a view to ascertaining whether they were appropriate for further attention and action by the

[1] See the 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); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

[2] See the preliminary report (A/CN.9/42), p. 7.

Commission. The Special Rapporteur further stated that he expected to be able to submit his final report to the fifth session of the Commission.

The representatives who spoke on the subject expressed general agreement that the Special Rapporteur's mandate should be extended to the fifth session, at which he would present his final report, and that every assistance in gathering materials should be given him by the members of the Commission and the Secretariat.

4. The view was generally held that the Special Rapporteur, in completing his study, should consider which of the problems set out in his preliminary report offered sufficient indication that they could be successfully resolved within the near future to justify undertaking work at the present time. A number of representatives offered suggestions in this regard for consideration by the Special Rapporteur. Some representatives stated that the problems should be ranked in terms of the possibility of reaching a solution to them rather than in terms of importance.

5. Several representatives expressed the opinion that uniform rules on international commercial arbitration should be prepared, which would become the subject of an international convention. The organization of a world-wide system of international commercial arbitration was also suggested. Other representatives were of the view that, instead of drafting a new convention, the Commission should concentrate on making the existing formulation more acceptable and should seek to ascertain why certain conventions, such as the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention of 1961 have not been adopted by a greater number of countries.

6. It was suggested that consideration should be given to the unification and simplification of national rules concerning the enforcement of arbitral awards and the limitation of judicial control over arbitral awards, including the reduction of means of recourse against enforcement.

7. Some representatives expressed the view that the Commission should promote the organization of new arbitration centres in developing countries and the rendering of technical assistance in this field. It was suggested that encouragement should be given by the Commission to the Economic Commission for Africa and the Organization of African Unity for the creation of an African Arbitration Association, which would have panels of African arbitrators. The widespread inclusion of Africans as arbitrators in arbitral tribunals involving trade with African countries was also mentioned as means for promoting international commercial arbitration in Africa.

8. Some representatives stated that the use of arbitration was impeded by its high cost, and suggested that work should be done towards stabilizing such expense.

9. A number of representatives indicated the progress made in their respective countries toward adherence to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. These statements were made in connexion with the decision of the Commission at its second session, as set out in paragraph 112 of its report, that the 1958 Convention should be adhered to by the largest possible number of States.

10. The Commission, at its 60th meeting, on 29 April 1970, unanimously adopted the following decision:

"The Commission, unanimously expressing its appreciation to the Special Rapporteur, Mr. Ion Nestor (Romania), for his preliminary report, decides:

"(*a*) To extend the mandate of the Special Rapporteur to the fifth session of the Commission;

"(*b*) To request the Special Rapporteur to take into consideration the suggestions made by members of the Commission and to submit his final report to the fifth session of the Commission;

"(*c*) To request the members of the Commission and interested intergovernmental and international non-governmental organizations to assist the Special Rapporteur in his task by giving him information on existing laws and practices in the field of international commercial arbitration;

"(*d*) To request the Secretary-General to arrange, if possible, for the reimbursement of the Special Rapporteur for his expenses in gathering, translating and reproducing materials for his report."

11. The Special Rapporteur thanks the representatives of the members of UNCITRAL for accepting the proposals he made in his preliminary report regarding the problems to be considered and the manner in which they should be approached and has the honour, in implementation of the above decision, to submit to the Commission the following

General comments and structure of the report

12. As stated in the preliminary report, 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 50 years, virtually unceasing efforts have been made at various levels and in various contexts to develop and unify the rules of international commercial arbitration. In the view of the Special Rapporteur, it would 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. Accordingly, the main aim of the Rapporteur is to give concise information 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 the field of international commercial arbitration. As far as possible, legal controversies (which abound on this subject) will be avoided, since the Commission, in making its decisions, is only concerned with *identifying the problems, establishing their nature, number and extent and finding a solution to them with pertinent suggestions and proposals*. In adopting this approach, the Special Rapporteur also hopes to comply with the wishes of the UNCITRAL secretariat that the report should be as condensed as possible.

13. Part I of the report consists of a general account of activities and results of the work on international commercial arbitration during the last five years: chapter I will describe the activities undertaken and the results achieved during the inter-war years (1920-1945), while chapter II will deal with the activities undertaken and the results achieved after the Second World War (between 1945 and 1970).

Part II is devoted to problems concerning the application and interpretation of existing international conventions on international commercial arbitration. It is, therefore, primarily a description and analysis of judicial practice on the subject in various countries which are parties to the conventions in question. The subject will be divided into four chapters, each referring to a particular group of problems relating respectively to the arbitration agreement, to arbitral procedure, to arbitral awards and to the enforcement of foreign arbitral awards.

Part III deals with possible measures for increasing the effectiveness of international commercial arbitration (chapter I) and some general questions and final proposals, which will be the subject of chapter II.

Part I. General account of activities and results of the work on international commercial arbitration

CHAPTER I. ACTIVITIES UNDERTAKEN AND RESULTS ACHIEVED IN THE PERIOD 1920-1945

1. *Activities undertaken within the framework of the League of Nations*

14. The activities undertaken within the framework of the League of Nations after the First World War culminated in the adoption of the first two important multilateral international instruments: the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. The Protocol has been ratified by 53 States and the Convention by 44 States.[3]

15. Under the Protocol on Arbitration Clauses, each of the Contracting States undertook to recognize the validity of an agreement whether relating to existing or future differences, by which the parties to a contract —being subject to the jurisdiction of different States parties to the Protocol—agreed to submit to arbitration any differences that might arise in connexion with such contract, whether or not the arbitration was to take place in the territory of a country to whose jurisdiction none of the parties was subject.

The Protocol applied to contracts relating either to commercial matters or to any other matter capable of settlement by arbitration or compromise.

However, each State party to the Protocol could, by means of a reservation, limit the obligations assumed to contracts considered as being commercial under its own law.

The arbitral procedure and the construction of the arbitral tribunal were to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place.

States undertook to facilitate all steps in the procedure which required to be taken in their own territories, in accordance with the provisions of their law concerning arbitration, and also undertook to ensure the execution by their authorities and in accordance with the provisions of their laws of arbitral awards made in their own territory.

Finally, attention should be drawn to an important provision of the Protocol, according to which the tribunals of the States parties to the Protocol could not decide a dispute which the parties to the dispute had agreed to settle by arbitration. At least one of the Contracting Parties was, however, required to invoke before the tribunal "an Arbitration Agreement whether referring to present or future differences which is valid . . . and capable of being carried into effect".

The judicial tribunals became competent "in case the agreement or the arbitration cannot proceed or becomes inoperative".

16. The 1923 Geneva Protocol was supplemented in 1927 by the Convention on the Execution of Foreign Arbitral Awards, which was open only to the parties to the Protocol. The States undertake to recognize as binding, in the territory of any High Contracting Party, an arbitral award made in pursuance of an agreement whether relating to existing or future differences, and to enforce it in accordance with the rules of procedure in force in the country where the award was relied upon, provided that the said award was made in the territory of one of the States parties to the Convention and between persons who were subject to the jurisdiction of one of the High Contracting Parties.

In order to obtain such recognition or enforcement, the following additional requirements had to be met:

(*a*) That the award had been made in pursuance of a submission to arbitration which was valid under the legislation of the country concerned;

(*b*) That the subject-matter of the award was capable of settlement by arbitration under the law of the country in which the award was sought to be relied upon;

(*c*) That the award had been by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(*d*) That the award had become final in the country in which it had been made, in the sense that it would not be considered as such if it was open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure existed) or if it was proved that any proceedings for the purpose of contesting the validity of the award were pending;

(*e*) That the recognition or enforcement of the award was not contrary to the public policy or to the principles of the law of the country in which it was sought to be relied upon.

Even if the aforementioned conditions were fulfilled, recognition and enforcement of the award might be refused if the court was satisfied:

[3] For the 1923 Protocol, see League of Nations, *Treaty Series*, vol. XXVII, p. 157; for the 1927 Convention, *ibid.*, vol. XCII, p. 301.

(*a*) That the award had been annulled in the country in which it had been made;

(*b*) That the party against whom it was sought to use the award had not been given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he had not been properly represented;

(*c*) That the award did not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contained decisions on matters beyond the scope of the submission to arbitration.

If the award did not cover all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award was sought could, if it thought fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority might decide.

If the party against whom the award had been made proved that, under the law governing the arbitration procedure, there was a ground, other than the grounds referred to in (*a*), (*b*) and (*c*) above, entitling him to contest the validity of the award in a court of law, the court might, if it thought fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

The Convention also specified the documents that were to be supplied by the party relying upon an award.

2. *Activities undertaken outside the framework of the League of Nations*

17. It is beyond question that the two international instruments mentioned in the preceding paragraph were concluded largely as a result of the efforts made at the national and international levels by certain circles, in various countries, which were actively popularizing and promoting international commercial arbitration. Furthermore, until the aforementioned instruments were concluded, and even afterwards, several governmental and non-governmental organizations or institutions pursued many activities of an organizational nature and worked on the drafting of certain national and international rules. During the period dealt with in this chapter, specialized work was done by the American Arbitration Association, the International Chamber of Commerce in Paris, the London Court of Arbitration, the Union Chamber of Commerce of Moscow, the Court of Arbitration of the Manchester Chamber of Commerce, the Arbitral Chamber of the Paris Bourse de Commerce, the International Institute for the Unification of Private Law in Rome, the International Law Association, and so forth. Frédéric-Edouard Klein views the activity carried out during this period as being linked with the emergence and development of certain arbitration systems established by treaty, which were oriented originally towards the creation of regional systems and later towards continental ones and are now showing a trend towards the creation of a world-wide system.[4]

18. The American Arbitration Association (AAA) was established in 1926 for the purpose of promoting the practice of arbitration both within and outside the United States.[5] It has had considerable influence on the development and unification of legislation dealing with arbitration in the various American States and has contributed to the organization of arbitral bodies in the western hemisphere. According to the rules of arbitration adopted by AAA, the place of arbitration was of little importance and parties were free to decide on any other place besides New York.[6] This was in contrast with the practice of other national arbitral bodies, such as the London Court of Arbitration or the Arbitral Chamber of the Paris Bourse de Commerce, whose rules specify that the arbitration proceedings should always be held at the same place (the headquarters of the arbitral institution).

The arbitrators are chosen by the parties either directly or from a panel, the names of whose members are forwarded to them by the registrar. They are appointed by the Association if the latter is not advised in due time of the decision of the parties. If one of the parties is not a United States citizen or is resident in a foreign country, the parties may request that the sole arbitrator or the third arbitrator should be a national of a third country.

19. As a result of the activities carried out by AAA outside the United States, several regional arbitration systems have been created, the most important of which is the inter-American system, where AAA has cooperated with the Pan American Union. Following discussions at several commercial conferences among North, Central and South American countries,[7] in 1931, the Fourth Pan American Commercial Conference invited the Pan American Union to prepare a report on problems of trade among those countries. The report, which was submitted in 1933 to the Seventh International Conference of American States, advocated, *inter alia*, the organization of an inter-American arbitration system. The latter Conference further recommended that all American States should adopt legislation to guarantee the enforcement of arbitral clauses or at least to ensure the observance of commercial discipline.[8] In 1934, the Pan American Union authorized AAA to organize such a system. The Inter-American Commercial Arbitration Commission was established in the same year, with its central office in New York, at AAA headquarters, and National Committees in each of the 21 American republics. The rules of the new organization follow the principles of the United States organization very closely. It was specified that the parties could exercise their free will within the limits permitted by the law governing the arbitra-

[4] Frédéric-Edouard Klein, *Considérations sur l'arbitrage en droit international privé*, Basel, 1955, p. 31. Further information on this problem attributed to the same author elsewhere in this report will also be taken from this source.

[5] AAA was formed by merger of the Arbitration Society of America (established in 1922) and the Arbitration Foundation, established in 1926, under the sponsorship of the New York Chamber of Commerce.

[6] The place of arbitration is not specified in the arbitral clause or arbitration agreement recommended by AAA.

[7] Cf. on the history of inter-American arbitration, the article by M. Domke and F. Keller, "Western Hemisphere System of Commercial Arbitration", in *University of Toronto Law Journal*, vol. VI, No. 2, 1946, p. 308.

[8] According to Frédéric-Edouard Klein (p. 84), these recommendations were followed only in the Colombian Act of 2 February 1938 and in a Brazilian Act of 18 September 1939.

tion, but it was not indicated how that law was to be determined.

20. The Canadian-United States system was created in 1943 as the result of an agreement between AAA and the Canadian American Commercial Arbitration Commission, with the co-operation of the Canadian Chamber of Commerce. This system comprises two sections, one attached to the Canadian Chamber of Commerce, with headquarters at Montreal, and the other attached to AAA in New York. A standard arbitral clause was drawn up and recommended to businessmen in both countries.

21. It was also in 1943 that the three regional arbitration systems in this part of the world were brought together with the establishment of a permanent Western Hemisphere Conference on Foreign Trade and Arbitration. A joint arbitral clause was adopted which entailed the concurrent application of more than one set of rules where the parties were domiciled in regions governed by different arbitration systems.

The joint arbitral clause procedure was used by AAA and the Inter-American Commercial Arbitration Commission to link their system with organizations outside America, such as the Associated Chamber of Commerce of Australia.

22. After the First World War, western business circles established the International Chamber of Commerce in Paris. One of the main reasons for creating it was to establish an international arbitral system. This led to the creation of the Court of Arbitration of the International Chamber of Commerce, which was to settle disputes between nationals of different countries. There are National Committees or group or individual members in many countries. Any party wishing to have recourse to arbitration submits his request through his National Committee. The Court forwards the request to the other party and invites him to state his position within a certain time-limit. It then proceeds to appoint the arbitrators, or in most cases a sole arbitrator, unless the parties have agreed that there would be three. The parties may propose persons of their choice to the Court. If they do not do so, the arbitrator is appointed *ex officio* on the proposal of the National Committees. A third arbitrator or a sole arbitrator must always be a national of a country other than those to which the parties belong. The country and place of arbitration are determined by the Court of Arbitration, unless the parties have agreed in advance on the place of arbitration.

The parties may agree that the arbitrators are to decide on the basis of documentary evidence. Normally, unless an extension has been granted by the Court, the award is made within 60 days. The award is subject to the approval of the Court, on questions pertaining to form; while the Court may criticize it on matters of substance, the freedom of the arbitrator or arbitrators to decide remains absolute.

The rules of the Court also provide for a conciliation procedure, which is useful when the parties have not concluded an arbitral clause. It should be noted that the rules do not contain any provisions regarding the legislation governing the arbitral clause and the relationship between the parties entering into it.

23. The International Chamber of Commerce (ICC) has entered into agreements with AAA and the Inter-American Commercial Arbitration Commission which provides for the adoption of joint clauses. Under these, if arbitration takes place outside the United States, the applicable rules of arbitration will be those of ICC (or those of the Inter-American Commercial Arbitration Commission, if the arbitration takes place in Latin America), unless the parties have agreed in writing to adopt the AAA rules. If arbitration takes place in the United States, the AAA rules will apply unless the parties have agreed in writing to adopt the ICC rules of arbitration.

If the place of arbitration is not specified by the parties and if they cannot agree on it, the decision will rest with a Mixed Arbitration Committee set up by the two bodies concerned and presided over by a person belonging to neither one.

24. Although there cannot be said to be any arbitration system in the British Commonwealth comparable to that of the Americas, the Eleventh Congress of Chambers of Commerce of the British Empire, held at Cape Town in 1927, adopted a resolution recommending that the various arbitral bodies should bring their rules into line with a model draft prepared on that occasion with the aim of achieving some degree of uniformity in the matter. The Rules for Commercial Arbitration within the British Empire were adopted (with some changes) by the London Court of Arbitration, the Sheffield and Southampton Chambers of Commerce, the Australia Chamber of Commerce, and so forth.

Although strictly speaking the London Court of Arbitration is a national body, it plays a special role in the relations between British and foreign businessmen. It was created in 1903 through the joint efforts of the Corporation of the City of London and the London Chamber of Commerce and was the outgrowth of the London Chamber of Arbitration, founded in 1892. It is worth noting that, contrary to the practice in the Americas, the rules of the London Court of Arbitration provide for an arbitral clause establishing in advance which law shall apply not only to the arbitration but also to the contract as a whole. The London Court of Arbitration supplemented the clause with a reference to English law.

25. In 1932, the Arbitration Commission for Foreign Trade, attached to the USSR Chamber of Commerce, was established. It is a permanent, non-governmental body established by a decree, dated 17 June 1932, of the Central Executive Committee and the Council of People's Commissars. Its rules of procedure were approved by the Presidium of the Chamber of Commerce of the USSR.

The decree of the Central Executive Committee and the Council of People's Commissars of the USSR, dated 13 December 1930, as amended by the decrees of the Central Executive Committee and the Council of People's Commissars of 8 January 1933 and 7 May 1936, set up the Maritime Arbitration Commission attached to the Chamber of Commerce. Its rules of procedure were approved by the Presidium of the Chamber of Commerce of the USSR.[9]

[9] Cf. E. Usenko, "L'arbitrage en URSS", in Union International des Avocats (International Association of Lawyers), Arbitrage International Commercial, vol. II, pp. 212-242.

The competence of these Commissions to settle foreign trade and maritime disputes was, of course, based on the arbitral clauses concluded by the parties and on the provisions of the treaties entered into by the USSR with foreign countries recognizing the validity of the arbitration agreement.

26. In accordance with the decision of 17 June 1932 of the CEC and the CPC of the USSR, the Arbitration Commission for Foreign Trade was to be made up of 15 members appointed for one-year terms by the Presidium of the Union Chamber of Commerce and chosen from among representatives of commercial, industrial, transport and other organizations, as well as from among persons having special knowledge in the field of foreign trade.

When the Arbitration Commission for Foreign Trade is seized of a dispute, each party nominates an arbitrator from among the members of the Commission.

If this procedure is provided for in the contract concluded between the parties and if one of the parties fails in his obligation to nominate an arbitrator within the period specified in the contract, the President of the Arbitration Commission for Foreign Trade will, at the request of the other party, appoint the second arbitrator.

Within 15 days from the date of their appointment, the arbitrators are required to choose an umpire from among the members of the Commission.

If within this period the arbitrators cannot agree on the choice of an umpire, the latter will be appointed by the President of the Commission from among its members.

The parties may, by mutual agreement, leave the choice of the arbitrators to the Arbitration Commission for Foreign Trade. If this is done, the President of the Commission may entrust the settlement of the dispute to a sole arbitrator, appointed from among the members of the Arbitration Commission.

In setling a dispute, the Arbitration Commission for Foreign Trade may take measures to enforce the claim, at the same time establishing the limits of their application.

The decisions of the Arbitration Commission for Foreign Trade are final and cannot be challenged by any means. The decision is carried out by the party against whom the award is made, within the time-limit specified by the Arbitration Commission.

3. *Attempts to unify the rules of arbitral procedure*

27. 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 solved all the problems connected with the proper functioning of arbitration. 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".[10]

A brief account is given below of the attempts to unify arbitral procedure made at that time by two of the best-known international scientific organizations, namely, the International Law Association (ILA), which is non-governmental, and the Rome International Institute for the Unification of Private Law (UNDROIT,) which is governmental.

28. The International Law Association, founded in 1873 as the Association for the Reform and Codification of the Law of Nations, drafted and adopted the Rules for the Execution of Foreign Judgements (eleventh Conference, Milan, 1883), the Rules of Procedure for International Arbitration (seventeenth Conference, Brussels, 1885), and the Model Treaty for Execution of Foreign Judgements (twenty-first Conference, Antwerp II, 1899). Immediately after the First World War, it started work also on rules relating to the sale of goods.[11] At the thirtieth Conference (The Hague, 1921), Dr. Greandyk noted the emergence of commercial affairs centres and the establishment of commercial associations to promote standard contracts, conditions and arbitration, three factors which could contribute to the modernization of commerce. He considered arbitration to be inseparably linked with standard contracts and conditions: "It makes a whole with these and the co-operation of the three influences in relation to each other is the manifestation of the modernisation of commerce."[12]

At subsequent conferences, it was proposed that the Council of ILA should adopt resolutions to encourage and support the efforts of the International Chamber of Commerce in favour of arbitration and standardization of the laws concerning arbitration and arbitral procedure.[13]

At Budapest, in 1934 (thirty-eighth Conference), discussions began on the adoption of an ILA arbitral clause and the constitution of an ILA Arbitral Court.[14] At Paris, in 1936 (thirty-ninth Conference), the Committee on Arbitration with R.S. Fraser in the Chair, recommended co-operation between existing organizations with a view to achieving unification of the rules governing arbitration. All national branches of ILA were invited to submit reports on this subject, to enable the Committee to decide upon measures to be taken with a view to unifying the rules of arbitration. Also at the thirty-ninth Conference, the French branch (Professor Laparadelle) made a proposal concerning the establishment by means of bilateral agreements, of mixed tribunals, competent to settle international civil or commercial disputes arising between States and private persons or between private persons (physical or legal). At the fortieth Conference (Amsterdam, 1938), the ILA Committee on Arbitration discussed the report submitted by R. S. Fraser and John Colombos containing certain comments on efforts towards

[10] René David, "Un projet de loi uniforme sur l'arbitrage", in *Recueil d'études en l'honneur d'Edouard Lambert,* fourth part: "Le droit comparé comme science international moderne", Paris, 1938, p. 885.

[11] See the report by Josephus Jitta, "International rules relating to the sale of goods" (thirtieth Conference, The Hague, 1921), and the report by H. Greandyk on the same subject.

[12] H. Greandyk, op. cit., p. 450.

[13] See the proposal by R. S. Fraser, thirty-first Conference of ILA, Buenos Aires, 1922, p. 189.

[14] It was decided not to set up such an Arbitral Court, to avoid duplicating the work of the Court of Arbitration of ICC, although that does not imply recognition of an ICC monopoly in that respect (see: Windham Berves, p. 122, thirty-eighth Conference).

unification in the field of arbitration (ICC, the Inter-American Association, UNIDROIT) and proposing a draft model arbitral clause and draft arbitral rules (Amsterdam Arbitral Rules, 1938—AMRUL, 1938).

As a result of the discussions, ILA decided to deal only with the most important points of arbitral procedure (particularly the problems of constituting the tribunal), unlike the UNIDROIT draft, which had broader aims. Furthermore, as stated in the report of the French branch, according to the principles of that Association rules are proposed for international commerce, but it is not envisaged that ILA should take any part in their implementation.

29. The Amsterdam Rules, 1938, again contain provisions concerning the constitution of the arbitral tribunal, the power of arbitrators, the role of the Chairman of the Committee on Commercial Arbitration of the International Law Association, procedures for the transmission of documentation between parties, administration of evidence, the hearings (six stages are mentioned), content of the award, fixing of costs, and so forth.

The arbitral tribunal may be composed of a sole arbitrator, two arbitrators (if these two arbitrators cannot reach agreement, the umpire shall decide in their stead) or three arbitrators. If the parties have made no provision to the contrary in their contract, the arbitral tribunal shall always be composed of three arbitrators. The arbitration agreement may be revoked only with the consent of both parties. The claimant and the respondent must make known their points of claim and points of defence. The parties shall determine where the arbitration is to take place, and if they make no such provision the decision shall be made by the arbitrator or arbitrators or by the umpire. The hearings are normally private, unless the parties request that they should be open. The award must be made in writing, within 10 days (and in complicated cases within 20 days). It must comply with the law of the country chosen for the purposes of the formation, validity and performance of the contract and with all such formalities as are necessary to render it enforceable in the country in which it will be enforced. The award is final and is not subject to appeal, unless the parties have made provision for an appeal in their contract.

30. The Rome International Institute for the Unification of Private Law included the question of arbitration in its working agenda in 1928, the year in which it was founded. After various preparatory studies, a report on arbitration in comparative law was drafted, and in 1933 a Committee was established to prepare a draft uniform law on arbitration. Under the chairmanship of Mr. d'Amelio, President of the Court of Cassation of Italy, and with the collaboration of jurists from different countries, a preliminary draft was prepared. Taking as its basis the concept that a uniform system of arbitration requires a uniform law on arbitration, because the diversity of laws gives rise to serious problems in international arbitration, and aware that the two Geneva instruments, signed under the auspices of the League of Nations, had considerably improved the situation in this respect, UNIDROIT intended its draft uniform law to cover the question of arbitration as fully as possible. Of the 40 articles in the draft, the first six cover "the scope of the law", articles 7-14 "the arbitral tribunal" (the term "arbitral tribunal" includes any organs which may be provided for in the arbitration agreement, apart from arbitrators), articles 15-21 "the procedure in the arbitration", articles 22-24 "the award", articles 25-28 "the enforcement of the award", articles 29-34 "setting aside the award", article 35 "costs, expenses and fees" and articles 36 and 37 "the competent court", while articles 38, 39 and 40 contain "supplementary provisions".

31. When Professor René David submitted the draft uniform law on arbitration,[15] he explained the general economy of the draft and the reasons why the Committee had adopted certain solutions.

The Committee believed at the time that it would not be possible to apply the uniform law to all arbitration indiscriminately. That is why article 1 specifies two cases in which it may apply; the first is when, *at the time an arbitration agreement is concluded*, the parties thereto have their respective *habitual residences* in different countries,[16] and the second is when the parties have provided that the arbitration upon which they have agreed shall be governed by the uniform law. Article 2 states that the parties may exclude application of the uniform law.

32. In the chapter concerning the arbitration agreement, it should be noted that an arbitration agreement respecting future differences shall only be valid if the differences arise out of a determinate relationship or contract, that an arbitration agreement or any modification thereof must in principle, be proved, in writing,[17] that a party may no longer invoke an arbitration agreement if he has indicated that he does not wish to avail itself thereof, and that the arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of arbitrators.

33. Among the articles of the draft concerning the constitution of the arbitral tribunal, it should be noted that article 7 does not require that the arbitrators be appointed by the agreement itself, that the constitution of an arbitral tribunal composed of an even number of arbitrators is treated as a quite exceptional case, and that the qualifications for an arbitrator are in no way limited by the draft, which allows anyone to serve as an arbitrator. Following a suggestion made at the Pan-American Congress of Montevideo, in 1933, the draft indicates that the nationality of an arbitrator shall be immaterial (article 11), that an arbitrator may be removed if he unduly delays to fulfil his office (article 14) and that an arbitrator may be disqualified from acting if he is a minor and, in general, if any circumstances exist capable of casting doubt on the arbitrator's impartiality or independence.

34. In Professor David's view, the provisions concerning the enforcement and the setting aside of arbitral awards constitute the essence of the draft, and also its greatest novelty and practical value.

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[15] René David, "Un projet de loi uniforme sur l'arbitrage", loc. cit., p. 884.

[16] The text states that the nationality of the parties shall not be taken into consideration.

[17] It may also be proved by the report of the arbitrators of the arbitral award, if these documents show that the parties explicitly acknowledged the existence of the agreement.

Where the enforcement of arbitral awards is concerned, the principle continues to be that enforcement is possible only after leave to issue execution has been granted by a judicial authority, the parties having the opportunity of being heard, but once such leave has been obtained in any country in which the uniform law is in force it will, under the system provided for in the draft, be enforceable in all countries which have adopted the uniform law. In 1938, the authors of the draft believed that the time had come to take the decisive step forward which had not been possible at Geneva in 1927.

