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ECONOMIC COMMISSION FOR EUROPE
COMMITTEE ON THE DEVELOPMENT OF TRADE
Ad hoc Working Group on Arbitration

REPORT OF THE WORKING GROUP ON ITS FOURTH SESSION

1. The ad hoc Working Group on Arbitration held its fourth session from 3 to 7 June 1957. Representatives participated from Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, the Federal Republic of Germany, France, Hungary, Italy, the Netherlands, Poland, Romania, Spain, Sweden, Switzerland, the Union of Soviet Socialist Republics, the Eastern Zone of Germany, the United Kingdom, the United States of America, and Yugoslavia.(1) The following international organizations were represented: UNESCO, International Institute for the Unification of Private Law, International Chamber of Commerce and International Association for Legal Science.(1) Professor B. Goldman, expert adviser appointed by UNESCO, also took part in the discussions.

2. The provisional agenda prepared by the Secretariat (TRADE/WP1/19) was adopted.

3. Mr. J. Trojan (Czechoslovakia) was elected Chairman and Mr. J. Trolle (Denmark) Vice-Chairman.

Handbook of National and International Institutions Active in the field of International Commercial Arbitration

4. The Working Group examined the Secretariat's first revised draft of the Handbook of National and International Institutions Active in the field of International Commercial Arbitration (TRADE/WP1/15, Vols. I and II and Addenda 1 to 5). It noted that this version did not as yet take account of the observations and corrections already received by the Secretariat, and that those observations and corrections would appear in the final draft of the Handbook (TRADE/WP1/17, paragraph 3).

5. In order to make the Handbook as complete and precise as possible, the Working Group felt it necessary to give the governments and institutions concerned additional time in which to forward to the Secretariat, on the one hand the statutes and rules of institutions active in the field of international commercial arbitration

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(1) See list of delegates (TRADE/WP1/20)

which were not yet included in the Handbook, or, where appropriate, the revised statutes of institutions already included, and on the other, their observations, if any, concerning the analysis of those statutes in the Handbook. But, to avoid undue delay in publishing the Handbook, it was decided that only statutes and rules received by the Secretariat in one of the Commission's three languages before 1 January 1958, and observations received by the Secretariat before 1 March 1958, could be taken into consideration for the purposes of the final publication of the Handbook.

6. With regard to the layout of the Handbook, the Working Group preferred the second variant, namely that containing summaries of the solutions adopted by the institutions reviewed on the various questions considered in the Handbook.

7. Some delegations felt that the summaries of solutions set forth by the Secretariat in Part II of the Handbook were in some cases too succinct. It was suggested that such governments as thought fit to do so should forward to the Secretariat proposals for more explicit statements, on the understanding, however, that to ensure convenience of reference the Handbook should not forfeit its conciseness. A note to be inserted in the foreword to the Handbook will warn users that the texts to be found therein are merely summaries and that to ascertain the complete Rules or Statutes which concern them they should consult the documents in question.

8. For ease of reference, it was decided to insert in the Handbook, after the table of contents, an alphabetical list of the institutions dealt with, showing the serial number allotted to each institution.

9. It was felt necessary to make several adjustments in respect of the actual contents of the Handbook:

(a) In both Part I and Part II it will be necessary to take into account the standard arbitration clauses recommended by certain institutions. This question will be dealt with under I, and the numbering of the other matters will be altered accordingly. A footnote will draw the reader's attention to the difficulties which may be caused by the use of some of the arbitration clauses analyzed outside their normal field of application.

(b) The problem of the arbitrator's right to rule as to his own competence will be excluded from the chapter concerning access to the arbitral tribunal and will be placed in a special chapter.

(c) The content of the claim and the defence (IV.B. 2 