The enforcement of an award in these countries may be opposed on the ground either that the award is contrary to public policy in the country concerned or that submission to arbitration would not have been allowed in that country in respect of the case to which the arbitrators' award relates.

35. The draft uniform law established a link between the procedure for obtaining enforcement and any action to set aside the award. According to Professor David,[18] it is extremely desirable that, whether in the lower court or in the court of appeal, the same authority should be responsible for granting leave to issue execution and for setting aside an award, in view of the obvious interrelationship of the two matters. It was difficult to specify who that authority should be in an international law, which must take into account the differences in the judicial organization of States. The drafters were therefore obliged to confine themselves to facilitating a solution to the problem along the lines that they thought desirable, by leaving it to firstly, laws of individual countries to determine what recourse was available against the decision on the application for leave to issue execution, and secondly, by establishing that an application to set aside an award must be made in the country where leave to issue execution has been claimed (article 37).

A restrictive list of the cases in which an arbitral award may be set aside appears in articles 29 *et seq.* of the draft. It should be noted that errors of law committed by the arbitrators are not included among those cases. If the parties want to guard against possible errors of law by their arbitrators and to be certain that the general principles of law will be observed in the settlement of their dispute, they must expressly agree on that point; article 30 will then apply and the award can be set aside. An agreement between the parties is also necessary if they intend to reserve the right to contest the award on the grounds that it is based on evidence which the arbitrators did not have the right to accept or had improperly accepted.

Professor David concludes that article 30, in requiring an agreement by the parties in such cases if an award is to be set aside, completely reverses the former rule in Latin countries, and particularly in France: it makes *amiable composition* the rule and arbitration proper the exception. Under the system provided for in draft, the arbitrators are in principle *amiables compositeurs*, that is to say, they should decide in accordance with the law, but their award cannot be set aside if it is not in fact in accordance with the law. The arbitrators are *amiables compositeurs*, according to the draft, unless the parties have expressly agreed to deny them such powers and require them to decide according to law.

This reversal of the traditional rule was already at that time considered entirely justified: "In international arbitration, to which the international law will primarily apply, the *amiable composition* clause has in fact already become the style; parties do not want to have their desire to settle their dispute rapidly and without publicity frustrated by an appeal; arbitrators, for their part, would not accept their task unless they were freed from the complicated and detailed procedures—the finer points of which are often unfamiliar to them—that are necessary in arbitration proper. Although the new rule constitutes in theory a very important change, in fact it only sanctions a state of affairs which already exists."[19]

Another solution in the draft which should be noted is that an award can be set aside on the ground that no reasons have been given only if the parties have required that reasons should be given. The authors of the draft were extremely hesitant to accept this solution; they did so only as a compromise, in order to facilitate the adoption of the uniform law by the English-speaking countries, where it is the practice to make arbitral awards without giving reasons.

4. *Observations on the development of commercial arbitration during the inter-war years*

36. 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 Académie de droit international in The Hague, 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". There were movements both towards and away from arbitration, but all agreed "that the trends towards arbitration prevailed in municipal as well as international law".[20]

37. 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 commercial relationships were concerned; this paved the way for a certain amount of legislative reform[21] and created a trend towards court decisions favouring arbitration and even a movement towards the unification of arbitration law.

38. Even when the idea of arbitration had been accepted, many practical problems arose, particularly in international relations. As a result, it soon became necessary to study more attentively the rules which

[18] René David, "Un projet de loi uniforme sur l'arbitrage", loc. cit. pp. 887-888.

[19] René David, *ibid*, p. 888.

[20] Giorgio Balladore-Pallieri, *"L'arbitrage privé dans les rapports internationaux"*, *Recueil des cours*, 1935, I, vol. 51, pp. 291 *et seq.*

[21] For example, the Federal Arbitration Act of 1925 in the United States, the Arbitration Acts of 1924, 1930 and 1934 in the United Kingdom, the Act of 1925 in France, the German Acts of 1924 and 1930 and the three Swedish Acts of 1929.

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 checks on arbitral proceedings, and so forth. The provisions of private international law, and particularly the rules of conflict, the problems of definitions, 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 relationships.

39. 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.

40. This explains, to a large extent, why arbitration began to acquire a dual autonomy—from national rules of civil procedure and from State courts of law. 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 should 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.[22]

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.

41. 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."[23] 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.

42. 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".[24] Actually, at that time the only arbitration was national arbitration, which was acknowledged, subject to certain reservations to have extraterritorial effects.

43. 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.

CHAPTER II. ACTIVITIES UNDERTAKEN AND RESULTS ACHIEVED IN THE PERIOD 1945-1970

1. *Activities undertaken under the auspices of the United Nations*

44. The growing intensity of modern international trade and the concomitant need to develop facilities for arbitration caused the international business community to consider that the Geneva Agreements were no longer adequate. A first step towards rectifying this situation was taken by the United Nations Economic and Social Council, at the suggestion of the International Chamber of Commerce (ICC) which submitted to the Council a preliminary draft convention on the recognition and enforcement of arbitral awards. The Council decided [resolution 520 (XVII)] to establish an *Ad Hoc* Committee composed of representatives of eight Member States.[25] This Committee was instructed to study the preliminary draft convention submitted by the International Chamber of Commerce and to report its conclusions to the Council and to draw up, should it see fit, a draft convention.

The draft (convention) drawn up by the *Ad Hoc* Committee was subsequently submitted, together with a report, to the Economic and Social Council.

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[22] 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).

[23] Giorgio Balladore-Pallieri, op. cit., p. 295.

[24] Frédéric-Edouard Klein, *Considerations sur l'arbitrage en droit international privé*, Basel, 1955, p. 12.

[25] Australia, Belgium, Ecuador, Egypt, India, Sweden, Union of Soviet Socialist Republics and United Kingdom.

In its report, the *Ad Hoc* Committee, analysing the question raised and the study prepared by the International Chamber of Commerce, concluded that it would be desirable "to establish a new convention which, while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States."[26]

In resolution 604 (XXI) of 3 May 1956, the Economic and Social Council decided to call a conference of plenipotentiaries to conclude a convention and to consider possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes. This Conference was held in New York, from 20 May to 10 June 1958, and adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[27]

45. The New York Convention had not regulated all the problems of international arbitration but it had nevertheless solved the most important one—as had the 1927 Geneva Convention—that of the recognition and enforcement of foreign arbitral awards, by also including in its text (article II) the substance of the Geneva Protocol of 1923. The Geneva Protocol and Convention were to cease to have effect between the Contracting States on their becoming bound by the New York Convention (article VII).[28]

The final text of the Convention adopted at the New York Conference in June 1958 was in many ways an intermediate solution between the text of the 1927 Geneva Convention and the text of the preliminary draft proposed by the International Chamber of Commerce. Thus, for example, the 1927 Geneva Convention required that an arbitral award should be *national,* that there should be both personal and territorial reciprocity, and that the award should have become final in the country in which it was made.

The preliminary draft of the International Chamber of Commerce was based, in contrast, on a diametrically opposed idea—the concept of the "international award", divorced as far as possible from any national criterion and based exclusively on agreement between the parties exercising the "autonomy of will" taken to have the force of law.

The New York Conference, although it retained the title of the Geneva Convention to the extent that it refers only to foreign arbitral awards and not to international awards as advocated in the preliminary draft of ICC, adopted a text which, without expressing the ideas in the preliminary draft, was nevertheless broader than the text of the draft prepared by the Economic and Social Council in 1956.[29]

Indeed, after having specified in the first part of article I, 1, that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the States where the recognition and enforcement of such awards are sought, it says in the following sentence that: "It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

This negative formulation left open to each Contracting State the possibility of applying the Convention independently of the territorial concept embodied in the first part of paragraph 1, for example, to the enforcement of an award made on its territory, but containing some elements of extraterritoriality which justified its consideration as a foreign award.[30]

We note, however, that the text no longer requires the condition imposed by the corresponding article of the Geneva Convention, that the persons involved should be subject to the jurisdiction of one of the high Contracting Parties nor, moreover, the condition of reciprocity (that the arbitral award, for which recognition and enforcement are sought, should have been made in a territory of one of the Contracting States).

Nevertheless, article I, 3 specifies that when signing, ratifying or acceding to the Convention, or notifying extension under article X thereof, States may make certain reservations, including the application of the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and the application of the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under national law.

46. Another question widely debated at the time of the Conference was that of the capacity of a State or a legal body of public law to conclude valid arbitral clauses. Despite the discussions, the problem was not solved at the time. However, the 1958 New York Convention clarified the situation regarding arbitral awards made by permanent arbitral bodies. Under article I, 2, arbitral awards made by *ad hoc* arbitral bodies are placed on the same footing—for the purposes of applying the Convention—as awards made by permanent arbitral bodies. That explanation is important, since until the New York Convention was adopted the position regarding the value of awards made by permanent arbitral bodies, and particularly by the arbitral bodies attached to the chambers of international commerce of the East European countries, was generally somewhat equivocal.

It should be made clear that the 1958 New York Convention (article II) provides the solution to the problems of the arbitral agreement, in a manner essentially similar to that of the 1923 Geneva Protocol.

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[26] *Official Records of the Economic and Social Council, Nineteenth Session, Annexes*, agenda item 14, document E/2704/Rev.1, p. 2.

[27] United Nations *Treaty Series*, vol. 330. As at 1 January 1971 the following 37 States had ratified the Convention: Austria, Bulgaria, Byelorussian SSR, Cambodia, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Federal Republic of Germany, Finland, France, Ghana, Greece, Hungary India, Israel, Italy, Japan, Madagascar, Morocco, Netherlands, Niger, Nigeria, Norway, Philippines, Poland, Romania, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, USSR, United Arab Republic, United Republic of Tanzania and United States of America.

[28] Pieter Sanders, "La Convention de New York", International Association of Lawyers (IAL), in *Arbitrage international commercial,* 1960, p. 294.

[29] Ion Nestor, *Probleme privind arbitrajul pentru comertul exterior în tarile socialiste europene* (Problems of foreign trade arbitration in the European Socialist Countries), Bucharest, 1962, part IV, nos. 138, 139 and 148.

[30] See Jean Robert, La Convention de New York de 10 juin 1958, pour la reconnaissance et l'exécution des sentences arbitrales étrangères, in *Revue de l'arbitrage,* 1958, No. 3, p. 74 and P. Sanders, loc. cit., p. 298.

It should be noted, however, that the New York Convention contains in addition a whole series of stipulations which are, moreover, extremely welcome, since they made it possible to arrive at a unified approach to certain problems which were solved in different ways by the national legislations of the different countries.

The first of these stipulations that should be mentioned is that referring to the requirement (article II, 1 and 2), that the arbitral agreement (arbitral clause or arbitration agreement) must be concluded *in writing*. This is a stipulation which certain authors consider to be "of capital importance", or "a uniform rule of law of inestimable value constituting the Convention's prime achievement in positive law".[31]

Also very valuable—from the point of view of unification—is the stipulation also appearing in article II, 1, whereby the arbitral agreement must refer to a "*defined* legal relationship, *whether contractual or not*, concerning a subject-matter capable of settlement by arbitration". A comment is needed here, since, although the first part of the stipulation "a *defined* legal relationship, *whether contractual or not*" makes it possible to achieve a certain unity of approach to a problem resolved differently by the legislation of the different countries,[32] the second part (that the subject-matter should be *capable of settlement by arbitration*) leaves in abeyance the problem of the subject-matters (questions) capable of settlement by arbitration.

It is none the less true that it follows from the Convention [article V, 2 (*a*)] that the problem of knowing whether the subject-matter of a litigation is "capable" of settlement by arbitration is resolved under *the law of the country in whose territory the recognition and enforcement of the award is sought*. But at the most that means that, if there is any unification, it only concerns the rule of conflict which designates the competent law, while the settlement of the substance remains different according to the provisions of one or the other of the national legislations indicated.

47. As for the requirements laid down for the recognition and enforcement of foreign arbitral awards, the system adopted by the 1958 New York Convention is completely different from that embodied in the 1927 Geneva Convention. Under the Geneva Convention, in order to obtain the recognition and enforcement of foreign arbitral awards it was incumbent on the party seeking recognition of an award or its enforcement to prove that the conditions required for recognition had been fulfilled and that enforcement could be authorized. What is more, once that proof had been given, the enforcing authority could consider *ex officio* the position regarding the other conditions and, if it established that the latter had not been fulfilled, refuse the request.

The New York Convention, on the other hand, adopts a system based on the idea that the award constitutes, in the hands of the person obtaining it, *an instrument to which credit must be given*. Consequently, the fact of presenting that *instrument* accompanied by the text of the arbitral agreement (in the form required by article IV of the Convention) must be considered as *prima facie*, in the sense that the award is mandatory and that the person seeking its recognition and enforcement has given the proof which authorizes him to obtain them. As from that moment *the burden of rebuttal* passes to the respondent, who, in order to be able to oppose admission of the recognition and enforcement, must prove the existence of one or more of the five grounds stipulated in article V, 1, (*a*), (*b*), (*c*), (*d*) and (*e*) of the Convention, on which the request may be refused.

48. Among the provisions governing the reasons for which recognition and enforcement of arbitral awards may be refused, particular note should be taken of those which are of importance in connexion with the problems of private international law raised by the recognition and enforcement of foreign arbitral awards.

The stipulation involved is that contained in the provision appearing in article V, 1 (*a*), which embodies the principle of autonomy of will in determining the law which governs the validity of the arbitral agreement, in the sense that the agreement must be valid under the law to which the parties have subjected it or, only if the parties have failed to agree on that point in the agreement, under the law of the country where the award was made.

The same is true of the stipulation in subparagraph (*d*), which also embodies the principle of autonomy of will in determining the law governing the composition of the arbitral authority or the arbitral procedure. The text quoted establishes that the parties may stipulate in their agreement both the way in which the arbitral authority is composed and the arbitral procedure and that, failing such agreement, the law applied is that of the country in which the arbitration took place.

The adoption of the text of article V, 1 (*d*) put an end to the discussions that arose out of the corresponding provisions of the 1923 Protocol and the 1927 Convention. Those two agreements stipulated that the arbitration procedure was governed "by the will of the parties *and* by the law of the country in whose territory the arbitration takes place", but without making it possible to ascertain whether two cumulative conditions or (only) a single form of reference were involved. Now, thanks to the New York Convention, the matter is no longer open to dispute, because on this occasion the text is unambiguous and, from that point of view at least, an improvement on the corresponding text in the Geneva Convention.

Finally, a look must also be taken at the provisions of article V, 1 (*e*), since they are important for two reasons. Under those provisions the foreign arbitral award can no longer be enforced if the defendant proves that the award has not yet become binding, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Let it be remembered, above all, that by adopting that text, the New York Conference abandoned the system proposed in the draft of the Council's *Ad Hoc* Committee, which stated that the award must not only be final, but also enforceable (which would in fact have amounted to a double *exequatur*).

49. Apart from its work at the international level through the Economic and Social Council, which culminated in the adoption of the 1958 New York Convention, which we have dealt with above, the

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[31] Jean Robert, op. cit., p. 75.

[32] Pieter Sanders, "*L'Arbitrage International Commercial*", International Association of Lawyers (IAL), vol. I, 1956, p. 14 and article 3 of the UNIDROIT Draft Uniform Law.

United Nations consistently sought to expand commercial arbitration through the four regional economic commissions: the Economic Commission for Europe (ECE), the Economic Commission for Asia and the Far East (ECAFE), the Economic Commission for Latin America (ECLA) and the Economic Commission for Africa (ECA).

As may be noted from the report of the Secretary-General on the progressive development of the law of international trade (document A/6396 of 23 September 1966, para. 66), the activities of the Economic Commission for Europe had been primarily in the field of international contracts and *commercial arbitration.*

At its third session (20 April to 3 May 1954), the ECE Committee on the Development of Trade expressed the opinion that it would be necessary for the development of East-West trade to study the problem of arbitration in cases of disagreement between parties which should submit any disputes that might arise to one of the existing arbitration institutions. The Committee felt that it was necessary to study the preparation of a uniform international arbitration procedure at the European level, which could be proposed as the subject of an intergovernmental agreement.

The Committee on the Development of Trade established for this purpose the Geneva *Ad Hoc* Working Group on Arbitration, which began its work in 1955.

During its fifth session, the Group instructed the ECE secretariat—having regard to the conclusions contemplated—to prepare the following two drafts and submit them to the Governments of participating countries:

A draft European Convention on International Commercial Arbitration;

Draft arbitration rules including a procedure for settling trade disputes, which parties would be obliged to apply if they had not agreed on some other procedure

At its seventh session, the *Ad Hoc* Working Group on Arbitration, having drawn up the text of a draft European Convention on International Commercial Arbitration, was of the opinion that the draft should be submitted to a Special Meeting of Plenipotentiaries convened for the purpose of negotiating and signing a European convention on international commercial arbitration.[33]

That Meeting was held at the European office of the United Nations in Geneva from 10 to 20 April 1961.[34]

50. The European Convention on International Commercial Arbitration was signed at Geneva on 21 April 1961.[35]

Unlike the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, the new Convention has a double purpose: firstly, to resolve the problem of the appointment of arbitrators where the parties to an arbitration agreement do not manage to agree on the choice to be made—a particularly thorny problem if the parties are resident in countries with different economic structures; and secondly, to facilitate recourse to commercial arbitration regardless of the economic structure of the countries in which the parties are resident. Moreover, this time the Convention states [article I, 1 (*a*)] that it shall apply "to arbitration agreements concluded for the purpose of settling disputes arising from international trade".

In other words, the Convention is not concerned with arbitral jurisdiction in general for all civil law relations, since it only governs jurisdiction in *international trade relations where*, as the text states, the parties who have concluded the arbitration agreement *must, when concluding the agreement, have had their habitual place of residence or their seat in different Contracting States.*

Article I, 2 defines what is meant, under the European Convention, by "arbitration agreement", "arbitration" and by "seat".

It should be noted, regarding the definition of the meaning of "arbitration agreement", that what is actually regulated here is the form in which such an agreement may be concluded in order to be covered by the Convention, including its submission in writing and the meaning of that concept.

The European Convention follows the 1958 New York Convention in stating that "arbitration" means both as the settlement of disputes by arbitrators appointed for each case (*ad hoc* arbitration) and the settlement of disputes by permanent arbitral institutions. The term "seat" is also defined, in order to avoid any misunderstanding—a solution also adopted in the UNIDROIT Draft Uniform Law Protocol.

51. The European Convention, unlike the others with which we have been concerned up to now, also deals with the right of legal persons of public law to resort to arbitration; agreements concluded by *legal persons considered* by the law which is applicable to them as "*legal persons of public law*" being, in principle, valid. We say "in principle", since in view of the categorical opposition of some European countries to that solution, the European Convention also specifies in the same article II (paragraph 2), that each State shall be entitled on signing, ratifying or acceding to the Convention, to make reservations on this provision. The European convention is, however, an advance on the other conventions, since in that way at least, it is clear *ab initio*, to what extent each State that becomes a party to the European Convention intends to undertake to apply the Convention.

Article III and IV contain provisions which cover the organization proper of the arbitration, when the latter is subject to the European Convention. It should be noted that article III provides expressly for the possibility of also designating foreigners as arbitrators in arbitration covered by the Convention. Article IV specifies the courses which the parties to an arbitration agreement (concluded under the European Convention) may adopt to organize the arbitration, to appoint the arbitrators, to determine the place of arbitration, to lay down the procedure to be followed by the arbitrators

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[33] See ECE documents E/ECE/TRADE/96 and 34 and annex 1.

[34] For more complete details, see document E/ECE/TRADE/47, which contains the report adopted by the meeting of 20 April 1961.

[35] United Nations, *Treaty Series*, vol. 484. As at 1 January 1971 the Convention had been ratified by the following countries: Austria, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, France, Federal Republic of Germany, Hungary, Italy, Poland, Romania, Ukrainian SSR, USSR, Upper Volta and Yugoslavia.

for settling disputes and also to delegate by default for the party who fails to fulfil his obligations under the arbitration agreement.

Under article IV, 1, the parties to an arbitration agreement are free to:

(*a*) Submit the dispute (or disputes) to a permanent arbitral institution; in this case, the arbitration is to be held in conformity with the rules of the said institution;

(*b*) Submit the dispute (or disputes) to an *ad hoc* arbitral procedure; in this case the parties are free *inter alia*:

(i) To appoint arbitrators or to establish means for their appointment in the event of an actual dispute;

(ii) To determine the place of arbitration;

(iii) To lay down the procedure to be followed by the arbitrators.

Under article IV, 2, where the parties have agreed to submit the settlement of their dispute to an *ad hoc* arbitration, and where within 30 days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration.

The same procedure also applies to the replacement of the arbitrators appointed by one of the parties or by the President of the above-mentioned Chamber of Commerce.

Article IV, 3, governs cases where the parties have agreed to submit the settlement of their dispute to an *ad hoc* arbitration, but the arbitration agreement concluded between them contains no indication regarding the necessary measures for the organization of the arbitration, which are referred to in article IV, 1.

These measures are established differently, according to whether the parties have agreed on the place of arbitration or not. Where the parties have not agreed, the claimant may apply either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the *annex* to the Convention.

The same paragraph 3 lays down that, where the claimant fails to exercise the rights given to him under the paragraph, the respondent or the arbitrators shall be entitled to do so.

Article IV, 4, sets forth the prerogatives of the President of the competent Chamber of Commerce or the Special Committee when they are seized of a request.

Article IV, 5, regulates cases where the parties, having agreed to submit the settlement of their disputes to a permanent arbitral institution but without having designated it expressly, cannot reach agreement thereon. In such a case the claimant may request the determination of such an institution under the procedure indicated in IV. 3.

Article IV, 6, deals with cases where the parties have not specified in the arbitration agreement the mode of arbitration (permanent arbitral institution or *ad hoc* arbitration) to which they have agreed to submit their disputes. In such a case, if the parties do not agree thereon, the claimant is entitled to have recourse to the procedure referred to in article IV, 3 to determine the question. The President of the competent Chamber of Commerce or, as the case may be, the Special Committee may refer the parties to a permanent arbitral institution or request them to appoint their arbitrators within a time-limit to be notified to them and to agree within such time-limits on the necessary measures for the functionning of the arbitration.

In the latter case, the provisions of article IV, 2, 3 and 4 apply.

The last paragraph of article IV (paragraph 7) establishes that, where the President of the Chamber of Commerce designated in accordance with the procedure outlined in article IV, 2, 3, 4, 5 and 6 has been requested to fulfil one of the functions set out in those paragraphs and has not fulfilled that function within a period of 60 days from the date of the request, the party requesting is entitled to ask the Special Committee to do so.

52. Article V and VI of the European Convention deal at considerable length with the establishment of the jurisdiction of the arbitral courts and the effect of an arbitration agreement on courts of ordinary law. The conditions under which a plea of incompetence may be made are laid down; the draft uniform law, like the UNIDROIT draft, establishes the right of arbitrators to rule on their own competence.

Regarding the *raising of a plea of lack of jurisdiction before a court of law*, the text of the European Convention (article VI, 1) lays down expressly that in such cases the plea must be presented, under *penalty of estoppel*, before or at the same time as the substantial defence, depending upon whether the law of the court seized regards the plea as one of procedure or one of substance.

The text of article VI also contains a series of provisions relating to the law applicable by the courts of contracting States, in ruling on the existence or the validity of an arbitration agreement.

Thus, under article VI, 2, courts decide on the capacity of the parties *under the law applicable to them*,[36] and, with reference to other questions, under the law to which the parties have subjected their arbitration agreements. Failing such indication in the parties' agreement, it will be *under the law of the country in which the award is to be made* and, where it is impossible to determine the country of the award at the time the question is raised in court, the competent law will be that indicated by the rules of conflict of the court seized of the dispute.

It is further provided that the court may also refuse recognition of the arbitration agreement if, under the *lex fori*, the dispute is not capable of settlement by arbitration.

[36] The same omission as existed in the 1923 Geneva Protocol has been maintained here: the text does not say which law is applicable or how it is to be determined.

Article VI, 3 deals with the situation of the court asked to deal with a case after the initiation of an arbitration procedure, and lays down that the courts of contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.[37]

Article VI, 4 contains the stipulation that a request for *interim measures or measures of conservation* addressed to a judicial authority is not to be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court.

53. Unlike the other known conventions—and it is precisely this which constitutes an advance in arbitration—the European Convention contains certain special provisions (article VII) whose purpose is to determine the law applicable to the substance of the dispute. The parties have the right to do this; however, failing any indication by the parties as to the applicable law, the arbitrators are to apply the law indicated (as being competent) under the rule of conflict that the arbitrators deem applicable.

Article VII, 1 also establishes that in both cases the arbitrators are to take account of the terms of the contract and trade usages.

In paragraph 2 of the same article it is laid down that the arbitrators may act as "*amiables compositeurs*" if the parties so decide and if they may do so under the law applicable to the arbitration. We must point out, however, that the law does not define this controversial concept.

54. The European Convention embodies in article VIII the rule on the reasons for the award, namely, that, in the absence of any agreement thereon, the parties shall be presumed to have agreed that reasons are to be given. In order for the arbitrators not to be obliged to give reasons for the award, the parties must have expressly declared that "reasons shall not be given", or they must have assented to an arbitral procedure under which it is not customary to give reasons for awards. And it would appear from the latter condition that the Convention makes a stipulation which, as far as the reasons for the award are concerned would, allow the parties to amend the arbitral procedure that the Convention indicates should be applied by the arbitrators. Indeed, the Convention provides that, even in the case where the parties have assented to an arbitral procedure under which it is not customary to give reasons for awards, reasons must be given, if either party expressly requests before the end of the hearing, or if there has not been a hearing, before the making of the award, that this should be done.

55. The European Convention makes an important stipulation on the setting aside of the arbitral award—a stipulation not recommended in any of the conventions we have considered up to now.

The text concerned is the preamble in paragraph 1 of article IX, according to which the setting aside in a Contracting State of an arbitral award covered by the European Convention is only to constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award was made, and only for the reasons set out in subparagraphs (*a*) to (*d*) of the same paragraph.

The reasons for the setting aside of the award which may also constitute grounds for the refusal of recognition and enforcement, listed exhaustively in article IX, 1 (*a*)-(*d*) of the European Convention also appear in article V, 1 (*a*)-(*d*) of the 1958 New York Convention.

It was quite natural therefore that article IX of the European Convention which specifies the reasons for setting aside an arbitral award obtained in accordance with the provisions of the Convention, reasons constituting grounds for refusing recognition of enforcement of the award, should also regulate, in paragraph 2, the manner in which the provisions of the European Convention may be combined for this purpose with those of the 1958 New York Convention in relations between countries that are Contracting Parties to the two Conventions.

Article V, 1 (*e*) of the New York Convention contains in fact another point which may constitute a ground for refusing recognition and enforcement of the award, namely, that the recognition and enforcement of an award may, according to the text quoted, be refused—at the request of the party against which it is invoked—if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". This provision gives the setting aside in the country in which the award was made absolute effect, regardless of the grounds on which the award was set aside.

The 1961 European Convention did not provide for a similar solution, and the system adopted by that Convention in article IX, 1 represents an advance on the New York Convention. In fact, by reducing the number of cases or setting aside of foreign arbitral awards in relations between States Parties to the European Convention, it eliminates to a large extent, right from the moment of enforcement of the award, certain delaying actions to which the losing party might possibly be tempted to resort.

And in order to debar any discussion on the fact that, in relations between Contracting States that are also parties to both Conventions, the number of cases in which a foreign arbitral award may be set aside is reduced only to those listed exhaustively in article IX, 1 (*a*)-(*b*) of the European Convention; article IX, 2 stipulates that:

> "In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcements of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this article limits the application of article V (1) (*e*) of the New York Convention solely to the cases of setting aside set out in paragraph 1 above."

56. We feel that this account of the 1961 Geneva European Convention on International Commercial Arbitration would not be complete without pointing

[37] The text does not explain what might constitute such *good and substantial reasons*; this is also left to the discretion of the judge of the ordinary court.

out that one of the most important innovations made by the Convention is the establishment, under article IV, of a Special Committee to which the claimant can apply if the respondent does not agree with him on the appointment of the arbitrator. The Special Committee is composed of three members elected for four years. One of these members is elected by the Chambers of Commerce of countries where there are National Committees of the International Chamber of Commerce and which at the time of the election are parties to the Convention. The second member is elected by the Chambers of Commerce of countries in which there are no National Committees of the International Chamber of Commerce and which at the time of the election are parties to the Convention. The third member, who acts as Chairman, is elected for two years by the Chambers of Commerce of the first group of countries and the Chambers of Commerce of the second group of countries alternatively.

The Special Committee is the only arbitral institution which is common to the market-economy countries and the countries with centrally planned economies.

57. The 1961 Geneva European Convention was supplemented by the publication of the January 1966 Arbitration Rules of the United Nations Economic Commission for Europe.

The preparation and publication of these Rules resulted from the concern of the Economic Commission for Europe to make available to parties model instruments (model contracts, general conditions of sale, etc.) to which they could refer, hence avoiding the delays inherent in drafting the clauses of a contract on the regulation of the various operations performed by the parties in international trade (deliveries of goods, providing services, etc.).

This initiative is also the result of a concern to encourage the extension of arbitration as a means of settling disputes between parties, especially by making available to the parties to an arbitration agreement an arbitration procedure which they can adopt by means of a simple reference clause whenever it is obviously impossible for the parties themselves to establish a procedure for organizing arbitration.

The ECE Arbitration Rules are consequently an optional set of rules which can only be applied to the extent that the parties agree to do so.

58. In speaking of the provisions and solutions embodied in these Rules, we should first mention those concerning the measures to be taken by the parties to an arbitration agreement in order that the arbitral procedure may be continued when the parties do not manage to agree on the form of arbitration, the membership of the arbitral court, the sole arbitrator or arbitrators, the appointment of the Chairman, or if one of the parties fails to appoint an arbitrator.

In all these situations the Rules provide for the parties to have recourse to an "Appointing Authority". As regards determining the "Appointing Authority", the Rules uphold the principle of the autonomy of will. Under article 4 of the Rules, the designation of the Appointing Authority by the parties is decisive, in the sense that, in order to resolve the situations enumerated in that article, the claimant has the right to apply to the Appointing Authority designated by the arbitration agreement, and it is only failing such designation that he may then apply to the Appointing Authority of the place of arbitration, provided, of course, that the parties have agreed on the place of arbitration.

If, by the arbitration agreement, the parties have determined neither the Appointing Authority, nor the place of arbitration, under article 5, the claimant is free, in order to resolve the situations referred to in article 4, to apply either to the Appointing Authority of the country where the respondent has his habitual residence or his seat, or to the Special Committee set up under article IV of the 1961 Geneva European Convention on International Commercial Arbitration; if the parties have their habitual residence or seat in countries where there exists a National Committee of ICC, the claimant may apply to the Court of Arbitration of ICC.

So that the interested parties will know which institutions may act as "Appointing Authority", for the purposes of applying the Rules, article 2 of the Rules states that, besides the institutions indicated in article 5 for the situation provided in that article (the Special Committee of article IV of the European Convention and the Court of Arbitration of ICC), the Appointing Authority of the place of arbitration or of the country where the respondent has his habitual place of residence or seat shall be the Chambers of Commerce or other institutions set out in the Annex to the Rules.

59. The "Appointing Authority" requested in the manner prescribed in the Rules (article 3) to intervene in order to ensure that the arbitral procedure goes forward, may take the following action as appropriate:

If the parties confirm their agreement thereto in writing, appoint a sole arbitrator, or an arbitral institution to settle the dispute in accordance with its own rules;

If the parties fail to agree on the appointment of a sole arbitrator or an arbitral institution, invite the parties each to appoint an arbitrator, the arbitrators so appointed choosing another arbitrator as presiding arbitrator;

If within a period of 30 days one of the parties has not appointed an arbitrator or if the arbitrators appointed fail within a period of 45 days to agree on the choice of the presiding arbitrator, proceed *ex officio* to such appointment.

Similarly, when a procedure must be established for replacing an arbitrator, a sole arbitrator or the presiding arbitrator following a challenge, death or incapacity, the Rules specify (articles 8 and 12) the cases in which the Appointing Authority may designate a substitute (arbitrator, sole arbitrator or presiding arbitrator).

60. Of the provisions dealing with the organization of the arbitration and of those covering the arbitration procedure proper, the following should be particularly noted:

Provisions relating to the place of arbitration (article 14 of the Rules) which embody the principle of the autonomy of will, in the sense that the place of arbitration is to be determined by the arbitrators only if the parties do not agree thereon;

The general provisions relating to procedure (articles 22, 23, and 24 of the Rules) which, in the absence of any provisions to the contrary in the rules, authorize the arbitrators to proceed to arbitrate in order to settle the dispute (or to conduct the arbitration) in such manner as they see fit, although they must in every case give the parties a fair hearing on the basis of absolute equality. Under the Rules (article 23) the procedure is oral; if the parties consent, however, the arbitrators are authorized to render an award without an oral hearing, solely on the basis of the documents (evidence) filed in the case. As to the submission of evidence, it is provided that the arbitrators are authorized to decide upon what proof they intend to admit and to appoint experts. They may also, at any time during the procedure, require the parties to produce supplementary documents or exhibits within such period as they shall determine;

The provisions regarding the measures of conservation and security for costs of the arbitral procedure (articles 27 and 28 of the Rules) authorized the arbitrators, subject to certain legal provisions to the contrary and the request of the parties, to take any measure of conservation of the goods forming the subject-matter in dispute, such as the ordering of their deposit with a third party, the opening of a banker's credit or the sale of (perishable) goods; they are also authorized to require a party to provide security for the costs of the arbitration proceedings.

The provisions regarding the arbitral award (articles 33-42) also embody a whole series of interesting solutions. Thus, with regard to the role of the presiding arbitrator in the making of awards, article 33 provides that, where the arbitral tribunal consists of two arbitrators and a presiding arbitrator, the award shall be made by a majority of votes, but failing that majority, the presiding arbitrator is entitled to make the award alone; the solution adopted in respect of the time-limit within which the arbitral award must be made (articles 34-35) makes it possible, in our opinion, to interpret the time-limit stipulated in article 34 as a recommended time-limit, since it may be extended by the parties or by the arbitrators for any valid reason; the solution adopted for the place of the award (article 37), although it is new in institutional practice, is considered by commentators to be a very welcome one since it is entirely in accord with the needs of international arbitration and avoids the difficulties of enforcement which are sometimes inherent in international awards;[38] the solution adopted on the law applicable for the substance of the dispute (article 38) also embodies here, for the first time, the principle of the autonomy of the parties' will in determining the law applicable and, failing any indication thereof by the parties, it establishes the role of the arbitrators in the choice of the rule of conflict applicable. However, in both cases (whether the law applicable is determined by the parties or according to the rule of conflict chosen by the arbitrators), the text of article 38 specifies that the arbitrators must take account of the terms of the contract and trade usages.[39] Article 42 contains a provision identical to that appearing in the arbitral clauses, namely, that by submitting to the Rules the parties undertake to carry out the award without delay and, subject to any legal provisions to the contrary, renounce any right of appeal either before another arbitral institution or before a court of law.

61. Among the other regional economic commissions of the United Nations, the Economic Commission for Asia and the Far East has undertaken and continues to undertake intensive activities relating to arbitration. In 1958 the ECAFE secretariat and the United Nations Office of Legal Affairs completed a study on arbitral legislation and the possibilities of arbitration in certain countries of Asia and the Far East, and a Centre for Commercial Arbitration was established in the ECAFE secretariat at Bangkok in 1962. The Centre co-operates with the Office of Legal Affairs and with the trade experts and correspondents appointed by member countries, in its efforts to make recourse to commercial arbitration a more general practice and to promote the establishment and improvement of arbitral institutions and arbitration methods in that region.

In January 1966, the ECAFE Conference on International Commercial Arbitration met at Bangkok and recommended the preparation of a set of arbitration rules. This has now been done and the said Rules have been brought to the attention of Chambers of Commerce, legal and trade associations, universities and other bodies.

As is explained in the report of the Secretary-General of the United Nations on the progressive development of the law of international trade,[40] the Conference also considered it advisable that separate lists of arbitrators and appointing authorities be prepared by the ECAFE Centre in consultation with Governments, national correspondents of the Centre and other appropriate institutions. In another recommendation the Conference dealt with the dissemination of model arbitration clauses and also agreed on certain standards of conciliation which would be appropriate as a guide to parties who wished to have recourse to conciliation for the settlement of their disputes. The Conference recommended that the standards should be adopted by the ECAFE Centre and disseminated throughout the region in the same manner as the rules for arbitration. The Conference also proposed that the ECAFE Centre should invite each of the main Chambers of Commerce of the region, through their respective Governments, to constitute panels of businessmen who would be prepared to sit on conciliation committees whenever so requested by parties.

62. The ECAFE Rules for International Commercial Arbitration are in many respects similar to the 1966 Geneva ECE Arbitration Rules, the drafting of which was in turn largely inspired by a comparative study

[38] See Peter Benjamin, "Nouveau Règlement d'Arbitrage pour le Commerce International" in IAL, Arbitrage International Commercial, vol. III, The Hague, 1965, p. 348.

[39] This provision, like that in article 39 of the Rules, is considered by commentators to be of great importance for the development of commercial arbitration, since it expressly recognizes the possibility of an arbitral award based on the stipulations of the contract and on trade usages and which, consequently, would be independent of any system of municipal law. See Peter Benjamin, in IAL, *op. cit.*, p. 350.

[40] *Official Records of the General Assembly, Twenty-first session, Annexes*, agenda item 88, document A/6396, para. 83; UNCITRAL Yearbook, vol. I: 1968-1970, part one, II, B.

of the rules of procedure of the various international arbitration bodies. Thus it may be said that the drafting of the ECAFE Rules was an attempt to establish an arbitration procedure which would represent in fact a harmonization of the rules of arbitration procedure prevailing in different countries.

The ECAFE Rules, according to article I, 1 (*a*) are applicable to the arbitration of disputes *arising from the international trade of the ECAFE region.* Point 1 (*b*) of the same article specifies which disputes are included in the category of disputes arising from international trade, and paragraph 1 (*c*), which disputes may be considered to have *arisen from the international trade of the ECAFE region.*

Under article I, 2, the ECAFE rules apply in cases where parties to the types of contract enumerated in paragraph 1 (*c*) have agreed that disputes which have arisen or which may arise out of a contract made between them shall be referred to arbitration under the ECAFE Rules. Such an agreement by the parties may be included in the contract or concluded separately after a dispute has arisen.

It is also stipulated in article I, 3 that disputes referable to arbitration under the ECAFE Rules may include those to which a government or state trading agency is a party.

The organization proper of the arbitration (the solutions to which the parties may resort to appoint the arbitrators, the method of choosing the place of arbitration, and the rules under which the arbitrators must conduct the arbitration) are regulated in articles II-VI of the Rules.

The ECAFE Rules also embody, as Professor Pieter Sanders has remarked, "the usual pattern"[41] regarding the appointment of arbitrators (article II) in the sense that it is primarily left to the parties to choose the arbitrators (paragraphs 1, 2 and 3). The parties may have recourse to the Special Committee established under article V of the above-mentioned Rules, only if they are unable to agree on the procedure for appointing the arbitrators, or if one of them fails to appoint an arbitrator, or if the arbitrators appointed by them are unable to choose the presiding arbitrator. In such cases the Special Committee has the option of either making the necessary appointment or designation itself or, at its discretion, of selecting an authority to make the necessary designation.

Under the arbitration procedure instituted by the ECAFE Rules, the parties which have agreed to adopt them are free to choose arbitrators of any nationality or any arbitral institution they consider appropriate to arbitrate the dispute (article II, 2). However, under article II, 4 the parties are given some assistance in the appointment of the arbitrators or the choice of an arbitral institution in the sense that the ECAFE Centre has to keep a list of persons who may be chosen by the parties as arbitrators and a list of appointing authorities who may be requested by the parties to designate the arbitrators.

Regarding the place of arbitration (article IV), the ECAFE Rules also uphold the idea that the will of the parties is decisive. Article IV allows them to agree either by contract, even at some later date, on the place of arbitration or to leave this choice to the arbitrators appointed by them (article IV, 1), or to agree on any other procedure for its determination (article IV, 2). Where no agreement is reached thereon, the parties may then have recourse to the Special Committee established under article V, which will determine the place of arbitration (article IV, 2).

The ECAFE Rules recommend, in cases where the parties themselves agree on the place of arbitration or where the determination is made by the Special Committee, that certain factors [enumerated in article IV, 1 (*a*), (*b*), (*c*), (*d*) and (*e*)] should be taken into consideration. The factors are conducive to the determination of the place of arbitration most suitable for ensuring that the arbitration of disputes can be conducted in conditions favourable to the case.

Regarding the rules of procedure to be taken into consideration by the arbitrators for the proper conduct of the arbitration, the ECAFE Rules also provide that the arbitral procedure to be followed should be the most appropriate to the case, and that the parties should be treated with absolute equality (article VI, 1 and 2).

The arbitrators are entitled to decide on the existence and validity of the arbitration agreement, to determine their own competence and, when applying ECAFE Rules, to interpret them (as necessary). It is also their responsibility to determine the periods within which the parties are to fulfil certain obligations incumbent upon them (article V, 3 and 4).

It must be remembered, however, that under the procedure adopted by the ECAFE Rules, oral hearings are not mandatory unless the parties so agree or the arbitrators so decide (article VI, 5).

The award is made—where the arbitration is conducted before an arbitral tribunal—by a majority of votes. Failing a majority, the ruling of the presiding arbitrator constitutes the decision of the arbitral tribunal.

Of the provisions concerning the award (article VII), the one which particularly commands our attention is the solution adopted by the ECAFE Rules on the law applicable. Under article VII, 4 (*a*), the parties are entitled to determine the law to be applicable to the substance of the dispute. Should the parties fail to indicate that law, however, the text provides that "the arbitrator/s shall apply the law he/they consider/s applicable in accordance with the rules of conflict of laws".

Whether the parties have specified the law applicable or not, the arbitrator or arbitrators must take account or the terms of the contract and trade usages.

The ECAFE Rules also allow the parties to authorize the arbitrators to decide *"ex aequo et bono (amiables compositeurs)"*, provided they may do so under the law applicable to the arbitration. It should be noted here that the ECAFE Rules do not expressly provide that the reasons for the decision must be given.

Article VIII, 2, which contains miscellaneous provisions, states that, after the award has been made, either of the parties may within a period of 30 days, with the necessary notice to the other party, request

[41] Pieter Sanders, "ECAFE Rules for International Commercial Arbitration", *Liber Amicorum for Martin Domke*—Martinus Nijhoff, The Hague, p. 257.

the arbitrators for an authentic interpretation of the award. The arbitrators must comply with the request and communicate the decision to both parties.

2. *Activities undertaken under the auspices of international bodies other than the United Nations*

63. In 1958 the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (CMEA) came into effect in those countries. Until 1958 the delivery of goods between these countries was regulated by general conditions established annually in bilateral conventions. With the experience acquired from the implementation of the bilateral conventions it was possible to adopt multilateral General Conditions, establishing uniform rules for the delivery of goods between organizations of CMEA member countries. These include numerous rules of substantive and procedural law and some rules concerning the conflict of laws (private international law).[42] These General Conditions were re-examined after 10 years in the light of the experience gained and were slightly modified and added to,[43] and in 1969 the revised General Conditions of Delivery of Goods (CMEA, 1968) came into force.

There is no need to analyse here these General Conditions or the discussions which were held on their nature, character and content.[44] What must be noted is the way in which the settlement of disputes arising between trading organizations of CMEA member countries over the delivery of goods is regulated.

64. The settlement of disputes is dealt with in paragraphs 90 and 91 of the CMEA General Conditions (1968), which do not differ essentially from paragraph 65 of the 1958 General Conditions. According to these paragraphs, all disputes which may arise out of or in connexion with a contract are to be settled by arbitration before an arbitration tribunal or commission established for such disputes in the country of the defendant or, by agreement of parties, in a third CMEA member country, the competence of general courts being excluded.

The arbitration tribunal which is competent to hear the original suit will also be competent to settle counter-claims and set-offs, provided they relate to the same legal relationship as the original suit; this condition was not included in the 1958 text.

The procedure to be followed in settling disputes is that operative in the arbitration tribunal in which the case is decided.

The text further states that cases are to be considered in the language of the country of arbitration, although translation into another language is to be provided when requested by one of the parties. This provision also relates to the awards rendered.

Lastly, arbitration awards are to be final and binding on the parties.

65. As may be seen, the two aforementioned paragraphs establish, very succinctly, a real arbitral system with all the minimum rules needed to guarantee the efficient settlement of disputes. For example, of all the many criteria used to determine the venue of the competent arbitration tribunal, it was agreed that, as a general rule, that of the defendant's domicile would be used, that is to say the rule *actor sequitur forum rei* was adopted, on the ground that that criterion best expressed, from the legal viewpoint, the idea of equality between the parties and reflected the partners' mutual trust.

The competence of the arbitration tribunal in which the original suit it considered was extended to include counter-claims and set-offs, thus eliminating any possible legal controversy and saving the parties time, money, and so on.

The jurisdiction of general courts was expressly excluded in the case of disputes concerning foreign trade, since such disputes fall within the jurisdiction of the Arbitration Commissions of the Chambers of Commerce and it was made clear that arbitral decisions rendered by these Commissions are final and binding.

Although no uniform arbitration procedure has been established, this procedure is determined clearly by the express reference to the regulations concerning the organization and operation of the competent Arbitration Commission, that of the Chamber of Commerce of the respective member country. This reference guarantees the effectiveness of the arbitral clause in all cases because, as everyone knows, all the arbitration Commissions of the Chambers of Commerce of CMEA member countries are institutional, permanent and have regulations setting out the necessary procedural rules which do not vary, so far as basic principles are concerned, from one Commission to another.

Since the General Conditions of Delivery of Goods also set out the substantive law applicable to relations between the parties, it can be considered that the arbitral system just described has all the essentials needed for efficient arbitration: a clearly identified, competent arbitration tribunal, a specific arbitral procedure and a clearly indicated law which is applicable to the substance of the dispute.

The system is based on co-operation among the various arbitration institutions of CMEA member countries, which operate on the basis of similar principles.

66. This co-operation is carried out principally through periodic conferences[45] organized by these countries' Chambers of Commerce to exchange experience concerning the problems arising from the implementation of the General Conditions of Delivery and the regulations of the Arbitration Commissions, in order to ensure that the provisions in question are uniformly interpreted.

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[42] The most important of these is the rule contained in paragraph 74, which states that when a problem is not regulated or is incompletely regulated by contracts or by the General Conditions the *substantive law of the seller's country* shall be applied.

[43] One of the most important additions was the insertion of a new chapter, chapter XVI, which provides for the uniform regulation of limitation of action.

[44] For further details see Peter Katona, "The International Sale of Goods among the Member States of the Council for Mutual Economic Assistance", in *Colombia Journal of Transnational Law*, No. 2/1970, one of the most recent works on the subject.

[45] Since 1958 six Arbitration Commission conferences have been held, at Prague, Moscow, Berlin, Warsaw, Varna and Bucharest. For details, see S.N. Bratus, *"La coopération entre les organismes d'arbitrage des pays socialistes d'Europe"*, in *Revue de l'arbitrage* 1969, No. 4 (spécial), pp. 171 *et seq.*

Important decisions of principle taken by the arbitration bodies are systematically exchanged and nearly all the Arbitration Commissions publish collections of arbitral practice concerning foreign trade or theoretical studies of such practice.

The development and consolidation of economic relations between CMEA member countries lead to still closer relations between these countries' foreign trade arbitration and hence to the improvement of the specific forms of co-operation between them.

Activities designed to further such improvement undertaken by existing foreign trade arbitration bodies of CMEA member countries have the following principal aims:[46]

Enlarging the competence of the bodies concerned to include any civil law dispute between economic organizations stemming from relations concerning any kind of economic, technical and scientific collaboration between CMEA member countries;

Enlarging the exchange of information (including information about arbitral awards) between arbitration bodies, in order to facilitate the uniform implementation by the various arbitration bodies of the provisions of the General Conditions of Delivery of Goods between Organizations of the Member Countries and other instruments regulating their economic, technical and scientific collaboration in various fields;

Harmonizing and unifying the rules of procedure of the national arbitration bodies of the Chambers of Commerce of CMEA member countries.

67. Western European countries, too, have long shown a particular interest in the unification of arbitration rules. Thanks to our distinguished colleague,[47] Mr. Paul Jenard, of the Belgian delegation, we are in a position to inform members of UNCITRAL of the activities undertaken in those countries. On 24 September 1954 the Consultative Assembly of the Council of Europe expressed the opinion that "arbitration procedure in international private law relations is of sufficient interest to justify finding out without further delay whether it is possible to unify the legislation of member States relating to that subject". The Assembly's Legal Committee then proceeded to examine the draft uniform law prepared by UNIDROIT in Rome and, after making various amendments, the Assembly suggested to the Committee of Ministers in recommendation No. 156 of 17 January 1958 "that a committee of governmental experts be appointed to draft a European Convention on Arbitration in respect of International Relations of Private Law". The Committee suggested that encouragement should be given to the preparation of a convention providing a uniform law on arbitration which would replace the national laws of contracting States. This suggestion was adopted and the Committee, basing itself on the UNIDROIT draft succeeded in adopting a "European Convention providing a uniform law on arbitration" whose main points we will try to present hereafter.

68. Whereas the UNIDROIT draft dealt with arbitration in international relations, the European Convention seeks to unify the domestic laws on arbitration of the various Contracting States. It was considered that the system adopted "avoided the difficulties that would have resulted from the co-existence in the Contracting States of two sets of arbitration laws, one relating to national and the other to international arbitration. In addition, amendments to codes of civil procedure which several countries are preparing at present would thus be allowed for. Finally and above all, as the adoption of a uniform law would provide an identical regulation of arbitration, wherever the proceedings might take place, it would assure an increase of legal security in international commercial relationships, by putting an end to conflicts of international private law".[48]

The texts adopted at Strasbourg fall into four categories: the Convention, the Uniform Law, reservations and relations between the Convention and other international instruments.

69. Primarily, the Convention binds the Contracting States to incorporate the provisions of the Uniform Law in their own legislation. Ideally, these should be reproduced verbatim in the various legislations and in the order established by the Uniform Law. Given the diversity of the rules of civil procedure and of the system of courts, it was, however, necessary to enable States to take the measures required for the incorporation of the Uniform Law in the entirety of their legal system. Certain alterations are accordingly authorized —those stemming from the exercise of reservations or rights, and such supplementary modifications as are deemed necessary either to regulate questions not provided for in the Uniform Law (for example, the capacity required to act as an arbitrator, counter-claims etc.), or to refer to other provisions of municipal law—for the purpose of ensuring the application of the Uniform Law.[49]

The Convention allows Contracting States to except from the application of the Uniform Law certain specific matters which may, however, be the subject of a compromise. Each Contracting Party can declare that it will apply the Uniform Law only to disputes arising out of legal relationships which are considered to be commercial by virtue of its national law. The Convention bars provisions excluding aliens from being arbitrators.

70. With regard to the Uniform Law the following should be noted: it makes no distinction between an arbitral clause and a separate arbitration agreement (in both cases the term used is arbitration agreement); the dispute must be one which has arisen out of a specific legal relationship and in respect of which it is permissible to compromise; the capacity required to compromise is not regulated in the Uniform Law; an arbitration agreement must be constituted by an instrument

[46] See the complex programme for strengthening and improvement through collaboration and development of the socialist economic integration of CMEA member countries, chapter 15, part IV, in *Scînteia* of 7 August 1971, Bucharest.

[47] See Paul Jenard, "Draft European Convention providing a Uniform Law on Arbitration", in IAL, op. cit., vol. III, pp. 371 *et seq.* We also wish to thank our eminent colleague for sending us the bill submitted to the Belgian Chamber of Representatives on 19 May 1971, approving the European Convention providing a Uniform Law on Arbitration, done at Strasbourg on 20 January 1966, and introducing a sixth part on arbitration into the judicial code.

[48] R. David, "Arbitrage et droit comparé", *Revue internationale de droit comparé*, No. 1/1959.

[49] Paul Jenard, loc. cit., p. 372.

in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration (it is not clear whether the written form is required *ad validitatem* or *ad probationem*); if, in an arbitration agreement, the parties have referred to a particular arbitration procedure, that procedure is deemed to be included in the agreement (this provision can be omitted from the national laws); an arbitration agreement will not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators; the Uniform Law establishes the principle of an uneven number of arbitrators (article 5 provides for the various situations that may arise); articles 7-14 regulate clearly questions relating to the constitution of the arbitral tribunal (giving of notice, challenges, replacements, role of the "judicial authority", etc.); the parties are free to decide on the rules of the arbitral procedure and on the place of arbitration (but they must observe some basic rules guaranteeing the right to defence, the principle of *audiatur et altera pars*, etc.); the arbitral tribunal may determine its own competence; nullity of the contract does not *ipso jure* imply nullity of the arbitration agreement contained in it;[50] unless there is a provision to the contrary the arbitral tribunal's ruling is to be final; similarly, unless the parties decide otherwise,[51] arbitrators are to rule according to the rules of law; the award must state the reasons on which it is based in all cases;[52] an arbitral award may be contested before a judicial authority only by way of an application to set aside and may be set aside only in the cases mentioned in the Uniform Law[53] (and is therefore not appealable before the judicial authorities); a decision refusing the enforcement formula is appealable;[54] an appeal against the decision to appose an enforcement formula (art. 30) must be submitted within one month from the date on which the decision was notified; the law requires that proceedings be consolidated when the party means to contest both the decision apposing the enforcement formula and the award itself;[55] the law contains no provision concerning the enforcement of foreign arbitral awards.

71. We have already spoken of the activities undertaken prior to the Second World War by the Inter-American Commercial Arbitration Commission, a non-governmental organization established in 1934, and of the inter-American commercial arbitration system.[56]

After the Second World War, efforts to bring about the adoption of uniform rules on international commercial arbitration and the organization of an efficient inter-American system were resumed.

At its first meeting, held at Rio de Janeiro in 1950, the Inter-American Council of Jurists assigned to the Inter-American Juridical Committee the study of the topic "International commercial arbitration" under the topic "Uniformity of legislation".[57] The Committee prepared a draft uniform law on the question, and after observations had been submitted and amendments made, the draft was approved by the Inter-American Council of Jurists at its third meeting, held in Mexico City in 1956 (resolution No. VIII). The Council recommended that "to the extent practicable, the American Republics adopt in their legislation, in accordance with their constitutional procedures, the draft Uniform Law on Inter-American Commercial Arbitration in such form as they consider desirable within their several jurisdictions".

72. In addition, the Committee deemed acceptable the idea of concluding an inter-American convention on commercial arbitration "but not as a substitute for the Mexico City draft, as a complement to that draft rather than as an alternative to it".[58]

The report of the Inter-American Juridical Committee noted, among other things, that the Governments of the American hemisphere believed that it was not appropriate to participate in the New York Convention of 1958 or the Geneva Convention of 1961, preferring "to preserve an inter-American commercial arbitration system". The European Convention was not acceptable in the Americas since it neither did—nor should it speak of the Inter-American Arbitration Commission, which, in the American hemisphere, was "the key institution for the development of arbitration", and because it "contemplates especially the case of juridical persons under public law who are authorized to conclude valid conventions on arbitration, that is, it refers to associations that direct or carry on foreign trade in the socialist States".[59] Furthermore, the European Convention "contains desirable stipulations, but its wording is inferior to that of the Mexico City draft, which is more concise and clear and has a better literary and juridical style".

The New York Convention of 1958 would be admissible for the American States which might adhere to it, "however, the Mexico City draft being a draft law is more extensive, encompassing matters not included in the Convention".

73. The draft convention recommended by the Inter-American Committee establishes the validity of the arbitration clause without making any distinction between disputes that have arisen and disputes that may arise; it allows aliens to be arbitrators; it states that the designation of arbitrators may be delegated to a third party who may be a natural or a juridical

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[50] The Contracting Parties may settle this question differently.

[51] The Contracting Parties may provide in their national laws that dispensation from ruling according to the rule of law should be granted only after the dispute has arisen.

[52] The Contracting Parties may omit a similar provision from their national law or derogate from a similar provision if they so wish.

[53] The Contracting Parties may derogate partially from a provision (paragraph 3 (c) of article 25). The Uniform Law establishes the periods within which application must be made, on pain of being barred, except when the award is contrary to *ordre public* or when the dispute was not capable of settlement by arbitration.

[54] The nature of this appeal and the period within which it must be submitted are not specified.

[55] Obviously, the application to set aside may be made in so far as the three-month period specified in the Uniform Law has not elapsed.

[56] See paras. 19-21 above.

[57] Work accomplished by the Inter-American Juridical Committee during its 1967 regular meeting, Pan American Union, General Secretariat, OAS, 1967, p. 31.

[58] *Ibid.*, p. 37 .

[59] The Special Rapporteur considers that this assessment is incorrect, since foreign trade associations in the socialist States have always had the capacity to conclude valid arbitration agreements. See para. 25 above.

person;[60] the procedure to be applied is to be that agreed on by the parties concerned; if there is no such agreement, preference is to be given to the procedure provided by the local arbitration law and if there is no express or presumed agreement, the procedure is to be established by the arbitrators; if the arbitrators are appointed by an Inter-American Arbitration Committee, the procedure is to be that established by the Regulations of the IACAC and the public policy provisions of the local law will be respected. The draft convention also states that arbitration awards have the force of a final judgement and that their execution may be enforced in the same manner as judgements of a court. The party against whom the award is made may oppose its execution only by submitting an appeal[61] to the judicial authority of the place where the award was pronounced.

74. The draft uniform law on international commercial arbitration takes up certain provisions of the draft convention (validity of the arbitral clause, appointment of the arbitrators, capacity of aliens to be arbitrators, arbitral procedure, binding nature of the award, appeal to the judicial authority) and contains 20 articles in all. Mention should be made of article 2 (which states that only those who have the legal capacity to contract according to their personal law can sign the arbitration clause), article 8 (which states that if the arbitration is in law the arbitrators must also be lawyers), article 14 (which states that the Arbitration Tribunal may not function unless all the arbitrators are present) and article 16 (which states that the arbitrators shall decide the controversy as *amiables compositeurs* unless the parties have agreed upon another basis for the decision in the arbitration clause or in a later agreement of which the arbitrators have been informed).

75. In 1967, in the course of the work done by the Inter-American Committee, note was taken of the difficulties of the inter-American arbitration system and mention was made of the somewhat apathetic attitude of the Inter-American Commercial Arbitration Commission established in 1933.[62] During 1967 the American Arbitration Association with the support of a few leading South American businessmen and lawyers, sponsored a series of three meetings to determine whether there was a need for improved inter-American arbitration facilities and if so, what improvements were indicated.[63] The conclusions arrived at during the meetings led to a determination to reorganize IACAC. The decision to reorganize the organization was taken at Mexico City in 1968. The headquarters of IACAC was moved from New York City to Rio de Janeiro and a new Board was formed that included representatives of the national sections. One of the main features of the reorganized IACAC was that a national of any country could file cases through his own national section; if he were the defendant, he would be notified by his own national section. Standards were developed for each national section as organs of IACAC. The old centralized system thus gave way to a decentralized one based on national sections, one in each country. Among other things, each section is to have a board of directors, the majority of whose members should be nationals of the country, must establish and maintain a list of competent arbitrators and forward copies of their *curriculum vitæ* to IACAC, must organize education and training programmes, and so on. The functions of the reorganized IACAC were reduced mainly to providing assistance.

76. Arbitration has recently begun to go beyond the framework of purely commercial transactions and to extend also into the broader field of international co-operation. We have already remarked on this trend.[64] Another illustration of this trend is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. The Board of Governors of IBRD, in its resolution 214 of 1964, decided to prepare this Convention at the request of numerous Governments of member countries which had requested its assistance in solving certain investment disputes.

The Convention establishes the International Centre for Settlement of Investment Disputes, whose purpose is "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States" (art. 1-2). The Centre does not itself act as conciliator or arbitrator, but will make its services available to conciliation commissions and arbitral tribunals established in accordance with the provisions of the Convention. The organs of the centre are: (*a*) an Administrative Council consisting of a representative of each Contracting State, and (*b*) a Secretariat. The Centre must maintain a Panel of Conciliators and a Panel of Arbitrators, from which the parties to a dispute may choose the members of the commission or tribunal to which the dispute is submitted.

77. The jurisdiction of the Centre with regard to the settlement of disputes is founded on the written consent of the parties, which must be given for every case and extends to all "legal disputes arising directly out of an investment" (art. 25.1), between a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State (whether a natural or juridical person). It is therefore not enough for a State to have ratified the Convention. It remains free to accept or reject the arbitration organized by the Centre. Any Contracting State may notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre (art. 25.4). Under article 41 of the Convention the arbitral tribunal is to be the judge of its own competence.

It should be noted that the IBRD Convention provides in article 42.1 that the arbitral tribunal shall

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[60] This stipulation was considered very important in America since it authorized the procedure which the Inter-American Commercial Arbitration Commission (IACAC) had advocated since 1934.

[61] Article 5 lists the six cases which may be grounds for the setting aside of the arbitration award.

[62] In many countries there are no national committees. According to official information, the committees operate fully and successfully only in three countries—Argentina, Colombia and Venezuela—and less intensively in Brazil, Chile, Guatemala and Peru.

[63] See Donald Straus "Co-operation amongst Arbitration Organizations of the Americas", first report to the Third Arbitration Congress, Venice, 1969.

[64] See para. 66 above. The ECAFE Rules also mention disputes arising out of contracts concerning industrial, financial or engineering services; see also para. 57 on the arbitration conducted within the framework of EEC.

apply the law agreed to by the parties and, if the parties give no guidance, it shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws). The arbitrators must state the reasons on which the award is based. Any award which fails to state the reasons on which it is based is invalid (art. 52.1). An award rendered under the Convention is binding on the parties, and is not subject to any appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (art. 51) and annulment (art. 52) of the award. Either party may, in addition, request an arbitral tribunal which has omitted to pronounce on a question to complete its award and may also ask it to interpret it.

The Convention came into force on 14 October 1966, that is, 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval.[65]

78. In describing the Convention, G. R. Delaume[66] notes that unlike other attempts to promote conciliation and arbitration under existing institutions, "the Convention does not simply make available to those concerned mechanisms which are particularly suited to the personality of the parties concerned or to the nature of their disputes. It also tries—and this is one of its principal features—to maintain as far as possible a balance between the opposing interests. For this purpose the Convention contains fundamental provisions which may be applied to the advantage or disadvantage of investors of States and which are designed both to clarify the conditions under which the Centres' mechanisms may be used and to ensure that the obligations voluntarily assumed by the parties in agreeing to accept the Convention are respected".

3. *Work on unification and harmonization undertaken by research organizations*

79. The forty-first Conference of the International Law Association—the first such meeting after the Second World War—was held at Cambridge in 1946, when the discussions on international commercial arbitration, among other topics, were resumed. The report prepared by Sir Lynden Macassey, President of the Institute of Arbitrators in London, proposed the formulation of "an effective system of private international commercial arbitration" dealing with a variety of essential aspects as follows:

The arbitral clause (in which the parties would also indicate the law applicable to the contract);

Rules of arbitration (taking into account the fact that the Amsterdam Rules of 1938 had not for the most part been accepted because they did not provide for the alternative of an *amiable compositeur* and were also too legalistic in form);

The national administrative organization (which would have offices, panels of arbitrators, etc.);

Uniform rules concerning international commercial arbitration (with each State adopting a uniform law on arbitration);

An International Supervisory Authority (to be organized within the framework of the United Nations).

80. It should be noted that shortly before this, but still in 1946, there had been a Conference organized by ICC and attended by representatives of the arbitral associations of the United States, Canada, the United Kingdom and the USSR, or of certain institutions, such as UNIDROIT and ILA, at which it was decided to undertake a joint study on the problems of international commercial arbitration, together with an exchange of information; the committees wishing to participate in the study were to be convened by ICC.

In addition, ICC had been recommended to publish information brochures on arbitration in individual countries (the text of which would be approved by the national committee), and the desire was expressed that the problems to be discussed in committee should include the following: co-ordination among the four major arbitral associations (of the British Empire, the western hemisphere, the USSR and ICC); unification of the laws concerning arbitration, and in particular the rules of arbitral procedure, including the recognition and enforcement of arbitral awards; arbitration between Governments and private persons; and education in the field of international commercial arbitration.

81. At the forty-third Conference of the International Law Association, held at Brussels in 1948, the discussions relating to the adoption of new rules concerning arbitration were continued and it was decided that the draft rules should be finalized at the following Conference, which was held in 1950, when what are known as the "Copenhagen Rules, 1950", were adopted.

The arbitral clause adopted at Copenhagen reads as follows: "Any dispute concerning this contract shall be settled in accordance with the ILA arbitration rules, known as the 'Copenhagen Rules, 1950'." By agreeing to the above arbitral clause or any equivalent thereof, the parties indicate their intention to be subject to the Copenhagen Rules, in so far as they have not expressly stipulated to the contrary. They thus are debarred from having recourse to the courts of law on the substance of the dispute (although the courts still have jurisdiction as regards interim or urgent measures).

The first eight articles of the Copenhagen Rules deal with the composition of the arbitral tribunal. The Chairman of the Executive Council of ILA intervenes in the event of a party's or an arbitrator's failure to act which may prevent the setting up of the arbitral tribunal. The other rules are also very simple: No arbitration agreement is drawn up unless the law of the place of arbitration or of enforcement, if any, so requires; the arbitral tribunal determines the place of arbitration, establishes the procedure and the investigation measures and decides whether the parties must appear in person or be represented. Reasons must be given for the award, which must be in the form required by the law of the country in which it is to be enforced. The award is final, and the parties waive any right of recourse which they can validly waive. Provision is made for the possible rectification or interpretation of the award. Lastly, should any provision of the Rules

[65] So far over 54 countries have become parties to the Convention.

[66] G. R. Delaume, "La Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats", *Journal du droit international*, No. 1/1966, pp. 28-29.

be legally prohibited, it would be deemed to be not written (*non écrite*), as would any provisions that were strictly incompatible with the voiding of the provision in question.

82. In 1952, at its Sienna session,[67] the Institute of International Law discussed the report prepared and the draft resolution proposed by Professor Sausser-Hall on the question of arbitration in private international law. The Special Rapporteur felt that it would be useful to give an outline of this work also, in view of the difference in approach and in resolving the problems involved as compared with the approach adopted by the International Law Association and by the International Institute for the Unification of Private Law at Rome.

The work of the Institute of International Law took as its starting-point the idea that "the formulation of a uniform law is a very long-term undertaking, and no one can say when, or whether, it will be achieved. Moreover, even if it were completed, it is realistic to acknowledge that it would not eliminate all conflicts of laws", and "lastly, it is unlikely that all States would subscribe to any unified law, so that there will always be conflicts of laws to be resolved in relations with dissenting States".[68] This being so, and "considering that private arbitration, being juridically *sui generis*, cannot be governed in international relations by a single law because, although it derives its effectiveness from the agreed intent of the parties as demonstrated by the arbitration contract, it is of a judicial nature involving the application of rules of procedural law",[69] Both the report submitted and the draft text adopted confine themselves to resolving conflicts of laws to which it gives rise: conclusion of the arbitration agreement, determination of the arbitral procedure, the making of the award and the means of contesting it and setting it aside, and enforcement of the award in a country other than that in which it was made.

83. With regard to the last-mentioned problem, the draft, after laying down that the governing law shall be that of the place at which the arbitral tribunal has its seat, providing for the deposit of the award and the formalities to be complied with in order to make it final and binding, and specifying how the awards of arbitrators may be contested and before what authorities, goes on to deal (in articles 13-19) with the question of "international recognition and enforcement".

The approach taken in the draft adopted by the Institute of International Law is that foreign arbitral awards must be recognized and enforced by all States in whose territory the awards could be relied upon, as soon as they have become final and binding under the laws of the country in which the arbitral tribunal has its seat. Eight cases are specified in which foreign arbitral awards cannot be recognized or enforced.

1. Where the award has been set aside in the State in which the arbitral tribunal has its seat;
2. Where the parties were not properly summoned or represented;
3. Where the award conflicts with a decision rendered, subsequent to the conclusion of the arbitration agreement, by a judicial or administrative authority of the country in which it is relied upon;
4. Where the arbitrators exceeded their terms of reference;
5. Where the award did not rule on all the submissions of the parties;
6. Where no reasons are given for the award, although the parties agreed that reasons would be given;
7. Where the award is contrary to the public policy of the country in which it is relied upon, including cases where the arbitration agreement or arbitral clause places one of the parties in a privileged position with regard to the appointment of the arbitrators.

In addition to direct action to obtain enforcement through official channels, the draft also provides for action *ex contractu* or, in other words, action based on the contractual nature of the arbitration agreement or arbitral clause, under the conditions laid down by the law of the country in which enforcement is sought.

Both in the case of enforcement obtained through official channels by direct action and in the case of action *ex contractu*, the court seized of the request would not, according to the provisions contained in the draft, be entitled to consider the substance of the dispute.

84. The discussions concerning the rules applicable to arbitration in private international law continued after adoption of the resolutions at the sessions in Amsterdam (1957) and in Neuchâtel (1959), resulting in the formulation of the text of certain unified rules, known as the "Neuchâtel Rules". Generally speaking, the Neuchâtel Rules retain the substance of the solutions recommended in 1952, according special importance to the seat of the arbitral tribunal as a governing criterion.

For example, the capacity to conclude arbitration agreements will be governed by the law indicated by the rules of conflict of the forum (article 4); the validity of an arbitral clause is governed by the law of the seat of the arbitral tribunal (article 5, para. 7); the capacity to submit certain disputes to arbitration is determined by the law applicable to the substance of the dispute, but that law will be determined by the rules of conflict of the country where the arbitral tribunal had its seat (article 5, para. 2); the contractual relationship between the parties and the arbitrators is governed by the law of the country in which the arbitral tribunal has its seat, which also governs the composition of the arbitral tribunal, the arbitration procedure to be followed, and challenges to and replacement of arbitrators (article 8); the law applicable to the substance of the dispute must be determined by the rules of conflict of the country in which the arbitration takes place (article 11). Because of the importance of the place of arbitration, articles 1 and 2 lay down detailed provisions on how it is to be established. Where the recognition and enforcement of foreign arbitral awards are concerned, only five cases of refusal are now provided for, as compared to the eight contained in the 1952 draft. It should be noted in this connexion that the setting aside of the award in the State in which the arbitration took place and the fact that one party was placed in a privileged position with

[67] See Professor Sausser-Hall's report on arbitration in private international law, in *Annuaire de l'Institut de droit international*, Basel, 1952, I, vol. 44, pp. 469-614.

[68] Sausser-Hall report, op. cit., p. 515.

[69] Sausser-Hall report, op. cit., p. 471.

regard to the appointment of the arbitrators are no longer included among the grounds for refusing enforcement. The provision for action *ex contractu* has also been dropped.

85. Unlike the Institute of International Law, an account of whose work has been given immediately above, UNIDROIT has, on the basis of its general conception of the need for the unification of private law, maintained its view that unification of the laws relating to arbitration is possible and would be of very great value to business. This is especially true in view of the fact that the inconvenience resulting from the diversity of laws can be obviated only to a very minor degree by the parties concerned, and in particular the fact that the parties lack the power to regulate for themselves either the question of the enforcement of arbitral awards or the equally vital question of what means may be employed to contest awards. A uniform arbitration system presupposes a uniform law on arbitration. Consequently, after the Second World War, UNIDROIT resumed the work which, as shown above, it had been doing before the war,[70] by revising in 1953 its draft Uniform Law on Arbitration in respect of International Relations of Private Law.[71] The draft, in its new form, was widely disseminated and formed the basis for nearly all the work done in the succeeding years at the national, regional or international level. Its provisions are, with few exceptions, identical with those of the 1937 draft, which was described in chapter II of this part.

4. *Seminars, congresses, conferences and other types of international meetings organized in recent years to discuss the main problems of commercial arbitration*

86. The International Association of Legal Science, with the assistance of UNESCO, organized a meeting between jurists from Eastern European countries and jurists from Western Europe and the United States of America in March 1958 at Rome. Discussions were held on the special legal aspects of trade relations between countries with different economic structures. One of the working papers circulated at the Conference and discussed by the experts was "*L'Arbitrage dans les différends commerciaux entre représentants ou organisations des pays d'économie planifiée et commerçants privés ou entreprises gouvernementales des pays d'économie libre*".

The work published by IALS[72] includes three reports on commercial arbitration: "*Le règlement des litiges par voie d'arbitrage en Yougoslavie*",[73] "*Le traitement de l'arbitrage communiste devant les cours occidentales*",[74] and "*L'arbitrage dans les différends commerciaux entre organisations de pays à économie planifiée et contractants de pays à économie libre*". In the final report and in the general report, Professor Harold Berman of the Harvard Law School, Harvard University (United States of America), makes some comments and draws conclusions showing the usefulness of such discussions between expert jurists. The Belgian Rapporteur, in discussing the fact that Western firms do not willingly accept the jurisdiction of arbitration tribunals in countries with centrally planned economies, notes that: "Such courts do not show partiality in their procedure or awards; on the contrary, their reputation for fairness is excellent. However, because of the link between the arbitrators and the State foreign trade enterprises, there is a feeling, based more on psychological reasons than on fact, that such arbitration lacks impartiality and fairness. None the less, arbitration is preferable to a judicial decision for the settlement of trade disputes between countries with centrally planned economies and countries with market economies, particularly because of the difficulties arising from the selection of a jurisdiction and the problems connected with political acts and the enforcement of awards."[75]

The criticisms formulated concerning the arbitration system of countries with centrally-planned economies (such as the connexions between arbitration and the State, the nationality of the arbitrators appearing on the list, freedom in the selection of arbitrators were discussed). Broad agreement was reached on many points, and particularly on the main question: "it is possible to improve, for the common good, what economists call the techniques and what the jurists call the framework or the legal and institutional structure of trade between countries with centrally-planned economies and market-economy countries".[76]

87. The Indian Council of Arbitration, prompted by the same desire for discussions between qualified jurists and businessmen from various regions with an interest in the problems of international commercial arbitration, organized a seminar in 1968, at New Delhi, under the auspices of the United Nations Conference on Trade and Development. Representatives of the ECAFE Centre for Commercial Arbitration, the International Chamber of Commerce, the American Arbitration Association. the USSR Chamber of Commerce and the Japan Commercial Arbitration Association took part in the seminar, together with delegates from UNCTAD. The following subjects were discussed: the choice of arbitrators, the development of international trade law to facilitate wider recourse to arbitration, the venue of arbitration and some promotional aspects of international commercial arbitration.[77]

88. The Seminar endorsed the criteria concerning the venue of arbitration laid down in the ECAFE Rules and decided that the venue would best be decided by the parties *after* the dispute had arisen.[78] The Seminar recommended the establishment of a high level inter-

[70] See chapter I, paras. 30-35, above.

[71] See UNIDROIT, explanatory report on the draft Uniform Law on Arbitration in respect of International Relations of Private Law, Rome, 1954.

[72] *Aspects juridiques du commerce avec les pays d'économie planifiée*, Librairie Général de Droit et de Jurisprudence, Paris, 1961.

[73] Aleksandar Golstajn, Professor of Economic Law at the Faculty of Zagreb.

[74] Samuel Pisar, formerly member of the Bureau of Legal Affairs of UNESCO.

[75] Paul van Reepinghen, Legal Adviser of the Fédération des Industries belges, Brussels.

[76] Harold Berman, op. cit., p. 12.

[77] See *International Seminar on Commercial Arbitration*, New Delhi, 18-19 March 1968, the Indian Council of Arbitration, Federation House, New Delhi, 1968.

[78] The opposite point of view (agreement by the parties as to the venue of arbitration at the time of the contract and prior to the dispute) had been suggested in the Memorandum submitted to the Bangkok Conference by the Office of Legal Affairs of the United Nations Secretariat.

national agency or an international commercial arbitration commission linking the arbitral organizations of various countries which could be entrusted with the task of deciding the venue of arbitration in international commercial disputes where the parties could not agree on the matter. The Seminar also suggested the conclusion of arbitration agreements between the various arbitral organizations, providing for determination of the venue of arbitration.

89. In a paper submitted to the New Delhi seminar, Donald Straus, President of the American Arbitration Association, suggested the establishment of an international commercial arbitration commission linking the various regional and national arbitration bodies which would, among other things, promote uniformity of arbitration laws and of designation of arbitrators when nationals of several countries are involved. Such a commission, working in close co-operation with national arbitration bodies, without itself undertaking any actual arbitration, would be in a position to overcome difficulties in the enforcement of arbitration awards and problems relating to conflict of laws, and soon, by facilitating and streamlining, on an international scale, the procedure for the submission, hearing and handing down of arbitral awards. The suggestion was approved by the Seminar and was emphasized in its statement of conclusions.[79]

90. At the New Delhi seminar, Dr. Martin Domke submitted a paper which he had prepared for the ECAFE Centre for Commercial Arbitration noting measures which should be undertaken to achieve speedier progress of arbitration in the region, but which could also be very useful for other regions, in the opinion of the Special Rapporteur. Some of those measures deserve special mention, namely the formulation by the countries of the ECAFE region of guidelines of model arbitration laws which might be appropriately adapted to the conditions of the different countries of the region; an analysis of the provisions of the various types of arbitration clauses currently in use in the ECAFE region in various sectors of commerce and industry and a study of the reasons why arbitration clauses are not widely used or not used at all; an examination of the various provisions of the laws of the ECAFE region in regard to enforcement of foreign arbitral awards; and an analysis of the structure and use of the various arbitral institutions in the region.

91. Three important international arbitration congresses have been held in recent years, at which useful exchanges of views took place and recommendations made regarding the solution of problems which at the time were of concern to jurists and to businessmen with an interest in arbitration.

The work of the First International Arbitration Congress[80] (Paris, 1961) was carried out by four commissions. The first commission discussed the problem of "the autonomous and procedural character of the arbitral clause" on the basis of the report submitted by F. E. Klein. At the conclusion of the debate, the commission adopted three recommendations: the first was that the arbitral clause should be regarded as an autonomous agreement between the parties, the validity of which is not dependent upon that of the main contract; the second being that arbitrators should be authorized, subject to ultimate judicial control and without depriving themselves of the right to decide on the merits, to inquire into and determine their own jurisdiction and to rule upon the existence and the validity of the arbitration agreement; the third concerned the insertion in future arbitration rules as well as in future arbitration agreements of an arbitration clause which could be used to avoid ambiguity concerning the autonomy of the arbitration clause.

92. The second commission dealt with the harmonization of the rules of procedure of the arbitration centres (Rapporteur: Dr. Glossner) and considered there was no doubt that unification was both necessary and entirely possible "it being understood that much goodwill on the part of the parties and of Governments was essential to the attainment of those objectives". It should be noted that the discussions revealed serious reservations concerning *amiable composition* and the Rapporteur thought it preferable to set that notion aside and speak simply of *equity*. "It would then be an international general law. Bâtonnier Paul van Reepinghen considered that use of *amiable composition* was fraught with dangers because 'the party is placed in the greatest uncertainty' by *a priori* renouncing law (prescription, estoppel, penalty clause, damages, etc.). Arbitration should be separate from *amiable composition*. That does not exclude attempts at conciliation, for which the parties would have requested the arbitrator's good offices."

The Commission, guided by considerations relating to the liberty of the parties, minimum formality and maximum flexibility and simplicity, and guarantees of a serious approach and procedural security, specified principles for the four successive stages of the opening of the procedure, instruction of the case, the hearings and the award.

93. The third commission discussed the report on "The creation of an international body or office which would be competent to nominate arbitrators, to determine the arbitral procedure and to register arbitral awards so as to facilitate their enforcement" (P. J. van Ommeren). During the discussion, stress was laid, among other things, on the damage caused to the practice of arbitration by the nomination of "advocate-arbitrators". The opinion of the commission was in favour of the establishment of international regional offices in order to promote the working of arbitral procedures, to give advice, to act as depositories for arbitral awards so as to be able to furnish to the parties certified copies of them, and so on.

94. The fourth commission discussed in depth "The problem of arbitration between Governments and legal persons of public and private persons" (report submitted by Professor Vedel) and concluded by recommending that impediments which in some jurisdictions still prevented bodies of public law from resorting to arbitration, be removed and that "access and ratification of the Geneva Convention of April 21, 1961 not be made with reservations and limitations which would in fact deprive of all significance the principle embodied

[79] See F. N. Krishnamurthi, "Co-operation on a regional scale—the Bangkok experiment", a report submitted to the Third International Arbitration Congress (Venice, Oct. 1969), in *Revue de l'arbitrage*, No. 4/1969, p. 214.

[80] See *Revue de l'arbitrage*, No. 2/1961, where the reports and a summary of the discussions appear.

in article 2 of the Convention, which authorizes the 'legal persons of public law validly to conclude arbitration agreements' ".

95. In 1966 the Netherlands Arbitration Institute organized at Rotterdam the Second International Arbitration Congress on the theme "Arbitration and the Common Market". Because of the theme, the work of the Congress was directly concerned with arbitration under community law, but many of the problems discussed also concern arbitration in general. In particular, we wish to refer to the paper by Professor E. Minoli, which analyses arbitration as a factor in the unification of law and elimination of conflict of laws (Professor Minoli considers that arbitration organizations are prime movers in a trend towards unification), and to the work of the second commission, which recommended that national legislation should be harmonized so that legal persons of public law should have the acknowledged right to conclude arbitration agreements.

96. The Third International Arbitration Congress, held in 1969 at Venice, was the most fruitful and representative congress to date. It was world-wide in character and the general theme was co-operation between arbitration organizations. Thirteen reports and many communications were submitted. In the keynote report Professor Minoli set out the reasons for co-operation between arbitration organizations and outlined the forms which such co-operation meant or should take. Valuable information was supplied on co-operation between arbitration organizations in almost every region of the world: in the Americas (Donald Straus), in eastern European Socialist countries (S. N. Bratus), in countries with different economic systems or degree of development (L. Kopelmanas) and in countries in Asia and the Far East (N. Krishnamurthi). Reports were also presented dealing with general questions of principle, such as the deontology of the international commercial arbitrator (F. Eisemann); standard of arbitration regulations applicable to international commercial affiairs (J. Robert); standard of legislation on international commercial arbitration (René David); with problems of development and promotion (N. Pearson, A. Broches, J. Jabukowski, M. Domke), and with practical suggestions (P. Sanders).

97. The Congress concluded that co-operation among arbitration organizations is desirable and possible. "Relations among these arbitration organizations should therefore be organized, without rigidity. The organizations without necessarily being unified, should seek to harmonize their relations while carefully retaining the particularities which justify the existence of each separate organization. To that end, it was probably necessary first to note the existence of arbitration organizations, to become aware of the problems involved in harmonizing their activities and to define at least the broad outline of future co-operation".[81]

The notion of organizing co-operation among arbitration organizations was constantly stressed, as was the establishment of a centre for contacts on a world-wide scale. The Congress considered it desirable that similar Congresses should be held periodically. It established an *ad hoc* Committee to continue the work which had been initiated. The Committee is currently preparing the next world-wide congress, which is to be held in Moscow, in 1972, on "Arbitration and economic co-operation in the field of industrial and technical development".

5. *Observations on the development of international commercial arbitration since the Second World War*

98. The fifth and last section of this chapter provides an opportunity, as did the last section 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.

99. This period witnessed, firstly, the emergence of the world economic system of the socialist countries, based on a planned economy, and the development of international commercial relations based on State monopoly. Secondly, there was the appearance of the third world, composed of States which have recently acceded to political independence and which are among the developing countries. 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 countries with 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 10 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 centre 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".

[81] Compte rendu du IIIème Congrès International de l'Arbitrage (Venise, 1969), *Revue de l'arbitrage*, No. 4 (special issue), p. 137.

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

100. 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 a different economic system. 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,[82] 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 the two 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."[83]

101. 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 standard 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 its 'institutionalization', that is, the proliferation of arbitration bodies of every type and appelation".[84] Institutional arbitration was earlier referred to by Charles Carabiber, at the First International Arbitration Congress,[85] 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 seems to have become established fact.

102. 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 I, paragraph 2, of that Convention is considered to be, so to speak, the epilogue to the *Ligna* v. *Baumgartner* case, as the Swiss representative[86] 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 relationships individually, as a separate category of relationships—even its title mentions international commercial arbitration. It may also be noted that commentators have taken the same approach.[87] 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 on the creation of a system of international commercial arbitration for economic organizations in the member countries of CMEA, on the one hand, and the adoption of the ECAFE Rules and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States on the other hand, all reflect, even if in different ways, the same needs for international co-operation in economic development.

103. 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 E. Minoli,[88] pointing out that "while it is true that differences in economic development may offer occasions for stronger economies

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[82] See 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.

[83] 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.

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

[85] Charles Carabiber, Exposé introductif, Proceedings of the International Arbitration Congress, *Revue de l'arbitrage*, Paris, 1961, p. 45.

[86] Cf. Philippe Fouchard, *L'Arbitrage commercial international*, Paris, 1965, p. 206.

[87] See, for example, the works by Professor Fouchard and Professor Lalive mentioned in previous foot-notes.

[88] Eugenio Minoli, Keynote Report, Third International Arbitration Congress, Venice, 1969, pp. 2 and 3.

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.

104. Since international commercial arbitration is itself an effective means of peaceful co-operation among nations[89] 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. 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.

Part II. Problems concerning the application and interpretation of existing multilateral international conventions on international commercial arbitration

105. 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 the enforcement of foreign arbitral awards. It was thought useful to devote a separate section, wherever possible, to one specific problem in the general category concerned and to identify the legal problem discussed in the heading of each section.

Chapter I. Problems concerning the arbitration agreement

1. *Law applicable to the arbitration agreement*

106. In West 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.[90]

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.[91]

Belgian judicial practice also takes the view that, within the framework of the 1923 Geneva Protocol and

[89] See René David, "La technique de l'arbitrage, moyen de coopération pacifique entre les nations de structures différentes", in *Problèmes contemporains de droit comparé*, I, Tokyo, 1962, pp. 22 *et seq.*

[90] Hamburg Civil Court, 12 November 1967, in *Revue de l'arbitrage*, No. 4/1959, pp. 126-128.

[91] 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.

the 1927 Geneva Convention, the validity of the arbitral clause of commercial contracts is determined in accordance with the law of the State in which the dispute is arbitrated. Czechoslovak law has been applied to the same effect.[92]

2. *Law applicable in establishing whether it is necessary to conclude a separate arbitration agreement or whether an arbitral clause suffices*

107. 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 and 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.[93]

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".[94]

On 6 April 1970, the First Chamber of the Appeals Court of Reims ruled that the arbitral procedure referred to in an arbitral clause is binding upon the parties to the contract. An arbitral clause which specifies the way in which the subject of a dispute is to be defined and the arbitrators appointed is the equivalent of an arbitration agreement.

If the procedure provided for in such an arbitral clause is followed, it is useless for a party to complain that its rights of defence have been violated.[95]

3. *Autonomy of the arbitral clause and the separate arbitration agreement with respect to the contract to which they relate*

108. 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 this case—absolute legal autonomy and is not affected by the possible invalidity of the document".[96] 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 has been 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.[97]

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."[98]

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.[99]

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[92] 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.

[93] Paris Appeals Court, First Chamber, 30 May 1963, in *Revue de l'arbitrage*, 1963, No. 3, p. 93.

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

[95] Appeals Court of Reims, 6 April 1970, Société Probrione versus Internationale Graanhandel Thegra NV, in *Revue de l'arbitrage*, 1970, No. 3, p. 161.

[96] Orleans Appeals Court, 15 February 1966, *Revue de l'arbitrage*, No. 4/1966, p. 109.

[97] *Ibid.*

[98] Paris Appeals Court, 9 January 1962, in *Revue de l'arbitrage*, No. 1/1962, p. 12.

[99] *Revue de l'arbitrage*, No. 4/1959, pp.128-130.

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.

4. *Requirement that arbitration agreements shall be in writing*

109. 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 "and 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.[100]

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".[101]

It should be noted that recently there has been a tendency to recognize arbitration agreements. For example, it was decided that the requirement that arbitration agreements be in writing is met in cases where there is between the parties to a dispute a constant flow of commercial orders and transactions which are covered by an arbitral clause, and similar orders or transactions are contested on grounds that they had not been agreed to in writing.[102]

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.[103]

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 containing an arbitral clause—which had not been confirmed in writing—in favour of the Czechoslovak arbitral body.[104]

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 6/1955).

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.

The Commission has considered the requirement that an agreement be set out "in writing" to be fulfilled when the documents accepted by the parties di-

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[100] 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 etrangères du 10 juin 1958", in *Revue suisse de jurisprudence,* 1968, vol. 64, p. 49; for the text of the decision of 8 June 1967 in the Walsum v. Chevaliers case, see *ibid.,* p. 56.

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

[102] Paris Appeals Court, Fifth Chamber, Decision of 14 February 1970, Ballais versus (1) Dubois and Co. (2) Nataf, *Revue de l'arbitrage,* 1970, No. 3, p. 148.

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

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

rectly or by implication show clearly and expressly that they are willing to submit their disputes to arbitration, the appointment of an arbitrator being no indication of acceptance of the Commission's jurisdiction. Thus, when the respondent in a case (the Silva Company of Bobigny, France) maintained that the Bucharest Commission was not competent to settle the case, the Commission accepted the argument, since there was no written evidence of an arbitration agreement between the two parties to the dispute. The respondent had concluded such an agreement with Exportlemn, the Romanian sales enterprise, but not with the Bureau of Merchandise Control, which was the claimant in the dispute although it had no direct contractual ties with the respondent.

In examining another aspect of the case, the Bucharest Commission ruled as follows: "The fact that the respondent appointed an arbitrator to serve on the arbitral tribunal while not appearing before the tribunal or submitting substantive information to it is not conclusive and does not constitute proof of acceptance of the Commission's jurisdiction . . .".[105]

In another case, the respondent, an Italian company, contested the jurisdiction of the Bucharest Arbitration Commission on the ground that the arbitral clause in question was not valid under the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, arguing that "the provision in article II of that Convention that an arbitral clause or agreement shall be in writing means that it must appear in a document which must be signed by the contracting parties in order to be enforceable and binding".

This requirement had not been met because the arbitral clause had not been incorporated in the contract signed by the parties but in the General Conditions of Delivery, of which the respondent had no knowledge and which had not been signed by the contracting parties. The arbitral tribunal rejected the respondent's argument on the ground that both parties acknowledged that the contract they had signed provided expressly that the General Conditions of Sale and Delivery, a printed copy of which was annexed to the contract, was an integral part of the contract and equally binding on both parties. The fact that the respondent had signed the contract with no reservations meant that it also subscribed to the General Conditions in which the arbitral clause was included.[106]

In West German judicial practice, the question of the form of the arbitration agreement is posed in the context of article 1027 of the West 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 (2) of the West 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.

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 West German law, particularly article 17 (2) of the West 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 West German law, for according to West 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 West 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.[107]

In an extremely interesting case judged by the Federal Court of the Federal Republic of Germany on 25 May 1970, it was ruled that an arbitral clause in a seller's letter of confirmation was valid since the buyer had remained silent. According to West German law, the clause was valid since the party which received the letter of confirmation should have refused to accept it if it did not wish the content of the letter to be enforceable against it.

The West German judge to whom application was made for enforcement of the award rendered by the foreign arbitral tribunal provided for in the clause in question followed West German judicial practice relative to cases where merchants remain silent on receipt of a letter of confirmation. In making his decision, he referred to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration signed at Geneva in 1961. The provisions of those Conventions were applicable since the two countries concerned were parties to them. Unfortunately, neither the Appeals Court nor the Federal Court based their decisions on the requirement laid down in those two Convention that arbitral clauses be set out in writing. Instead, they had recourse to the private international law of the Federal Republic of Germany. A commentator on this decision has observed:

> "The two courts thus followed a doctrine which minimizes the effect of the rule regarding form laid down in the 1958 New York Convention and maintained in an attenuated version, in the 1961 Geneva

[105] Arbitration Commission of the Chamber of Commerce of Romania, arbitral award No. 30 of 7 July 1967, Case 432/1967.

[106] Arbitration Commission of the Chamber of Commerce of Romania, interlocutory award of 30 November 1971, Case 621/1970.

[107] Hamburg Civil Court, Commercial Chamber, 12 November 1957, in *Revue de l'arbitrage*, No. 4/1959, pp. 126-128.

Convention, and which is more favourable to the recognition of arbitration agreements and arbitral awards. Article 1, paragraph 2 of the Geneva Convention is intended to ensure legal security and uniformity of solutions among Member States. Both security and uniformity are jeopardized when jurists in individual countries consider that they are entitled to apply national principles of private international law... Some advocates of arbitration may nevertheless find it preferable to apply ordinary law, since by so doing it is possible to avoid the awkward situation in which an application for enforcement of an award rendered in accordance with the law of another contracting State and which can no longer be contested in that State is refused because a formal defect renders the arbitration agreement non-existent in the eyes of the judge to whom the application for enforcement is made, while the time-limit for appeal under the law of the State in which the award was rendered has expired. However, this situation can be avoided only by interpreting the rules with regard to form laid down in article II of the 1958 Convention and article 1, paragraph 2 of the 1961 Convention as limiting the freedom of contracting States not to respect an arbitration agreement, their ordinary law remaining intact in so far as it is more favourable to recognition."[108]

5. *Dispute not covered by the arbitral clause or the arbitration agreement*

110. 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.

For example, in one dispute[109] 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 specification 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.[110]

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.

In another dispute,[111] 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 specific 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;
>
> "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

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[108] E. Meger, "Du consentement en matière d'*electio juris* et de la clause compromissoire" (on the decision taken by the Federal Court of Germany on 25 May 1970), in *Revue critique de droit international privé*, 1971, No. 1, p. 37 *et seq.*

[109] Case 245/1964, in which the claimant was a firm in the Federal Republic of Germany and the respondent Exportlemn (Socialist Republic of Romania). The case was settled by decision No. 9 of 19 March 1965.

[110] Award No. 38 of 19 September 1966 (Case 367/1966: claimant, a Romanian firm; respondent, a firm in Aleppo).

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

not agreed that it had jurisdiction to settle their dispute, and decided to disseize itself of the case.

6. *Capacity to conclude the arbitration agreement*

111. 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 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".[112]

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.[113]

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.[114]

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.[115]

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.[116]

The Court of Cassation took the same view[117] 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 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

1. *Law applicable to arbitral procedure. Interpretation of the will of the parties*

112. 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

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[112] 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.

[113] 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.

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

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

[116] 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.

[117] *Revue de l'arbitrage*, 1964, pp. 82 *et seq.*

the appointment of "two arbitrators at London... members of the Baltic, who could appoint a referee".[118]

2. *Jurisdiction of the arbitral tribunal dependent on the validity of the arbitration agreement*

113. 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."[119] 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.

3. *Constitution of the arbitral tribunal when one of the parties fails to appoint an arbitrator*

114. 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".[120]

4. *Nationality of arbitrators. Selection from an official panel*

115. It has been decided that the obligation to choose an arbitrator from the panel of the Chamber of Commerce of Czechoslovakia, which includes only arbitrators of Czechoslovak nationality domiciled in Czechoslovakia, is not contrary to the public policy of Switzerland.[121]

5. *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*

116. 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 an employee of 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 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.[122]

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.

6. *Right of the umpire to take a decision without consulting the arbitrators. Conditions*

117. 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 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 was allowed.[123]

[118] French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, in *Revue de l'arbitrage*, No. 2/1964, p. 46.

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

[120] Tokyo Appeals Court, Second Civil Section, in *Revue de l'arbitrage*, No. 3/1964, p. 102.

[121] Swiss Federal Court, decision of 12 February 1958, in *Revue de l'arbitrage*, No. 1/1959, pp. 26-31.

[122] Rouen Appeals Court, Second Civil Chamber, 21 October 1965, in *Revue de l'arbitrage*, No. 1/1966, p. 22.

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

CHAPTER III. PROBLEMS CONCERNING ARBITRAL AWARDS

1. *Arbitral awards for which no reasons are given*

118. 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 the reasons for the solution to 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".[124] 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 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".[125]

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 award".[126]

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 governing that award".[127]

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.[128]

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".[129] As an exception, however, the arbitral award, for which no reasons are given may be considered as not violating Swiss 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".[130]

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.[131]

2. *Renunciation of means of recourse against an arbitral award. Its effects*

119. 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".[132]

3. *Assumption implying that the parties intend to acknowledge the finality of the arbitral award*

120. When an application was made in France for leave to enforce an arbitral award rendered in English by an umpire in accordance 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 (section 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 award must be considered final and binding".[133] Consequently, after the court had ascertained that the legal requirements had been fulfilled, it issued an enforcement order in accordance with the 1927 Geneva Convention.

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[124] 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.

[125] French Court of Cassation, 22 November 1966.

[126] Paris Appeals Court, 27 March 1962, *Revue de l'arbitrage*, No. 2/1962, p. 45.

[127] Paris Appeals Court, 30 May 1963, *Revue de l'arbitrage*, No. 3/1963, p. 93.

[128] Nancy Appeals Court, First Chamber, 29 January 1958, *Revue de l'arbitrage*, No. 4/1958, p. 122.

[129] Swiss Federal Court, Public Law Chamber, 11 November 1959, *Revue de l'arbitrage*, No. 3/1960, p. 105.

[130] *Ibid.*

[131] Florence Appeals Court, 7 March 1957, *Journal du droit international* (Clunet), No. 3/1961, p. 864.

[132] Geneva Court of Justice, First Section, 5 July 1963, *Revue de l'arbitrage*, No. 4/1964, p. 152.

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

4. *Operative part of the award expressed in the currency of the country in which arbitration takes place. Limits of the arbitral clause not exceeded*

121. 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".[134]

Chapter IV. Problems concerning the enforcement of foreign arbitral awards

1. *Refusal of enforcement based on the nullity of the arbitration agreement. Public policy*

122. 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 of the deliveries by the competent French administrative body, 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 accordingly 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".[135]

2. *Refusal of enforcement based on delay in notification*

123. 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 in indicating the date of the substantive hearing (the Swiss firm was informed on 17 November 1960, the day on which the hearing was actually being held).[136]

3. *Refusal of enforcement based on the fact that the limits of the arbitral clause have been exceeded*

124. 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".[137]

4. *Authorization to enforce an award rendered by default*

125. 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, 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".[138]

Hence, a party cannot plead that his right of defence is violated when he has quite voluntarily refrained from participating in the hearing set for consideration of the substance, when the date appointed for that hearing had been agreed to by the parties and the arbitrators had previously rejected a request for postponement submitted by the same party. Nor can a party complain that his right of defence is violated when, in the arbitral hearing from which he chose to be absent, the other party had, without his knowledge, changed the substance of the claim as previously submitted to the arbitrator and notified to him, if the change consisted only in a reduction of the amount of the original claim and thus did not adversely affect his interests.[139]

5. *System of enforcement, when there are no relevant rules of domestic law*

126. 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

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[134] French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, *Revue de l'arbitrage*, No. 2/1964, p. 46.

[135] Orleans Appeals Court, 15 May 1961, *Journal du droit international* (Clunet), No. 1/1962, p. 140.

[136] Geneva Court of Justice, First Section, 5 July 1963, *Revue de l'arbitrage*, No. 4/1964, p. 152.

[137] *Ibid.*

[138] Tokyo Appeals Court, 14 March 1963, *Revue de l'arbitrage*, No. 3/1964, p. 102.

[139] Paris Appeals Court, 5 June 1970, *Cie. France Participation (Cofrapar)* v. *La société navale d'Afrique du Nord*, in *Revue de l'arbitrage*, No. 3/1970, p. 2.

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".[140]

6. *Authorization of enforcement provided that the award concerns a dispute capable of settlement by arbitration*

127. 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 allowed arbitration, enforcement was authorized.[141]

7. *Priority of bilateral conventions over the 1927 Geneva Convention with regard to the enforcement of foreign arbitral awards*

128. 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 same way as a judicial decision. Consequently, the 1934 Convention between the United Kingdom and France was applied and not the 1927 Geneva Convention.[142]

8. *Irrevocability of the substance of foreign arbitral awards*

129. 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 allows 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 allowed without a review of the substance.[143]

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 refer to all agreements reactivated by the two countries".[144]

9. *Need for foreign arbitral awards to be provided with an order for enforcement in order to have the authority of* res judicata *in France*

130. A final English arbitral award was invoked in France as having the authority of *res judicata.* The court ruled otherwise, because "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 *res judicata,* will not be enforceable and cannot be invoked in France until an order for its enforcement in this country has been obtained".[145]

Furthermore, the Strasbourg District Court decided, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, that, since the plaintiff had conformed to the requirements of the Convention, its application for leave to enforce was admissible without enforcement order's having been obtained in the country where the award was made.[146]

10. *Law applicable to the enforcement of a foreign arbitral award not covered by an international agreement*

131. It has been decided that the enforcement in Switzerland of an arbitral award rendered in California is governed by the legislation of the canton in which it was applied for—in the case in question, the Geneva Code of Civil Procedure—since there is no agreement between Switzerland and the United States concerning the enforcement of such awards. Furthermore, the United States is not a party to the 1927 Geneva Convention.[147]

11. *Authorization to enforce the arbitral award provided that it has become final*

132. 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

[140] Tokyo Appeals Court, Second Civil Section, 14 March 1963, *Revue de l'arbitrage*, No. 3/1964, p. 102.

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

[142] Paris Appeals Court, First Chamber, 20 October 1959, *Revue de l'arbitrage*, No. 2/1960, p. 48.

[143] Milan Appeals Court, 23 April 1965, *Journal du droit international*, No. 3/1966, p. 702.

[144] Italian Court of Cassation, 9 May 1962, *Journal du droit international*, No. 2/1964, p. 356.

[145] Paris Appeals Court, Fifteenth Chamber, 4 January 1960, *Revue de l'arbitrage*, No. 4/1960, p. 123.

[146] Strasbourg District Court (Commercial Chamber), October 1970, *Animal Feeds International* v. *Becker*, in *Revue de l'arbitrage*, No. 3/1970, p. 166.

[147] Swiss Federal Court, Public Law Chamber, 11 November 1959, *Revue de l'arbitrage*, No. 3/1960, pp. 105-109.

final in the sense of articles 37 and 38 of the Arbitration Act, 1950; its enforcement was therefore authorized.[148]

12. *Means of recourse against orders for enforcement*

133. 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 Geneva Convention".[149]

Part III. Possible measures for increasing the effectiveness of international commercial arbitration; general questions, findings and final proposals

CHAPTER I. POSSIBLE MEASURES FOR INCREASING EFFECTIVENESS OF INTERNATIONAL COMMERCIAL ARBITRATION

1. *Measures recommended by the United Nations*

134. 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 Council envisaged a stimulation of the activities of the regional economc commissions and various intergovernmental organizations interested in promoting 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".

135. In order to prepare for the discussions at the Conference, the Secretary-General drew up a report, dated 24 April 1958 (United Nations document 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 1958, a "Committee on Other Measures" was established, open to any of the 45 Governments wishing to participate. On 6 June 1958, 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 on 17 April 1959, at which resolution 708 (XXVII) was adopted. In the International Association of Lawyers' volume II on International Commercial Arbitration (editor 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.[150]

136. As a first measure, a "wider diffusion of information on arbitration laws, practices and facilities" was recommended in order to facilitate access to arbitration and at the same time constitute a first step towards any further activities aimed at the improvement of arbitration facilities and legislation. The International Chamber of Commerce,[151] the International Association of Lawyers,[152] the Economic Commission for Europe[153] and the Economic Commission for Asia and the Far East have already done a great deal of work in these fields. It has been rightly observed that mere publication of the text of arbitration statutes, even when accompanied by their translation, or by the rules of procedure of arbitral institutions, is not sufficient. One must also be able to obtain information on the interpretation of statutory law in court decisions and administrative practice. This practical aspect is still too little known, despite the efforts of some of the national and international bodies which issue arbitration publications that include references to court practice in the various countries.

There is the problem of a publication with worldwide coverage, the expansion of the activities of existing publications and the creation of arbitration publications in areas where they do not yet exist.

137. 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 a greater uniformity in the rules of procedure of arbitral institutions and more precise drafting of standard arbitration clauses recommended

[148] Court of Appeal, 13 March 1959, *Journal du droit international* (Clunet), No. 4/1961, p. 1177.

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

[150] See Martin Domke, "Possible measures for increasing the effectiveness of international commercial arbitration", in IAL, *Arbitrage International Commercial*, vol. II, 1960, pp. 328 *et seq.*

[151] *Commercial arbitration throughout the world*, 1949, with supplements for 1951 and 1958.

[152] IAL, *Arbitrage International Commercial*, vol. I (1956), vol. II (1960) and vol. III (1965).

[153] *Handbook of national and international institutions active in the field of international commercial arbitration*, United Nations Economic Commission for Europe, document TRADE/WP.1/15.

by arbitral institutions for inclusion in standard contracts and in general conditions of trade. A move should be encouraged to reduce to one standard procedure the rules employed in arbitration practice by the main commercial arbitration centres of the various countries.

138. 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. Use must be made of experts able to advise on appropriate arbitral legislation and to contribute to the setting up of adequate arbitration machinery. It has also been recommended that "regional study groups, seminars or working parties" should be organized to agree on the solutions best suited to the needs of the various countries. Exchanges of views and personal contacts 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.[154]

139. In 1969, Martin Domke, in his report to the Third International Arbitration Congress,[155] noted the progress achieved in recent years with regard to the diffusion of arbitral information.

Firstly, a number of new publications, mostly quarterlies, have joined the older ones which have been in existence for many years, namely *Arbitrale Rechtspraak* in the Netherlands, *Arbitration,* of the Institute of Arbitrators in the United Kingdom, and *Arbitration Journal* in the United States. The new publications are the *News Bulletin* of the ECAFE Centre for Commercial Arbitration, the *Revue de l'arbitrage* of the Comité Français de l'Arbitrage, the *Arbitration News* of the Inter-American Commercial Arbitration Commission, the *Rassegna dell' Arbitrato* of the Associazione Italiana per L'Arbitrato, the *Quarterly* of the Japan Commercial Arbitration Association, and the *Arbitration Quarterly* of the Indian Council of Arbitration. Other publications publish articles and court decisions on arbitral issues, for example, the *Journal of Business Law* in the United Kingdom and *Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen* and the monthly *Aussenwirtschaftsdienst des Betriebs-Berater* in the Federal Republic of Germany.

In addition, numerous collections or chronicles of arbitral practice in international trade are published by the arbitration commissions of Moscow, Warsaw, Bucharest, Prague, and so on. Other means, too, are used for the diffusion of arbitration and the study of its known problems as, for example, the Training Course on Commercial Arbitration, held in February 1969 at Bombay, organized by the Indian Council of Arbitration. The trainees were sponsored "by Trade Associations, Chambers of Commerce, Export Promotion Councils, Commodity Boards, Export-oriented industries, Export houses, Government Trading Agencies and the Central and State Governments".

Similar, symposiums or seminars were held, with the co-operation of various arbitration bodies and individuals interested in international commercial arbitration, in London in 1966[156] and in Hamburg in May 1968, the latter under the auspices of the German Lawyers Association and the German Committee for Arbitration.[157]

140. Lastly, there is a 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 the expansion of international commercial arbitration. The Special Rapporteur is thinking here in particular of the limitation of the means of review of the arbitral award by ordinary judges and in general of 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, which 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".[158]

2. *Co-operation among arbitration organizations*

141. Co-operation among the various arbitration organizations is a very important and also a very topical problem. We have already mentioned it several times. 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 largely based, Martin Domke expressed the hope that the encouragement given by the resolutions adopted by the

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[154] The United Kingdom representative rightly considered that one urgent problem in the field of arbitration could be solved by "educating businessmen in the spirit and practice of arbitration—a necessarily slow process" (E/CONF.26/C.2/SR.2, p. 4).

[155] See the account of the Third International Arbitration Congress, in *Revue de l'arbitrage,* No. 4/1969.

[156] International arbitration: A symposium, in *International and Comparative Law Quarterly*, vol. 15, p. 718 (1966).

[157] On the previous Arbitration Congresses in Paris in 1961, see *Revue de l'arbitrage*, 1961, No. 2, and at Rotterdam in 1966, *ibid.* 1966, No. 3 (Special).

[158] See Philippe Fouchard, op. cit., pp. 523-524.

United Nations Conference on 10 June 1958 and by the Economic and Social Council on 17 April 1959 would 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 in various parts of the world. However, the elements of its complexity are becoming increasingly numerous.

142. As Professor Minoli observed in his excellent Keynote Report to the Third International Arbitration Congress, "the arbitration organizations are the natural meeting points for social forces that exert pressure to strengthen the international commercial arbitration network, 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.[159] 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".

Bearing in mind the fact that "economic relations are far 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 international commercial arbitration, "valid uniform results all over the world or at least over vast areas of it".

143. The most reasonable and practical course would therefore seem to be to settle on the arbitration organizations as centres for promoting the further development of international commercial arbitration. According to Professor Minoli, however, it is still difficult to organize world-wide co-operation on international commercial arbitration, mainly because of the existing relations between countries with differing levels of development.

One might think that the major difficulty involved in fitting business dealings into efficient international commercial arbitration schemes is due mostly to limited experience and to the almost total lack of participation in the organization and implementation of such schemes by qualified persons from the less-developed countries. As a result one can see in those countries a growing feeling that such arbitration is the prerogative of the more developed countries, and that the latter run the arbitration organizations with their own interests at heart; in a word, that such arbitration is in the final instance one more element and factor in the developed countries' preponderance. The elimination of that situation is the main task of those who wish to make the ACI an instrument of truly universal application.[160]

144. Again, at the Third International Arbitration Congress, L. Kopelmanas noted that one feature common to the problems of international commercial arbitration in relations between countries with differing economic structures on the one hand, and between countries with differing levels of development on the other, was the mutual distrust between both private and governmental undertakings belonging to countries with differing forms of economic organization or differing levels of development. He also noted, however, that the two types of problems differed in the extent to which it had been possible to overcome that distrust. In relations between the countries of Eastern and Western Europe the difficulty of agreeing on the choice of arbitrators or on a procedure for their nomination—the the most obvious manifestation of distrust that could arise between undertakings belonging to different economic systems—hardly ever arose nowadays. The same could not be said of relations between the industrialized countries and the developing countries. The fact that it has been possible to reduce gradually, or eliminate, mutual distrust concerning trade relations in general, and the organization of international arbitration in particular, from economic relations between the countries of Eastern and Western Europe was the result of a constant effort supported by goodwill on both sides and involving great ingenuity. Mr. Kopelmanas believed that the experience thus acquired might well serve as a precedent for a similar exercise in arbitration relations between industrialized countries and developing countries. The arbitration organizations of the various countries concerned had played a leading role in solving the problems of international commercial arbitration between the countries of Eastern and Western Europe; the same approach might produce comparable results in relations between the industrialized countries and the developing countries.[161]

145. 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

[159] 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 Chambers of Commerce and Industry and the Pakistan Federation of Chambers of Commerce and Industry.

[160] Eugenio Minoli, Keynote report, Third International Arbitration Congress, op. cit., p. 143.

[161] L. Kopelmanas, "Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différent", Third International Arbitration Congress, in *Revue de l'arbitrage.*

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 lawyers than to the businessmen who use arbitration services. In his view the obstacles to co-operation and utilization of facilities have been greatly exaggerated by lawyers, a fact that partly explains the delay in the progress of arbitration.

He refers to the problem of adapting existing arbitration organizations 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 suggests that a world-wide network of national and regional arbitration organizations could best serve the dispute settlement needs of multinational corporations.

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 arbitration organization; 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.

Chapter II. General questions, findings and final proposals

1. *Introductory remarks*

146. In his preliminary report, which was submitted and discussed at the third session of UNCITRAL, in 1970, the Special Rapporteur enumerated the following important problems, which are both theoretical and practical in nature, and suggested that they should be discussed with a view to taking a decision concerning possible steps which might be taken under UNCITRAL's auspices (A/CN.9/42, para. 74):

Definition of international commercial arbitration;

Autonomization of international commercial arbitration; scope and purpose of that autonomy;

The interpretation of existing multilateral international conventions relating to commercial arbitration. The need to make them universal;

Adopting of uniform rules. The need to adopt certain basic arbitral principles;

The unification and simplification of national laws concerning arbitration;

Authorization of legal persons of public law to conclude valid arbitration agreements;

Domain 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.

147. Members of UNCITRAL made certain suggestions to the Special Rapporteur, some stating that the problems should be ranked in terms of the possibility of reaching a solution to them rather than in terms of importance, and others recommending that they should be approached from the standpoint of whether there was enough likelihood of their being resolved in the near future to justify undertaking work on them at the present time.

The representatives of the various countries drew attention to other problems, closely related to the 12 mentioned above. These are reproduced in this report (Introduction paras. 9-12) and the Special Rapporteur feels they should also be studied. Most of the problems mentioned by the representatives had already been mentioned in the preliminary report. The Special Rapporteur, bearing in mind the suggestions made and the wishes expressed, has re-examined all the problems mentioned, re-assessing their content and importance, and grouping together those which were closely related. The following paragraphs present an analysis of these problems, as well as certain final proposals.

2. *Definition of international commercial arbitration—national and international arbitration; autonomization of international and commercial arbitration*

148. Before any proposals concerning the organization and operation of international commercial arbitration are put forward, it seems useful to agree first on the meaning of the concept of "international commercial arbitration". This expression would appear to require further clarification, even though it has been officially and internationally recognized and used by theoreticians in the field.

Philippe Fouchard says that the expression is commonly used, particularly nowadays, because it is convenient and *apparently* precise, but that it actually conceals a highly complex phenomenon, or rather the development of a phenomenon, i.e., arbitration in respect of international economic relations; this development has many facets and its outcome is as yet difficult to perceive.[162]

[162] Philippe Fouchard, *L'Arbitrage commercial international*, pp. 4-5.

The Special Rapporteur, too, believes that since the expression "international commercial arbitration" is already in general use it should be retained, provided that everyone gives it the same meaning. What might that meaning be?

149. It is well known that questions have been raised concerning the existence and definition of international commercial arbitration. Some people contest its very existence. For example, R. Martin states that, "Strictly speaking, international arbitration does not as yet exist, because every arbitration is tied to the legal system of a specific country and subject to its national laws and rules."[163] International commercial arbitration has been defined in terms of what is considered to be its opposite. It has thus been contrasted with the concept of national arbitration. Any arbitration that is not national would thus be considered international. We must therefore define national arbitration.

National arbitration would seem, at first sight, to be any arbitration where "all the elements (the subject of the dispute, the nationality of the parties and of the arbitrators, the applicable law, the place of arbitration) are solely and equally tied to a given State".[164] Since in the case of international trade at least one of the elements is by definition tied to a foreign country, *that would mean that in this particular field, arbitration could never be defined as "national".*

In referring to international trade it would thus only be proper to speak of "foreign" or "international" arbitration. In order to avoid the purely negative definition of arbitration as "foreign" which would result from the practical impossibility of attributing a given nationality to an arbitration proceeding in which all the elements are not tied to a single country; and also in order to avoid conflicts of "nationality" between national systems concerned with the same arbitration proceeding, it is suggested that the idea of "national" or "foreign" arbitration should be abandoned and that the existence of *"international arbitration" should be recognized.*

150. It would be a broad concept—a purely economic, or, to be more precise, a purely geographical one. Arbitration would be considered to be international even if *only one* material or juridical element *of the dispute* or *of the arbitration procedure* involved a country other than the country concerned with the remainder of the case.

The international character of arbitration would be corroborated, on the one hand, by the entire history of international treaty law on the subject, which tends to ensure a truly international system for arbitration relating to international trade—particular reference is made here to the European Convention on International Commercial Arbitration (Geneva, 1961)—and, on the other, by the increasing recognition accorded by national and international systems to autonomy of will.

It has been suggested that, in order to give the expression "international commercial arbitration" a more precise, although seemingly more revolutionary meaning, consideration should be given to the possibility of going even further and making international commercial arbitration independent of any State framework, subject in every regard to truly international norms and authorities, in other words—although these expressions may be barbarisms—supranational, extranational or better yet, anational system.[165]

151. Two theories have been advanced to support the idea of international commercial arbitration independent of any national legal system. According to certain authors the first one consists of making arbitration which is independent of municipal law directly subject to international law. This would be possible, given the current trend towards considering even individuals as subjects of international law and the increasing participation of legal persons of public law and international organizations in international economic relations, which has blurred the theoretical borderline between private persons subject to private international law and public persons subject to public international law. The second theory consists of viewing the community formed by persons engaged in international trade as a group sufficiently coherent to be equivalent to a society in formation,[166] of which arbitration would be an essential element that would help to reinforce its autonomy, providing this extranational community with a substitute jurisdictional organization whose efficacy would no longer depend exclusively on the goodwill of the two parties to the dispute.[167]

152. Nevertheless, this "very precise" notion of international commercial arbitration as being completely independent of State law and State authorities cannot be upheld without reservations, even if it can be proved that it is widely accepted in practice and even to a large extent in positive law, because there are still obstacles connected with the as yet incomplete development of this new international society of traders. It is claimed there are three obstacles: the fact that most of the structures of such arbitration—essentially the permanent arbitration centres, their organization and their methods—are still not *completely independent of national structures*, the existence of gaps in international trade law (requiring the application of municipal law) and, finally, the intervention of State authorities which cannot be totally excluded either during the arbitration proceedings or, more particularly, at the time of enforcement of the award.

153. The Special Rapporteur feels that it is not essential to analyse in depth the meaning and definition of international commercial arbitration as set forth above. We do not wish to become involved in controversies which are for the most part of a theoretical nature. Theoretical arguments lead to generalizations and absolute statements, to extreme solutions which may be intellectually rewarding but are too often unrelated to practical realities.

We shall, however, express serious reservations regarding the validity of the points of departure of the arguments outlined above, particularly when they are presented as enjoying general recognition. We have in mind, in the first place, the two theories set forth in

[163] R. Martin, "Preface", in IAL, op. cit., vol. I, p. 5.

[164] Philippe Fouchard, op. cit., p. 16.

[165] Cf. Philippe Fouchard, op. cit., pp. 18-23.

[166] Battifol, *Traité élémentaire de droit international privé*, No. 557.

[167] Philippe Fouchard, op. cit., p. 25.

paragraph. 151 regarding the trend towards considering individuals as subjects of international law and the existence of an extranational community in formation for which arbitration would serve as a substitute jurisdictional organization. These theories are not accepted widely enough to justify using them as grounds or premises for measures which should be valid and acceptable throughout the world.

Secondly, we are thinking of the arguments advanced to support the international character of arbitration, including the one which refers to a "truly international" system which would be set up under the European Convention on International Commercial Arbitration of 1961. The Special Rapporteur also has serious reservations regarding the description of such a system as "truly international". As far as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is concerned, it is known that the notion of an "international award" was rejected.

Lastly, the three obstacles mentioned in the preceding paragraph, which, presumably would prevent the realization of the "very precise" concept of international commercial arbitration within the framework of the new international society of traders, can only be considered valid if one accepts the basic premise that national arbitration is arbitration where *all* the elements (the subject of the dispute, the nationality of the parties and of the arbitrators, the applicable law, the place of arbitration) are solely and equally tied to a given State and that international arbitration is to be understood as "international" not only as regards its substance and form, but also by virtue of its being *independent of any national framework.* It is our belief that these are extreme formal positions and we reject as unrealistic the conclusion which follows from them, i.e., that *in international trade, arbitration is always international.* Actually, what is *always* international in international trade is not arbitration as a whole (the arbitral body plus the dispute) but rather the *dispute* submitted to arbitration, as it arises from international relations. A distinction must be made between "arbitration" as a structure, as a jurisdictional body, and the competence of that body (jurisdictional competence). An arbitral body may well be an internal, domestic one, but it may have international competence (jurisdictional competence). In general, internal, ordinary bodies may take cognizance of disputes involving foreign elements, i.e., they may have international competence. However, the fact that a tribunal has international competence does not make it an international tribunal. This is also true of arbitral bodies. The fact that a dispute is international, that is, arises out of international trade relations, is not enough to make the entire arbitration proceeding international. Furthermore, some national arbitral bodies have both internal and international competence (for example, the American Arbitration Association) and some national arbitral bodies have only international competence (for example, the Arbitration Commission of the Chamber of Commerce of Romania). In order for arbitration to be "international", the structure and composition of the arbitral body must be international as well as the dispute (a case in point is the Court of Arbitration of the International Chamber of Commerce). This does not mean that such an "international" arbitral body would necessarily be independent of any national framework.

Some authors hesitate to call arbitration international on purely procedural grounds,[168] for example, in a case where the arbitrator is a foreigner. Pierre Lalive argues, for example, that if two Swiss parties to a dispute on the interpretation of an "internal" contract accept, by compromise, an award rendered by a French or a German arbitrator domiciled in Switzerland, the arbitration can hardly be called "international". Lalive goes on to state that it is superfluous to seek a single definition of private "international" arbitration that could be generally employed, whether it be based on the applicable law, on competence or any other problem. Each particular case should be examined individually to determine whether what might be called "international" aspects of the dispute justify the application of a special system, different from the one used for internal arbitration.[169] The Special Rapporteur fully agrees with this view.

154. To conclude our discussion on this point, we consider that international commercial arbitration is presently carried out by both national and international arbitral bodies. We agree with Berthold Goldmann's observation that the settlement of substantially international disputes is still entrusted to "national" arbitral bodies.[170] This is a fact, and it is in the light of this fact that we must act if we are to devise any proposal regarding the organization of arbitration throughout the world.

UNCITRAL should therefore avoid supporting or opposing the idea on internationalizing the arbitration of present or future disputes arising from international trade transactions with a view to seeking to render up commercial arbitration autonomous through "internationalization". Present practice shows that two types of arbitration are used and that they are both tied to the various national legal systems.

The problem is how best to put these two types of arbitration at the service of the parties, who alone must make their choice, bearing in mind their own interests.

3. Ad hoc *arbitration and institutional arbitration*

155. Generally speaking, there are two kinds of arbitration: *ad hoc* and institutional (permanent). The latter appears to have become characteristic of modern international arbitration. As already mentioned, there are authors who speak of a veritable proliferation of arbitration bodies of all kinds and denominations: "courts of arbitration", "centres", "associations", "officies", etc.[171] Many commentators believe that the future of arbitration lies in its institutionalization and that *ad hoc* arbitration is on the decline, reduced to the status of a "poor relation" beside institutional arbitration.

As already indicated, there are very different kinds of institutional arbitration. Some are professional, limited

[168] C. N. Fragistas, "*Arbitrage étranger et arbitrage international en droit privé*", in *Revue critique de droit privé*, 1960,

[169] P. A. Lalive, "Problèmes relatifs à l'arbitrage international commercial", *Recueil des Cours*, Académie de droit international, The Hague, 1967, p. 581.

[170] See Berthold Goldmann in the preface to Philippe Fouchard, op. cit., p. vii.

[171] See para. 101 above.

to a particular activity; others are general, i.e. open to all businessmen, whatever their line. Some are national (like the Netherlands Arbitration Institute, the Arbitral Chamber of Paris, the Arbitral Tribunal of the Chamber of Commerce of Manchester and the Zurich Chamber of Commerce). Others are "international" (although they do not have legal international status, properly speaking, because they are private), of which the classic example is the International Chamber of Commerce.[172]

In the handbook prepared by the Economic Commission for Europe, 127 institutions of all kinds are described and analysed.[173]

156. It is customary to use the expression "institutional" arbitration in opposition to *ad hoc* arbitration, but these terms do not have a very precise legal meaning and there is no substantial difference between the two categories.

As a rule, institutional arbitration involves a permanent body *which does not itself take part in the settlement of the dispute* but plays a part at the administrative level. It assists, as necessary, in constituting the arbitral tribunal and in initiating the arbitration proceedings by appointing the arbitrators, the presiding arbitrator, the place of arbitration, etc., in cases where one of the parties wishes to block the arbitral procedure. Hence this body does more than make its rules of procedure, premises and administrative services available to the parties; it also has a say in the application of these arbitral rules. The criterion of institutional arbitration would seem to lie "in the existence or absence of the parties' willingness to be bound in advance by the rules of a body which enforces them".[174]

Ad hoc arbitration is not just arbitration agreed upon in each particular case by the parties, but also arbitration in which the parties follow the rules of a given institution or association which participates in the conduct of the proceedings.[175]

Obviously, there are borderline cases, as always in business and law, falling somewhere between *ad hoc* arbitration and institutional arbitration. One example of this is when parties agree to follow, in their disputes, the "rules of Copenhagen", 1960, of the International Law Association (ILA), because those rules do in fact provide for intervention by the President of the Executive Council of ILA in appointing the arbitrator of a defaulting party and in replacing an arbitrator who resigns without giving reasons.[176] However, since ILA is a private international association and not an arbitration body, it cannot be called an institution.[177]

157. With regard to institutional or permanent arbitration, there is no need to refer in detail to divergent views on definitions of these kinds of arbitration or to consider the rise of institutional arbitration or the decline of *ad hoc* arbitration. It should, however, be noted that there is no substantial difference between the two. Permanent arbitration has the practical advantages of organized arbitration, with the result that a larger number of international commercial disputes are submitted to permanent arbitration bodies nowadays. Such advantages are probably not a decisive factor in important cases, where the parties have the necessary means to organize arbitration for the occasion at their own cost, thereby retaining more extensive control over the rules applied for the dispute and particularly over the choice of arbitrators. However, basically, the arbitration tribunal (sole arbitrator or several arbitrators) is always "for the occasion" even where permanent arbitration is involved. The only permanent feature of institutional arbitration is the "technical facilities", organized services at the parties' disposal. The arbitration tribunal *is always constituted for each particular case.*

The basic difficulties involved in the settlement of disputes (enforcement of the appropriate law, administration of evidence, witnesses, experts, etc.) are almost exactly the same in both permanent and *ad hoc* arbitration. The advantages of permanent arbitration are really those deriving from systematic organization which makes it possible, once the dispute arises, to deal with any dilatory manoeuvres more simply and efficiently. The material conditions in which international trade is carried on today should also be borne in mind. Relationships are made over a distance and, generally speaking, the parties do not know each other before a contract is signed. The personal element is becoming less important. That is why the parties' trust (a decisive factor in arbitration) is transferred from the arbitrators to the arbitration institution or body itself through which the arbitrators are chosen.

On the other hand, it would seem that there are serious objective reasons which indicate the limited possibilities for developing institutional arbitration. Indeed, private contacts in legal or business circles clearly show that a fair number of disputes are never submitted to arbitration bodies.[178] Unfortunately, it is impossible to obtain more complete information on occasional arbitration, but both kinds of arbitration will undoubtedly continue to coexist. That is why UNCITRAL, while giving priority to the problems of permanent arbitration, should also take into account the practice of *ad hoc* arbitration. Moreover, as will be seen below, the two important international conventions on international commercial arbitration (New York, 1958, and Geneva, 1961) deal expressly with both categories of arbitration.

158. There is no need to go into the details of the controversies concerning the problem which is worth mentioning here, although, in the Rapporteur's view, it should not have constituted a problem. It continues, however, to figure as such in certain specialized literature, published in the countries of Western Europe, concerning permanent arbitration centres associated with the chambers of commerce in the Eastern European countries. This problem was mentioned in the first part of the report,[179] where it was indicated that the entry

[172] Cf. P. A. Lalive, op. cit., p. 666.

[173] According to the final version of the Handbook of National and International Institutions Active in the Field of International Commercial Arbitration. United Nations Economic Commission for Europe, document TRADE/WP.1/15/Rev.1 (see above foot-note 153).

[174] P. J. Van Ommeren, Rapport au Congrès international de l'arbitrage, Paris, 1961, in *Revue de l'Arbitrage*, No. 2/1961, p. 101.

[175] See P. A. Lalive, op. cit. p. 665.

[176] See paras. 28 and 29 above.

[177] See P. A. Lalive, op. cit. p. 670.

[178] See P. A. Lalive, op. cit. p. 670.

[179] See para. 46 above.

into force of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was tantamount to recognition at the international level of the arbitral nature of all permanent arbitration centres in all areas of the world. Article 1, paragraph 2, of this Convention states that "the term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted".

In 1961, the European Convention on International Commercial Arbitration also stated in article 1, paragraph 2 (*b*), that arbitration was "not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but *also by permanent arbitral institutions*".

Although the adoption of the above texts should have solved the problem, the controversies have continued among jurists. Some people—although gradually fewer—still affirm that permanent arbitration in the Eastern European countries is on the borderline of arbitration, or even that it cannot be considered arbitration in view of its preconstituted structure, lack of independence, violation of the fundamental principle of equality of the parties, lack of guarantees of impartiality, because the bodies concerned are constituted under a system of closed lists which only include nationals, because the arbitrators are civil servants (teachers, people in charge of foreign trade, etc.).

In 1965, in the Milan Court of Appeal, INTERFERRO of Milan raised similar questions, in contesting the application for execution made by the Romanian firm METALIMPORT. The following are the findings and appraisals of the Court of Milan concerning the nature of the Arbitration Commission of Bucharest:

> "*It is therefore evident that the arbitral body is not a preconstituted legal authority even if its members are elected by the parties from a closed list.*
>
> "Actually the nature of the arbitral body cannot relieve the parties of the obligation to appoint the two arbitrators from among those indicated on the list, since the law requires fulfilment of a subjective condition for inclusion on the list, in the same way as our law lays down certain preconditions for a person to be appointed as arbitrator (Italian citizenship, capacity to act, solvency, etc.: Code of Civil Procedure, article 812).
>
> "Limiting the choice to a specific category of people does not necessarily prevent freedom of choice by the parties, within that limitation, from being a determining factor in the constitution of the court . . .".[180]

Not to over-emphasize the problem, it may be useful to quote the points made by Italo Telchini concerning the award granted by the Milan Court of Appeal.

> "Without repeating the other relevant observations on the award it seems that, in this particular case, the solution to the problem could be based on whether or not the parties involved could avoid having recourse to the Arbitration Commission of the Romanian Chamber of Commerce. In fact, there is no specific provision in the legislation of that country, and still less in that of our own country, which obliges the parties to submit to that Commission any disputes that may arise from the execution of the contract concluded between them. Indeed, as stated in a recent publication,[181] the inclusion of arbitration clauses in favour of Romanian arbitration is merely 'recommended' to the firms dealing with foreign trade in Romania. It therefore follows that, wherever that clause is not accepted by both parties and included in the contract, any disputes that may arise may be settled by a different procedure.
>
> "Hence, since the possibility of choosing not to submit disputes of that kind to the Arbitral Commission is not excluded, the question whether the parties had more or less freedom in selecting arbitrators was less important in this case. It should be recognized, furthermore, that there was still a certain margin of freedom in this case, although it was limited to the choice in a list, which was undoubtedly somewhat restricted, being composed of only 15 persons. The fact that those included in the list were appointed from above and that the arbitrators were bound to apply preset rules of procedure *is by no means exceptional.*"[182]

159. Philippe Fouchard also analyses all the aspects of the problem in detail.[183] He points out that several Western institutions draw up lists of arbitrators which include only their nationals and that certain Western legislations do not allow foreigners to be arbitrators (Greece, Italy, Portugal). It should be noted that the "national" concept of arbitration in international commerce is not peculiar to socialist institutions and that this practice is becoming more flexible.

On the other hand, the choice of arbitrators must be made from among qualified persons who therefore have certain responsibilities in the legal or economic life of the countries concerned. This is so in the case of the Western countries in which the arbitrators are most often businessmen. There again, the situation is not basically different from that found in Western arbitral institutions, particularly those which are constituted within a specific corporate group or local chamber of commerce.

I consider that I can draw the following conclusions on the subject: *that there is no substantial difference between the existing permanent arbitral centres in the different regions of the world; that all are suitable for use in international commerce; and that they will continue to exist only in so far as they can win and retain the confidence of the parties concerned in view of the voluntary nature of their competence. Therefore, from that point of view, co-operation at the world level between the various arbitration centres could be organized without too much difficulty.*

4. Amiable compositeur *and arbitration according to the rules of law*

160. In his introduction to volume I of the IAL on international commercial arbitration, the general Rap-

[180] Milan Court of Appeal, decision of 23 April 1965, in *Rivista di diritto internazionale privato e processuale*, No. 3/1965, pp. 580 and 581.

[181] Cf. IAL, op. cit., vol. II, p. 174.

[182] Italo Telchini, "In terma di efficacia in Italia di una sentenza arbitrale straniera", in "*Rivista di diritto internazionale privato e processuale*", No. 1/1966, pp. 72-73.

[183] Philippe Fouchard, op. cit., p. 195 *et seq.*

porteur Pieter Sanders states that much would be gained if "the misunderstandings about the true character of the *amiable compositeur* disappeared. This would mean removal of an important obstacle to every attempt at international co-operation in the field of arbitration".[184]

We, too, feel that the problem is very important and some clarification of the matter might be useful, particularly since proposals have been made for unifying arbitration by abolishing arbitration according to the rules of law,[185] some authors have noted that the rules of a number of arbitration centres refer to such criteria as equity or natural justice,[186] and some arbitration centres are even considering separating arbitration completely from any pre-established rule (arbitration *in equity*, by *amiable composition, ex aequo et bono*) as a general solution or as a solution which might be applied at the request of either party.[187]

161. At the 1946 Conference of the ICC in Paris, the main problem discussed was that of the *amiable compositeur*, or arbitrator *de facto* to whom, in contrast to the arbitrator *de jure* the following characteristics were attributed: (*a*) he is not bound by the rules of legal proceedings, (*b*) he is not bound to apply the rules of material law but decides in equity, and (*c*) his award is final.

In an article published in the Arbitration Journal in 1947, Dr. Robert Marx spoke of the Anglo-Saxon aversion to the *amiable compositeur*, which had been demonstrated clearly as early as 1937 by the attitude of the British, United States and Australian delegations to the preliminary draft of a uniform law on arbitration prepared by UNIDROIT. Indeed, at the 1937 ICC Congress those delegations specifically rejected the UNIDROIT draft precisely because it introduced the system of *amiable compositeur*.

Commenting on the above Dr. Marx states:

> "In my opinion, the real danger which in these circumstances seems to be the problem of *amiable compositeur* for unification of international commercial arbitration law, comes from an erroneous interpretation of the notion of *amiable composition*.
>
> "The *amiable compositeur* in fact does not differ from the arbitrator recognized by those legislations which do not know the antagonism between the arbitrator *de jure* and the *amiable compositeur*. The building up of two or even three systems of arbitrators—arbitrator *de jure*, *amiable compositeur*, arbitrator who takes into consideration the rules of law but whose award, which is final, cannot be set aside for error in law—is lacking of a scientific basis and does not correspond to the interests and intentions of the parties.
>
> "There should be only one kind of arbitrator as there exists only one kind of public judge".[188]

Dr. Marx, referring in 1947 to how things had developed, notes that, owing to the fact that *amiable composition* was more expeditious, simpler and provided a final settlement of disputes it had developed "as an antagonist against the arbitration *de jure*". However, although it would have been logical for the *amiable compositeur* to replace the arbitrator *de jure*, that did not happen; instead both kinds of arbitration continued to develop side by side in many countries.

Dr. Marx raises the following question: is the *amiable compositeur* really able to refuse deliberately to apply the rules of law? "Certainly not. The *amiable compositeur* as any other arbitrator must observe the fundamental rules which govern judicial procedure and material law. For instance, he is not allowed to base his opinion on secret information or on hearing of the witnesses in the absence of the other party or his representative. Witnesses or experts cannot be sworn by him when the legislation of the country where arbitration is held reserves the authorization to administer an oath to the public judge."[189]

A little further on he concludes that the fact that the *amiable compositeur* is not bound to apply the rules of law has been exaggerated by his "too eager" enemies and friends. The *amiable compositeur* cannot go beyond the limits of public policy, and must obey certain compulsory rules and fulfil his jurisdictional duties just as any other arbitrator must.

Even with regard to the finality of the award there does not seem to be any essential difference between the *amiable compositeur* and the arbitrator *de jure*. Certain countries consider the finality of the award a characteristic of *any* arbitration. Sweden and Finland, for example, refuse to apply the legislation on arbitration in case parties want to reserve the right of appeal. Such a reservation is inadmissible whether the arbitrator involved is an arbitrator *de jure* or an *amiable compositeur*.

Dr. Marx concludes his article by stating that the existence of the arbitrator *de jure* side by side with the *amiable compositeur* is superfluous and merely gives occasion to doctrinal misunderstandings and complications.

> "The existence of one arbitrator is to conform to the interests and intentions of the parties, and, on the theoretical plane, clears up a situation which was unfavourable to the unification of international commercial law".[190]

162. In the circumstances a survey of current arbitration procedure and the law applicable thereto in various countries is necessary to establish whether the misunderstandings about the true character of the *amiable compositeur* and the correctness of the classification of arbitration into "arbitration according to the rules of law" and "*amiable composition*", still applies. On the basis of such a survey we shall be able to define our views on the current possibilities concerning unification and harmonization in this field.

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[184] Pieter Sanders, introduction, in IAL, *Arbitrage International Commercial*, vol. I, p. 22.

[185] See, for example, Dr. Robert Marx, "*Amiable compositeur*: Contribution to the problem of uniform international commercial arbitration", in *Arbitration Journal*, 1947, pp. 211-217.

[186] See Peter Benjamin "A comparative study of international commercial institutional arbitration in Europe and in the United States of America", in IAL, *Arbitrage International Commercial*, vol. II, p. 386.

[187] O. Riese and Eugenio Minoli "*L'arbitrage, facteur d'unification du droit et d'élimination des conflits de lois*" in *Revue de l'arbitrage*, 1966, No. 3 (special), Paris, p. 70.

[188] Dr. Robert Marx "*Amiable compositeur:* Contribution to the problem of uniform international commercial arbitration", in *Arbitration Journal*, vol. 2, 1947, p. 212.

[189] *Ibid.*, p. 214.

[190] *Ibid.*, p. 217.

Some countries still recognize the existence of the *amiable compositeur* and the arbitrator who decides "according to the rules of law"; others recognize only one method of arbitration which is either similar to *amiable composition* or similar to arbitration "according to the rules of law". The three volumes published in 1956, 1960 and 1965 by the International Association of Lawyers and edited by Professor Sanders provide valuable information and give us an idea of the situation throughout the world.

163. In the first category, countries which recognize two kinds of arbitration, we can classify most of the European countries. There are also quite a number of such countries in the other continents. Following is an account of the situation in a few countries in various regions of the world:

In France, states Jean Robert, although arbitrators must decide according to the rules of law, they must respect all the rules, even supplementary rules, just as any court of law would do; indeed, as far as the administration of the law is concerned there is no difference between an arbitrator and a court of law.

Parties may confer on the arbitrators the role of *amiable compositeurs*, but to act as such *is a mere right* and not a duty, in cases where arbitrators are of the opinion that it would be equitable to apply the rules of law. Thus, when serving as "*amiables compositeurs*", if they think that equity demands it, arbitrators may dispense with all the rules of law, *both strict and supplementary*. In such cases they are bound only by the principles of *public policy*.[191]

In Spain, since the passing of the Act of 22 December 1953, states Juan de Leyva y Andía,[192] there is only one type of arbitration whereas formerly there had been two, namely, arbitration in law and *amiable composition*. Only one type is left, although the former dualism still exists in so far as arbitrators may resolve disputes either in accordance with the rules of law (*con arreglo a derecho*) or else in accordance with "their knowledge and insight" (*con sujeción a su saber y entender*). In the former case (arbitration in accordance with the rules of law) the arbitrators must be practising lawyers, whereas in the latter case (arbitration *ex aequo et bono*) they may be laymen.

In Spain, therefore, there is no more "*amiable composition*", but there is a type of arbitration *ex aequo et bono* in which the procedure followed does not have to be in accordance with the legal forms. The only recourse against an award thus rendered is an action before the First Chamber of the High Court to have the award set aside on the grounds determined in the Code of Civil Procedure (articles 1774-1780).[193]

With regard to Italy, although Italian law distinguishes between awards made according to the rules of law on the one hand and awards *ex aequo et bono* on the other, this does not preclude the possibility of awards being made partly in accordance with the rules of law and partly *ex aequo et bono*. All arbitration awards, whether made according to the rules of law or *ex aequo et bono*, must state the grounds on which they are based. Appeals to set aside awards made *ex aequo et bono* are not receivable. Italy also has "free arbitration" in which the decision need not be filed with the clerk of the *Pretura*. It merely has the effect of a contract and is comparable to an agreement concluded by the parties themselves. The persons designated by the parties thereby acquire the powers of arbiters (mediators) rather than of arbitrators in the strict sense of the word. The decision of the arbiters in such cases cannot be enforced, however, without further proceedings. If one party refuses to comply with the award appeal must be made to an ordinary judge who, without examining the merits of the matter will issue an injuction ordering performance of the obligation established by the arbiters.[194]

In Norway, in the absence of any agreement to the contrary, the arbitrators must render judgement in accordance with the prevailing rules of law and must not decide the case *ex aequo et bono*. *Amiable composition* is therefore permitted side by side with arbitration in accordance with the rules of law. Sven Arntzen states that occasionally an arbitration agreement may contain the stipulation that the arbitral tribunal shall make its award in accordance with "law and equity" (*ex aequo et bono*), implying thereby that the arbitral tribunal will be less bound by the letter of the law than the ordinary courts.[195]

In the Netherlands it is customary for the parties to confer on the arbitrators the quality of *amiables compositeurs*. However, arbitrators who act as *amiables compositeurs*, as well as those adjudicative in accordance with the rules of law, are obliged to state the reasons of their award and to observe the imperative rules of law. It is only with regard to the supplementary rules of law that they have greater freedom than arbitrators who adjudicate according to rules of law.[196]

164. With regard to Latin America, Argentina recognizes both categories of arbitration. There are two separate chapters in the Code of Procedure entitled "Procedure for arbitrators" and "Procedure for *amiables compositeurs*". The former is also known as *arbitri juris*; and is governed by the same rules as proceedings before the courts of law. The *amiable compositeur* is not bound by rules of procedure. He decides according to his knowledge and conscience.[197] In Brazil, arbitration procedure is determined by agreement between the parties. Only in cases where the parties have not mentioned procedure do the rules of law apply.[198] In Mexico, as a rule, the arbitrators adjudicate according to the rules of law but they may act as *amiables compositeurs* if they have been so authorized in the arbitration agreement.[199] Peru, too, recognizes both

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[191] Jean Robert, in IAL, *Arbitrage International Commercial*, vol. I, p. 255. He also mentions the possibility of free arbitration in which arbitrators are charged with the task of determining the contents of the contractual relations between parties (p. 269). There are no judicial precedents concerning free arbitration in France.

[192] Juan de Leyva y Andía, op. cit., vol. I, p. 169. He also mentions free (*informal*) arbitration used in matters of little importance (for example cases brought before the jury of the irrigation communities).

[193] Because of this we have classified Spain as a country which recognizes two types of arbitration.

[194] Mario Braschi, Bernardo Ansbacher, Enzo Caratti, Giorgio Jarach, Raffaele Nobili in IAL, op. cit., pp. 339, 341, 345, 357.

[195] Sven Arntzen, *ibid.*, p. 361.

[196] Pieter Sanders, *ibid.*, pp. 397 and 407.

[197] Mauricio A. Ottolenghi, *ibid.*, vol. II, p. 3.

[198] Celso A. Frazao Guimaraes, *ibid.*, vol. II, p. 23.

[199] Raul Cervantes Ahumada, *ibid.*, vol. II, p. 45.

categories of arbitration; the *amiable compositeur* is dispensed from following the ordinary rules of procedure and may adjudicate in accordance with his knowledge and conscience, observing the customs of the trade, reasonable justice and good faith.[200] In Uruguay the situation is slightly different. Arbitrators must apply the provisions of the Code of Commerce stating in the arbitral award which provisions have been applied. They therefore judge according to the rules of law. With regard to the procedure, they are not bound by the rules of law unless the parties have so agreed in the arbitration agreement. If the parties have not determined the procedure in the agreement the arbitrators adjudicate without regard to the rules applicable in court proceedings. Usually the arbitrators establish a simplified procedure which assures the parties equal rights and equal opportunities to present their case.[201]

165. In other regions of the world, too, there are countries where both categories of arbitration are recognized and although there are slight variations they are basically the same as those we have already described. There are also countries which are hard to classify in either category. For example, in India—as in Uruguay—arbitrators must adjudicate according to the rules of law, except those rules which are clearly procedural. But even as regards procedure although the strict rules of the Evidence Act are not directly applicable to the arbitration proceedings, the rules of natural justice have got to be observed. For example, the arbitrators cannot proceed to hear evidence in the absence of a party unless the party is absent after notice has been given of the hearing.[202]

In Iran as regards procedure the law specifically releases arbitrators from any obligation to observe the rules of civil procedure. The arbitrators are expected to comply in this respect with the wishes of the parties as expressed in the arbitration agreement or otherwise. Where no directions are given as to rules of procedure, they are determined by the arbitrators. If the parties have agreed to give the arbitrators the status of "*amiable compositeur*" the arbitrators can base their award on general considerations of reasonableness and equity. However, an arbitrator cannot validly issue an award which conflicts with substantive laws.[203]

166. We feel that the countries of Eastern Europe can be included in the category of countries that recognize both types of arbitration even though *amiable composition* as such is not actually mentioned in the various laws. Generally speaking, the procedures followed in *ad hoc* arbitration are closer to what we call arbitration "in equity" or *"amiable composition"*, whereas the permanent arbitration bodies of the Chambers of Commerce of these countries operate in accordance with the rules of law, although their awards are final.

For example, in Poland the Code of Civil Procedure provides in general that procedure before an arbitral tribunal shall be left to the parties' discretion. If, however, the parties do not avail themselves of that right, it becomes the right and duty of the arbitrators to establish the procedure (while respecting the binding rules). Polish law makes no distinction between arbitrators acting as *amiables compositeurs* and arbitrators who decide a case according to the rules of law. Their award must not be contrary to public policy or the principles of the social community; otherwise the award may be set aside.[204]

In the German Democratic Republic arbitral procedure is based on the German Code of Civil Procedure of 1879, which is applied in both German States, with a few amendments. The arbitral procedure therefore depends in the first place upon the agreement of the parties but, if the parties have not determined the procedure, it is up to the arbitrators to do so at their discretion. As for arbitration at the Chamber of Commerce, the arbitration tribunal makes its decision on the basis of the legislation agreed on by the parties in so far as that does not go against the private international law of the German Democratic Republic. The Court of Arbitration takes account of commercial customs applicable to disputes provided that the parties have agreed to negotiate on the basis of those customs or that the latter are explicitly recognized in the legislation to be applied.

In Romania, *ad hoc* arbitration is regulated by the Code of Civil Procedure, which stipulates that arbitrators, making their award, shall apply the rules of law, unless they have been authorized by the arbitration agreement to decide according to their conscience and appreciation. Arbitration under the authority of Chamber of Commerce, which is permanent, is carried out in accordance with that institution's regulations governing its organization and operation. The arbitrators are obliged always to adjudicate in accordance with the rules of law and cannot be authorized by the parties to decide as *amiables compositeurs*.

The same seems to apply as regards permanent arbitration in the USSR,[205] Czechoslovakia[206] and Hungary,[207] judging from the fact that the awards rendered under such arbitration are final and binding, although that does not mean that *ad hoc* arbitration on the basis of *ex aequo et bono* would not be valid. The situation in Bulgaria is different. The regulations of the Arbitration Commission of Sofia state that arbitrators shall assess the evidence on the basis of their own conviction and shall state the grounds for the award in accordance with the laws and commercial customs as indicated by the rules of private international law; in cases where the laws and customs are inadequate they are to adjudicate in accordance with conscience and equity.[208]

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200 Ulises Montoya Manfredi, *ibid.*, vol. II, p. 67.

201 Quintin Alfonsin, *ibid.*, vol. II, p. 89.

202 Tanubhai D. Desai, *ibid.*, vol. III, p. 39. The same regulations also exist in Pakistan. See J. P. A. Burton, *ibid.*, vol. III, p. 113.

203 Fuad Rouhani, *ibid.*, vol. III, p. 61. Mention must also be made of the existence in Iran of a set of rules for oil arbitration embodied in the existing law between the Iranian Government (including the National Iranian Oil Company) and the consortium of oil companies concerning disputes arising from the operation of the oil agreement. For details see Fuad Rouhani, *ibid.*, pp. 65-67.

204 Henryk Trammer, *ibid.*, vol. II, p. 137.

205 See E. Usenko, *ibid.*, vol. II, pp. 213 *et seq.*

206 Théodor Donner, *ibid.*, vol. II, p. 205.

207 See Imre Mora, *ibid.*, vol. II, p. 107. He states that there is no *amiable composition* in Hungary. However, one should mention that opinions differ on that subject and that it is asserted that the possibility of arbitration in equity exists.

208 See the regulations of the Arbitration Commission for External Trade, art. 47, Sofia, 1965.

167. Finally, some countries have only one type of arbitration, for example the Federal Republic of Germany, Denmark, Austria, Finland and the United States. In such countries the notion of *amiable compositeur* as such is not used but, generally speaking, the procedure before arbitral tribunals is determined by agreement between the parties. The same freedom seems to exist as regards the substance.

Under Japanese law, arbitrators are bound neither by provisions of procedure, nor by substantive provisions of statute law. They must render their award in accordance with commercial usage, good faith or natural justice, with the sole restriction that they are not permitted to contravene the public order. Therefore Japanese law does not know the distinction between arbitrators deciding as *amiables compositeurs* and arbitrators deciding according to the rules of law. Further, the court of law has no power to examine the correctness of the law applied in an arbitral award.[209]

Among the countries which recognize only one type of arbitration the United Kingdom is considered to occupy a special place. Its system is unknown in the other countries.[210] The arbitrator may judge only in accordance with the rules of law and he can always refer a particular question of law to the Court for decision. Here we find co-operation between the courts and the arbitrators in order to reach a decision which is right in law ("special case stated").[211] Sir Lynden Macassey states that the only kind of arbitration recognized by law throughout the whole of the United Kingdom is what is generally known among international jurists as "judicial arbitration". The laws of England, Scotland and Northern Ireland do not recognize the validity of *amiable composition*.[212] However, it seems that arbitrators may, if they are expressly authorized to do so by the parties, settle questions in accordance with their own judgement and experience. The author in question explains that arbitrators must act "judicially" but that that does not mean they must "follow meticulously the procedure of the English law courts". They must observe the fundamental rules of natural justice. They must decide according to the legal rights of the parties, "unless the arbitration agreement authorizes them, which it seldom does, to decide according to what they think is equitable". They are bound by substantially the same "rules of evidence" as bind an English court of law "though not necessarily by all the same formal rules of proof".[213]

168. From this general survey certain conclusions can be drawn:

(*a*) Nearly all countries recognize arbitration by *amiable compositeur*, even if it is sometimes called arbitration ("in equity", "*ex aequo et bono*" and so on). Even in England, which is cited as an example of a country which recognizes only "judicial" arbitration, arbitrators are not—as we have seen—always obliged to follow meticulously the procedure of the English law courts. In some cases they may decide "according to what they think is equitable" (if they have been authorized to do so in the arbitration agreement).

(*b*) "*Amiable composition*" does not mean "separating arbitration completely from any pre-established rule" as some authors think (see above). An *amiable compositeur* is bound to respect the fundamental principles of procedural law at least, and as regards rules of substance is also bound by public policy or prohibitive provisions.

(*c*) *Amiables compositeurs* are never conciliators. They represent a form of justice for they settle disputes by deciding on the basis of rules or principles which can be generally and equally applied to all people in the same circumstances. As Pierre Lalive[214] has rightly observed, *amiable composition* does not necessarily mean basing one's decision on purely "practical" consideration. Equity does not necessarily fall outside the realm of law. In the Special Rapporteur's opinion, if *amiable composition* was really extrajuridical (outside the realm of law) *it should not be a subject of concern for the United Nations Commission on International Trade Law.*

(*d*) *Amiable composition* is always legal, simply because the source of its validity and effectiveness is not solely the will of the parties but the law which recognizes the will of the parties. Besides, that is the concept underlying article VII of the 1961 European Convention on International Commercial Arbitration which states that "arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration".[215]

(*e*) As Pieter Sanders rightly notes, although *amiable composition* may be preferred in practice, there are no particular objections to arbitration "according to the rules of law" particularly as with a few exceptions the "national judge does not investigate whether the award complies with the rules of law; in other words, the arbitral award is final in each type of case".[216]

(*f*) Not only is there a difference between arbitration "in accordance with the rules of law" and the *"amiable compositeur" but there are also differences within each category.*

(*g*) Unification must be achieved within each category because there is still, even now, a certain amount of confusion about the notion of arbitration "in accordance with the rules of law" and the "*amiable compositeur*".

(*h*) Although currently the term *amiable compositeur* is widely used, we would prefer to introduce the

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209 Junichi Nakata, in IAL, op. cit., vol. III, p. 85.

210 It seems, however, that a similar system also exists in Australia (see Arthur Francis Rath, *ibid.*, vol. III, p. 12). The "special case stated" procedure also exists in India and Pakistan but unlike England there is no provision which states that arbitrators must thus refer to the courts (Tanubhai D. Desai, *ibid.*, vol. III, p. 37 and J. P. A. Burton, vol. III, p. 113).

211 Cf. Pieter Sanders, *ibid.*, vol. I, p. 21. However, one should remember that Robert Marx (*ibid.*, pp. 215-216) considers that this rule is not a matter of public policy and that the parties can therefore oust the jurisdiction of the court by agreement. We refer the reader to art. 17 of the rules of the London Court of Arbitration.

212 Sir Lynden Macassey, *ibid.*, vol. I, p. 63.

213 Sir Lynden Macassey, *ibid.*, vol. I, p. 75.

214 Pierre Lalive, *ibid.*, p. 578.

215 Naturally, as regards arbitration procedure the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral awards had already established the autonomy of the will of the parties.

216 Pieter Sanders, in IAL, op. cit., p. 21.

terms "arbitration in strict law" and "arbitration in equity" to show that the *law is involved in both cases.*

(*i*) To achieve such unification it is not essential for countries that recognize both categories of arbitration to eliminate and have only one category, that of the *amiable compositeur*. This is true not only because, as Professor Sanders says,[217] the adoption of such a proposal would be very problematic as the countries which have both categories of arbitration are inclined to maintain them, but also because arbitration "according to the rules of law" (in strict law) can quite well co-exist with the "*amiable compositeur*" (arbitration inequity) so long as the parties are allowed to choose freely either system and provided that the differences between the two categories are uniformly and clearly stated.

5. *Domain of arbitrability; authorization of legal persons of public law to conclude valid arbitration agreements*

169. Two very important points have been mentioned in connexion with the arbitration agreement, which is rightly considered to be a basic element of arbitral jurisdiction. Firstly, there is no uniformity in national bodies of law regarding disputes which may be the subject of arbitration agreements and secondly, there are also a number of differences regarding the capacity of certain natural or legal persons to submit to arbitration the settlement of disputes to which they are parties.

170. In principle, all the rights that the parties are free to exercise may be submitted to the arbitrator. The extent of that freedom of exercise is established by the various national bodies of law. In Norway, for example, no arbitral clause may be included in a credit-sale agreement, this proviison being one of the protective measures established with regard to credit-sale transactions.[218] In France, there may be no recourse to arbitration in connexion with questions relating to the validity of company registrations, bankruptcy, the ownership and validity of patents and trademarks and, in general, all disputes affecting the rights of third parties or which involve problems concerning prescribed rates of exchange and official price regulations. All such problems are considered incompatible with the rules of public policy.[219] In the Federal Republic of Germany arbitration agreements may be made with respect to all matters of a financial nature, i.e. practically all civil and commercial claims, but "matters pertaining to public law or involving public policy"[220] (bankruptcy, for example are precluded). In Austria, India, Japan, Switzerland and the United States, any dispute of a commercial nature may, *in principle*,[221] be ruled on by arbitrators. The same is true, in general, in the East European countries for any trade dispute involving the trading enterprises. In Argentina, a number of matters, including those concerning public or municipal property and those which, for one reason or another, require the intervention of the tax authorities, are excluded from arbitration for reasons of public policy.[222] In Mexico, questions relating to the validity of patents, the registration of trademarks, the validity of commercial company registrations, bankruptcy and so on may not be submitted to arbitration,[223]

171. It was not possible to define directly the idea of an "arbitrable trade dispute" in recent international conventions, and divergences between national legislations still persist. The 1923 Geneva Protocol recognizes the validity of an arbitration agreement concluded "relating to commercial matters or to any other matter *capable of settlement by arbitration*", but each Contracting State reserves the right to limit its obligation to contracts which are considered as commercial under its national law, which amounts to a statement that each State remains virtually free to decide which matters it considers to be arbitrable.

The 1958 New York Convention, too, allows States to restrict its application to "legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration"; that law is competent to decide whether the arbitration agreement relates to a legal relationship "whether contractual or not" concerning a subject matter "capable of settlement by arbitration" (article II, paragraph 1). It was not possible to define, in the 1961 European Convention, the international trade questions to which it was to be applied. Moreover, a definition of the "commercial nature" of a dispute would not have solved all the problems that might arise in each particular case. In 1956, Pieter Sanders, in his introduction to volume I of *International Commercial Arbitration*, concluded that in his opinion, "this matter can hardly be standardized; there will always remain differences between the laws of various countries."[224] Ten years later, Philippe Fouchard noted that the question of the arbitrability of a dispute is so complex, and the national concepts it involves are so specific, that it cannot be decided abstractly by an international text or even by a national text.[225]

172. In the opinion of the Special Rapporteur it would be extremely difficult to reduce the diversity concerning the extent of arbitrability by adopting an international convention for that purpose; the solution is still to be found in the techniques of private international law which have already defined the *lex fori* of the judge seized of a dispute as the rule of conflict applicable to arbitrability. That solution was adopted by the 1927 Geneva Convention which states that in

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217 Pieter Sanders, *ibid.*, p. 21.

218 See Sven Arntzen, in IAL, op. cit., vol. I, p. 365.

219 See Jean Robert, *ibid.*, p. 243.

220 See D. J. Schottelius, *ibid.*, p. 39.

221 We have underlined the words "*in principle*", because even in those countries, despite the general trend towards the promotion of arbitration and the broadening of its sphere of application, recent cases show that some problems are not arbitrable. There are, for example, three decisions of 1968 handed down by the Court of Appeal of New York, quashing decisions of lower courts which allowed "anti-trust" problems to be settled by arbitrators (Aimcee Wholesale Corp. *v.* Tomar Products and American Safety Equip. Corp. *v.* J. P. Maguire and Co. *v.* Hickok Mfg. Co.) on the grounds that very important and complex probelms were involved and, moreover, that arbitrators are not bound by the norms of law and their decisions are final. Such a procedure might lead to contradictory interpretations (see AAA, *Lawyers Arbitration Letter*, No. 35, 15 August 1968).

222 See Mauricio Ottolenghi, in IAL, op. cit., vol. II, p. 8.

223 See Raul Cervantes Ahumada, *ibid.*, vol. II, p. 46.

224 *Ibid.*, vol. I, p. 15.

225 Philippe Fouchard, op. cit., p. 107.

order to obtain recognition or enforcement of an award, the subject-matter of the award must be capable of settlement by arbitration (article I (*b*)), under the law of the country in which the award is sought to be relied upon. That solution was also retained by the 1958 New York Convention which, in article V, paragraph 2, provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country. The 1961 Geneva Convention likewise stipulates (article VI, paragraph 2) that the judge seized of the dispute may also refuse recognition of the arbitration agreement if under the *lex fori* the dispute is not capable of settlement by arbitration.

We know this solution is not perfect and gives rise to uncertainties, since at the moment when the arbitrator makes the award he cannot be certain of the law according to which he should rule on the arbitrability of all or part of the dispute submitted to him, in order to avoid invalidation of the award. We think that if a new international convention on arbitration is prepared it should embody the solution which makes all international trade disputes arbitrable, in principle, subject to the rules of international public policy of each country. Philippe Fouchard observes that such a solution would reinforce the stability of the system since the likelihood of such a case arising would be remote. The Special Rapporteur is of the opinion that even if a new arbitration convention is a remote possibility, practical steps could be started immediately: the drawing up of a list of non-arbitrable questions, for each country, the publication of those lists, and consideration of the possibility of establishing a generally acceptable list that could be annexed to a possible new convention.

173. Difficulties have arisen for "legal persons of public law" in connexion with their right to accept arbitration in international trade disputes. This is an important question in view of the growing role played by States or bodies depending more or less directly on them. In modern international trade, States and legal persons of public law, whatever their political and economic structures may be, are becoming increasingly active in economic matters and particularly in international trade. This is a general phenomenon although the reasons for it are varied.

The economic activity of States or legal persons of public law brings them into contact with private parties to contracts and consequently with the subject-matter and methods of trade law. The problems raised by the settlement of disputes arising from such mixed relations are complex,[226] and opinions are divided as to how they should be resolved. Without wishing to enter the controversy, the Special Rapporteur is of the view that arbitration is nevertheless to be recommended, since for such disputes recourse to ordinary national jurisdiction raises still more delicate problems. We believe that this is partly a question of the social relations arising from international trade, so that it is a commercial matter even if one of the parties is subject to international law. In such a case, the contracting State or legal person of public law must bow to the needs of international trade and be able, among other things, to accept validly the competence of an arbitral tribunal.

174. There are countries like Greece, the Netherlands, Belgium and France, which have passed a general interdiction preventing legal persons of public law from resorting to private arbitration, *save in exceptional instances*. The problem that has arisen was to see if those interdictions relating to internal relations were equally valid for international relations. In recent judicial practice in France there has been a trend towards the solution restricting that incapacity solely to internal relations.[227] Reference has even been made to "international public policy" as distinct from national public policy. This would involve an appeal to general principles of law or to purely doctrinal analysis of legal situations made by the arbitrators, who would be more concerned with discovering an internationally applicable rule than with reliance on a particular body of municipal law.[228]

Leaving aside the problem of the capacity of legal persons of public law to resort to arbitration to settle disputes arising from their internal legal relations, since UNCITRAL does not have to concern itself with such relations, the Special Rapporteur is of the opinion that the trend to admit such capacity in international trade relations should be encouraged, in any event, the discussion is mainly of academic interest, without much practical value, since cases of the incapacity of legal persons of public law to resort to arbitration in private international law relations are very rare. In the field of such relations, a uniform solution such as that adopted in article II of the 1961 European Convention seems satisfactory to us. As a general rule, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude *valid* arbitration agreements, but on signing, ratifying or acceding to the Convention any State is entitled to declare that it limits that faculty to such conditions as may be stated in its declaration.

6. *Other general findings and final proposals*

175. The Special Rapporteur was instructed to study "the most important problems concerning the application and interpretation of the existing conventions and other related problems".[229] Unfortunately the innocent expression "other related problems" covers almost every aspect of international commercial arbitration. The Special Rapporteur has nevertheless made every effort to give UNCITRAL as complete a picture as possible

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226 What is involved here is the immunity from jurisdiction that States may invoke regarding the law applicable etc. See C. Carabiber, Le concept des immunités de juridiction doit-il être révisé et dans quel sens? Clunet, 1952, pp. 440-494; J. F. Lalive, L'immunité de juridiction des Etats et des organisations internationales, *Recueil des Cours*, Académie de droit international, The Hague, 1953, vol. III.

227 This refers to a series of judgements beginning with the judgement of the Paris Appeals Court, of 10 April 1957, confirmed by the judgement of the supreme court of 14 April 1964.

228 P. Fouchard, op. cit., p. 102.

229 See the decision unanimously adopted by UNCITRAL on 26 March 1969 (report on the second session, para. 112; *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970*, part II, chapter II, A).

of the situation in that domain, which is generally acknowledged to be very important for the development of international trade.

The Special Rapporteur is aware that a great deal of information has probably been omitted from the report. He believes, however, that he has covered the most important aspects of international commercial arbitration and given a general impression of the related problems, and that he is in a position to make proposals that can be discussed by UNCITRAL.

176. With regard to the application of the existing conventions (the 1923 Geneva Protocol, the 1927 Geneva Convention, the 1958 New York Convention, the 1961 Geneva Convention and the Agreement relating to application of the 1961 Convention concluded in Paris in 1962 under the auspices of the Council of Europe, the 1965 Washington Convention and the 1966 Strasbourg Convention), an initial distinction can be drawn on the basis of the States which can participate in those Conventions. The definition of that participation ranges from "all States" (1923 Geneva Protocol) to "any Member of the United Nations and ... any other State which is or hereafter becomes a member of any specialized agency ... or ... a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations" (1958 New York Convention), to "States members of the [International Bank] [for Reconstruction and Development]" and "any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council [of the Centre established by the Convention], by a vote of two thirds of its members, shall have invited to sign [the Convention]" (1965 Washington Convention). Although these three provisions allow the great majority of States to become parties to the conventions in question, it should be noted that actual participation is still small in comparison with potential participation:[230] 52 contracting States and 10 unratified signatures for the 1965 Washington Convention, 37 contracting States and 9 unratified signatures for the 1958 New York Convention, and 33 contracting States with 13 unratified signatures for the Geneva Protocol.[231] The 1961 European Convention, which is given as an example of a regional convention, is open for signature or accession by countries members of the Economic Commission for Europe, countries admitted to the Commission in a consultative capacity and such countries as may participate in certain of its activities. There are 14 contracting parties to this Convention, with 6 unratified signatures. This Convention, which according to its provisions could be applied in its entirety to arbitration involving Eastern countries only as well as to arbitration involving Western countries only, is in practice applied solely to disputes relating to trade between Eastern countries and Western countries, because disputes between the foreign trade organizations of CMEA member countries are covered by the relevant provisions of the 1968 CMEA General Conditions of Delivery of Goods, while the members of the Council of Europe and, upon invitation, other States where there is a national committee of ICC, concluded in the 1962 Agreement relating to application of the Convention which in the case of these parties precludes the application of those provisions of the 1961 Convention which concern the organization of the arbitration, and in particular the ones concerning the settlement of differences relating to the establishment and functioning of arbitral tribunals (art. IV, paras. 2-7).

With regard to the relationship between some of the aforementioned international conventions, we would mention that between the 1927 Geneva Convention, which is open only to the signatories to the 1923 Geneva Protocol, and the 1958 New York Convention. As States parties to the 1927 Geneva Convention become parties to the 1958 New York Convention, the 1927 Convention ceases to be applicable between them, thus eliminating any conflicts between the two conventions so far as those States are concerned.

In any case, the Special Rapporteur has noted that so far there have been virtually no complications in the application of the two aforementioned conventions, and that consequently there is no need to raise the question of amendments. Furthermore, the 1923 Geneva Protocol has diminished in importance, since its substance has been absorbed into most national legislations or into the conventions adopted since the Second World War. As we have seen, the fate of the 1927 Convention is closely linked to that of the 1958 New York Convention, which is gradually replacing it. This represents a step forward, for an analysis of the content[232] of the New York Convention shows that it improves on the 1927 Geneva Convention in that it greatly simplifies the conditions for enforcement of foreign arbitral awards; this explains the favourable trend towards ratification of the New York Convention in recent years.

The Special Rapporteur considers that UNCITRAL should note with satisfaction the favourable trend towards ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and recommend other States to ratify it as soon as possible.

Similarly, in view of the part which the 1961 European Convention on International Commercial Arbitration can play in relations between countries with different economic structures, UNCITRAL could recommend that countries which have not yet ratified the Convention should do so.

In making this recommendation, the Special Rapporteur is aware that reservations have been expressed about the latter Convention, which is said to contain "essentially a rather complicated system for making arbitral agreements work with the help of a special committee".[233] The system established to make arbitral agreements work when the parties cannot agree on the choice of arbitrators or the place of arbitration is considered to be unsatisfactory, although at the same

[230] See A. Broches, "Promotion du perfectionnement des conventions en matière d'arbitrage", in *Revue de l'arbitrage*, No. 4 (1969), p. 274.

[231] These figures are subject to a number of reservations and uncertainties, owing to the changes which have taken place in the status of some contracting parties or to subsequent agreements which replaced the preceding ones.

[232] See paras. 44-51 above.

[233] P. Sanders, "Travaux du 2ème Congrès international de l'arbitrage" in *Revue de l'arbitrage*, No. 3 (numéro spécial), 1966, p. 17.

time the value and usefulness of the other provisions of the European Convention are acknowledged, particularly in the case of the provisions relating to the applicable law, the right of legal persons of public law to conclude valid arbitration agreements and the right of foreign nationals to be designated as arbitrators.

The Special Rapporteur feels that the 1961 Geneva Convention is the outcome of a sustained effort and that it would be a pity not to support it. Basically, the system established by this Convention does not become complicated *unless the parties cannot agree on the choice of arbitrators or on the place or nature of the arbitration.* But what system does not become complicated in such circumstances?

The system offered by the 1961 Geneva Convention establishes, in normal cases, relationships based on mutual confidence; it is a modern and advanced system, in which concordance between the will of the parties is the key to the solution of most problems.

The difficulties mentioned can be overcome if the recommendation concerning the avoidance of "blank" arbitral clauses is implemented. We therefore deem it advisable to recommend the use of this Convention as a model to be imitated and, of course, improved upon in so far as better solutions can be found, particularly in the case of relations between countries with different economic and social systems or different levels of development.

177. The question of the uniformity of interpretation and application of the provisions of multilateral international conventions and the related problems are dealt with mainly in part II of this report. The Special Rapporteur feels he is in a position to state that these problems are not numerous. Although more extensive research—which could not be carried out by one person in the limited time available to the Special Rapporteur—would certainly have revealed a number of specific cases which could have been included in part II, it is none the less true that very few problems have arisen in connexion with the interpretation and application of the aforementioned Conventions.

It is truly encouraging to note that very few foreign arbitral awards have had to be enforced with the co-operation of the courts on the basis of these international conventions. That proves, first, that arbitration has, generally speaking, enjoyed the confidence of the parties, who have implemented arbitral awards of their own free will, and secondly, that the existing conventions on the enforcement of foreign arbitral awards have a preventive effect in that they discourage those who might be tempted not to comply with those awards of their own free will.

In any event, no problems remain with regard to the interpretation of the New York Convention, apart from a number of cases concerning the form of the arbitration agreement,[234] the law applicable to that agreement or the capacity to conclude such an agreement. We therefore consider that the problem of divergent interpretations, which jeopardized or appreciably reduced the value of the unification achieved by the 1958 New York Convention, has been virtually eliminated for some time.

[234] See part II, paras. 106-112.

The Special Rapporteur therefore maintains the view he expressed during the discussion on his preliminary report, namely that from this point of view there is no need at the present time to envisage a revision of parts of the aforementioned Convention. Of course, the Convention must be compared with international practice. To that end, more active efforts should be made to disseminate the relevant information and encourage discussion of the solutions embodied in the New York Convention by every means (specialized periodicals, arbitration bulletins, monographs, meetings, seminars and so on) so as to permit the definition of common views and thus improve the stability of the Convention, on which general agreement was so difficult to obtain.

178. This report has described the untiring efforts made to unify the rules of arbitral procedure. Comparative studies concerning the content of the rules of the various arbitration centres[235] have been prepared and informative documentation on this subject is now available, which points out both the differences and the similarities between the rules of the various centres. In any case, all the studies tend to contain a conclusion along the following lines: "Even in the absence of evident harmony among the various provisions of the rules, the Economic Commission for Europe was able to deduce the general principles of those rules".[236]

In 1961, in Paris, the second commission of the International Arbitration Conference reconsidered the problem of the harmonization of the rules of procedure of the arbitration centres, and the Congress adopted a whole series of recommendations concerning the content of rules "covering the four successive stages of the opening of the procedure, the instruction, the hearings and finally the award", as follows:

The opening of the procedure

The claim should take the form of a request addressed to the arbitration centre.

The claim should always contain:

An identification of the two parties;

The terms of the arbitral agreement;

The nature of the controversy;

The object of the request.

The defendant's answer should:

Be submitted within a time-limit to be determined by the centre;

Have a content corresponding to that of the claim;

If appropriate, contain a counter-claim.

The procedure

The arbitral tribunal must have the direction of the proceedings.

The parties must exchange their "*mémoires*".

The language of the arbitration must be determined by the arbitral tribunal and provision must be made for translation.

The hearing

It should, if possible, include an oral hearing.

The place of the hearing should be determined by agreement between the parties or by the arbitral tribunal.

[235] We are referring here mainly to the documents prepared prior to 1958 by the United Nations Economic Commission for Europe (Committee on Development of Trade). See document E/ECE/TRADE/WP.1/15/Rev.1.

[236] See the report by Dr. Glossner submitted to the Second International Arbitration Congress in *Revue de l'arbitrage*, No. 2 (1961), p. 78.

Hearings should be public.

If the parties or their representatives do not appear, the arbitral tribunal should have the power to continue the proceedings, to be considered as contradictory proceedings.

Witnesses should be heard at the request of the parties or of the arbitral tribunal.

The arbitral tribunal may have the right to issue a technical statement, if necessary.

The arbitral tribunal should, if it considers it possible, make a conciliation effort.

The award

It should include the arbitration agreement and a chronological outline of the proceedings.

The arbitral tribunal should determine the applicable law unless the parties have agreed upon it in advance.

It would seem advisable for awards to contain a statement of the reasons on which they are based.

At the Third International Arbitration Congress, held at Venice in 1969, the emphasis was placed, not on harmonization, but on the study of the basic principles of the various rules, with a view to facilitating a rapprochement between arbitration centres. Jean Robert[237] thinks that "in the necessary diversity which must characterize an institution whose essential trait is its contractual character, we need only seek to determine how the provisions of the rules differ or agree in relation to certain questions". He leaves aside the differences which will never constitute an obstacle preventing the parties from accepting a certain set of rules and concentrates on the following points, which could create such obstacles:

Means of choosing arbitrators (the panel system, freedom of choice, mixed system consisting of a panel with the possibility of choosing an arbitrator not included in the panel):

Existence and role of an administrative organ within the arbitration centre;

Determination of the arbitral procedure;

Law applicable to the substance;

Production of evidence;

Freedom of arbitrators to adjudicate on questions of law or obligation to refer such questions to another body;

Formal content of arbitral awards.

179. After analysing the aforementioned points, Jean Robert observes that "one has the impression that the convergence of solutions is greater than one imagines, showing that an arbitration community is coming into being", as a result of a number of factors, including the existence of common arbitral usages corresponding more or less to the requirements of a common business ethic, the effect of which international conventions have produced on arbitration and particularly on rules, and the unification of the general principles which govern arbitration law. He even goes so far as to speak of the imperceptible but definite creation of "an international legal spirit of arbitration, common to representatives of all nations".

Jean Robert[238] goes on to state that the search for the guiding principles which govern arbitration rules is ultimately encouraging. The differences, although sometimes great, are not, in the final analysis, essential, and in any case the means of effecting a rapprochement are becoming apparent. Among those means, Mr. Robert stresses the technique of judicial practice, "which separates the requirements relating to the institution in the municipal law of each country from the freedom required for the exercise of international arbitration".

Similarly, Pieter Sanders suggests the preparation of a code of principles to be incorporated in the rules for international arbitration. The code of principles would cover the place of arbitration, the nomination of arbitrators, the applicable law (including international usage) and so on, and would be based on the arbitration rules which provide solutions to those questions (ECE Rules of 1963, ECAFE Rules, etc.). Arbitration institutions would incorporate those principles in their rules in their own way. The code would thus function as a set of guidelines for arbitration institutions.[239]

180. Taking into account the information given in the report on the adoption of uniform rules, the efforts made thus far to that end, the current favourable attitude towards reexamination of this question, the effect produced by the multilateral conventions adopted under the United Nations auspices, and the documentation and information collected, the Special Rapporteur proposes that within UNCTAD a study group (or working group) should be established which, alone or in co-operation with the representatives of certain interested arbitration centres, would re-examine the question of drawing up a model set of arbitration rules. The Special Rapporteur would prefer model rules containing basic provisions which would subsequently be recommended to all arbitration centres for gradual inclusion in their rules on organizations and operation. The model rules would be designed to cover exclusively the settlement of disputes relating to international commercial relationships.

181. The Special Rapporteur feels that the same suggestion could be made with regard to the unification and simplification of national legislation on arbitration and the unification and simplification of national rules relating to the enforcement of arbitral awards, including the problem of the limitation of judicial control over arbitral awards and the reduction of means of recourse against enforcement orders. The same study group (or working group) would analyse the results obtained thus far in that sphere and define the scope of the unification envisaged. Generally speaking, development in this direction is slow and in our view could not be too extensive.

The Special Rapporteur feels that a practical and realistic solution would be to draw up a uniform law that could serve as a model, containing certain basic norms (for example, the form of the arbitration agreement and its effects, principles for the establishment of the arbitral tribunal, possibility of choosing a foreign arbitrator, definitive character of the arbitral award, possibility of choice between arbitration according to the rules of law and arbitration according to equity, means of recourse).

[237] See Jean Robert, "Principes directeurs des règlements d'arbitrage applicables aux affaires commerciales internationales" in *Revue de l'arbitrage*, No. 4 (special issue), 1969, p. 237.

[238] Jean Robert, op. cit., p. 251.

[239] See P. Sanders, Report to the Third International Congress in *Revue de l'arbitrage*, No. 4 (1969), p. 314.

This model law would relate directly only to disputes concerning international trade (excluding domestic commercial relationships and civil law relationships) and would be limited to procedures which determine the extent to which the State, through its judicial institutions, intends to retain what Professor René David calls "a legitimate and necessary control over the conditions in which the arbitration foreseen by the parties is to be administered and the award of the arbitrators rendered".[240]

René David is quite right when he states that insufficient account has been taken of "the fact that arbitration in international commercial relationships, differed from arbitration in civil relationships or even in domestic commercial relationships and required a different approach".

182. The Special Rapporteur is gratified to be able to inform UNCITRAL that his research has shown that, in accordance with the resolution adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 and Economic and Social Council resolution 708 (XXVII) of 17 April 1959, action has been undertaken to promote international commercial arbitration. Account has been taken of the suggestion made in the latter resolution "that intergovernmental and non-governmental organizations active in the field of international private law arbitration co-operate with each other and with the United Nations organs concerned, especially in the diffusion of information on arbitration laws, practices and facilities, educational programmes and studies . . .".

Action has in fact been taken to ensure a wider diffusion of information on national and international arbitration laws and existing arbitration practices and facilities. Various means have been used to disseminate this information; in recent years they have also covered lesser-known aspects of the question. We are referring here to the increase in the number of publications containing information on arbitral practice in various countries, which has helped to spread knowledge of the interpretation and application of the various rules relating to procedure and to the substance of the dispute. In this connexion we would also mention the exchanges of information and co-operation between the various arbitration centres, the organization of congresses, symposia, seminars, exchanges of experience and so on, as well as the particularly encouraging progress being made with regard to mutual acquaintance, which is directly related to mutual trust between arbitration organization and the various organizations and undertakings which have recourse to them. This progress has permitted the re-evaluation of bilateral and multilateral co-operation agreements concluded between different arbitral systems or different arbitration organizations, irrespective of the social and economic systems and the level of development of the countries concerned, and the conclusion of new agreements of that type.

In view of his findings in this respect, the Special Rapporteur proposes that UNCTAD, after noting the progress made with regard to the implementation of the resolution included in the Final Act of the United Nations Conference on Arbitration and the aforementioned Economic and Social Council resolution, and taking into account also General Assembly resolution 2205 (XXI) of 17 December 1966, should invite Governments and governmental and non-governmental organizations to support and encourage the concentration of efforts on information and research activities in the field of arbitration in all its forms, as well as the organization of more regular and systematic bilateral and multilateral co-operation in that field with a view to achieving a balance in the organization of arbitration procedures between developing countries and industrialized countries and between countries having different economic systems in all regions of the world.

183. The information contained in this report has shown that the recommendation in Economic and Social Council resolution 708 (XXVII) concerning the inclusion in the programme of work of the regional economic commissions of the United Nations of a study of "measures for the more effective use of arbitration by member States in their regions" has not yet been fully implemented by all the commissions.

With regard to what has been called the "Bangkok experiment", Mr. Krishnamurthi has observed that "Much has been achieved but much more remains to be done. It is somewhat disappointing to know of the slow progress made in popularizing and practising international arbitration in almost all the countries of the region."[241] L. Kopelmanas speaks of the need to take steps in Africa, under the auspices of the United Nations Economic Commission for Africa, to ensure that "the geographic base for co-operation among arbitration organizations becomes really representative of the world as a whole."[242]

However, since equilibrium in the organization of arbitration procedures cannot be achieved in the countries of the aforementioned regions unless those regions have arbitration organizations which can provide the foundation for co-operation on an equal basis with the organizations of other regions, the Special Rapporteur considers that the United Nations should help those regions to obtain the technical and material assistance needed for the establishment or strengthening of arbitration centres. That would represent an important step toward the achievement of equilibrium between the industrialized and the developing countries with regard to arbitration.

184. It should be remembered that so far co-operation between arbitration centres at the international level has been mainly bilateral. Examples of this type of co-operation are the 15 agreements concluded by the Japan Commercial Arbitration Association, the numerous agreements concluded by the Polish Chamber of Foreign Trade,[243] those of the American Arbitration

[240] "Principes directeurs des règlements d'arbitrage applicable aux affaires commerciales internationales", in *Revue de l'arbitrage*, No. 4 (special issue), 1969.

[241] "Co-operation on a regional scale—the Bangkok experiment", Report No. 4 to the International Arbitration Congress, *Co-operation Among Arbitration Organizations*, pp. 258-259.

[242] "*Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différent*". Third International Arbitration Congress, in *Revue de l'arbitrage*, loc. cit.

[243] A detailed account of these documents is given in the article by Z. L. Nanowski entitled "Arbitration agreements concluded by the Polish Chamber of Foreign Trade" (in Polish), in *Prawo w handlu zagranicznym (Law in Foreign Trade)*, 1965, vol. 8, pp. 40-49.

Association[244] and so on. Multilateral co-operation is not developing at the same pace. One example of such co-operation at the regional level is the co-operation between the foreign trade arbitration courts of the member countries of CMEA. Means of establishing co-operation at the world-wide level are being considered. This idea has been gaining momentum in recent years and, as has been seen, the Special Rapporteur considered it useful to inform UNCITRAL on that point.

It has been suggested that a non-governmental International Organization of Commercial Arbitration (IOCA) should be established, because international commercial arbitration will become increasingly important for all arbitration institutions. It has been pointed out that "mutual acquaintance should not be limited to the familiarity with legal provisions and judicial practice, but should pertain also to the realities of activity and, last but not least, to the operators".[245] Generally speaking, it is felt that lack of familiarity with the real state of affairs in a given country leads to exaggeration of differences and of the significance to be attributed to differences of secondary importance. Furthermore, mutual acquaintance of people operating in the field of international commercial arbitration is indispensable for the elimination of the appearance or perpetuation of the erroneous or even tendentious information which is sometimes encountered. Experience has shown that the creation of the atmosphere of mutual trust essential to the development of international commercial arbitration depends to a large extent on close and direct contacts. Experience has also shown that mutual acquaintance does not necessarily imply institutionalization in the form of special agreements, although such institutionalization can contribute to the frequency and durability of contacts.

As Professor Jakubowski, the distinguished representative of Poland on UNCITRAL has said, "What we mean is the co-operation of arbitration organizations on a universal scale. Hitherto the only form of this kind of co-operation has been arbitration congresses. They are of great importance because they offer an opportunity for personal acquaintance, for the discussion of certain problems and for the adoption of certain recommendations. But this is a rather loose and occasional form of co-operation. It is necessary meanwhile to transform this co-operation into regular and organized co-operation. I am of the opinion that it would be desirable to set up an International Organization of Commercial Arbitration—IOCA. It could be a non-governmental organization composed of national arbitration organizations and affiliated to the United Nations."[246] The structure of IOCA "should be acceptable to arbitration organizations of countries with different socio-economic systems and different levels of economic development". The tasks of IOCA would include the provision of a permanent framework for co-operation between arbitration organizations, the establishment of a documentation and information centre in the field of international commercial arbitration,[247] the publication of an international journal,[248] the preparation of draft laws on international commercial arbitration for submission to UNCITRAL, the organization of congresses and symposia and the standardization of the rules of procedure of permanent arbitration centres. However, IOCA would not have any executive powers with regard to its member organizations or in any way impede bilateral or regional multilateral co-operation.

Similarly, Mr. N. Krishnamurthi stated at the Venice Congress in 1969 "We would like to propose that we lay down the guidelines for the establishment of an agency which would strive for the widest possible representation from the developed and developing countries and the planned economies. The paramount objective should be to evolve principles which would be universally acceptable by harmonizing the basic principles under the various legal and economic systems, standardizing commercial practices and where necessary, by innovating new procedures. Such a body would be able in course of time to bring about desirable solutions to many of the problems of international arbitration. This is a consummation to be devoutly wished for. The task is not easy, but nevertheless the attempt has to be made."[249]

The Special Rapporteur considers that UNCITRAL cannot disregard all these facts and all the opinions expressed and that it would be in the general interest for UNCITRAL *to encourage such steps, to agree—if a suitable proposal is submitted to it by a sufficiently representative number of arbitration organizations—to sponsor the establishment of a world-wide organization for co-operation in the field of arbitration of the type envisaged, and to declare itself ready to co-operate with that organization on terms to be laid down on an agreed basis.*

185. Arbitration is often regarded as "a substitute for a true 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". These fine words may contain a measure of truth. There has certainly been no basic change in the situation. We believe, however, that the psychological battle in the realm of international commercial relationships has now virtually ended with a victory for arbitration, and that the "substitute" for a true jurisdiction has won a permanent, and not merely temporary, place among the rules of international trade. "Arbitration seeks to settle the dispute, that is to adjudicate between the parties."

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[244] See Donald B. Straus, op. cit., pp. 161-162.

[245] Jerzy Jakubowski, "Promotion of co-operation in the domain of international commercial arbitration practice", report No. 10 to the Third International Arbitration Congress, *Co-operation among Arbitration Organizations*, p. 344.

[246] *Ibid.*, p. 348.

[247] See also in this connexion the offer made by Donald Straus, President of AAA, concerning the organization of a bibliographical centre which could be extended to libraries throughout the world.

[248] In this connexion, see also Pieter Sanders, who considers that the establishment of a world arbitration journal would lead to contacts which could subsequently be developed through a world centre of contact (*Revue de l'arbitrage*, No. 4 (1969), p. 313).

[249] N. Krishnamurthi, "Co-operation on a regional scale—the Bangkok experiment", Report No. 4 to the Third International Arbitration Congress, *Co-operation among arbitration organizations*, p. 258.

The businessmen who have regarded arbitration as "a substitute for a true international commercial jurisdiction" have perhaps sought to strengthen it, but it has been rightly observed that "although their efforts have been prompted by certain mistrust of the legislative and the judicial authorities of States, the latter have not sought to check this development, and have even facilitated it in many ways, either through liberal judicial practice, which endows the concept of international public policy with a new and positive content, or by the adoption of international conventions which definitely favour international commercial arbitration.[250]

Without calling in question the contractual origin of arbitration, it has been stressed that arbitration is evolving towards a rapprochement between jurisdiction and jurisdictional machinery, so that it can now play "the part of a real international jurisdiction, which is to adjudicate".[251]

It should also be noted that the "hidden part of the iceberg", to which arbitration has often been compared, has begun to emerge from the shade into the light without further hindrance. Many publications provide information about arbitral practice, thus diffusing information about the rules of international trade and the related difficulties. In this way arbitration can play a useful part, by contributing to the unification and harmonization of the rules of international trade.

In view of UNCITRAL's responsibilities with regard to the unification and harmonization of the rules of international trade law, it is directly concerned with obtaining a thorough knowledge of, and disseminating, the information provided by the "observation post" constituted by international commercial arbitration.

That being so, the Special Rapporteur believes—and this is his last proposal—that it would be useful for the United Nations to publish a compilation of the arbitral awards of the greatest significance for international trade (provided, of course, that the parties are not opposed to their publication). If sufficient funds cannot be found to publish a special periodical on arbitration, which would form a "world centre of contact" in that sphere, it might be possible to devote part of the UNCITRAL *Register of Texts* to arbitral practice in the field of international trade.

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[250] Philippe Fouchard, op. cit., p. 544.

[251] *Ibid.*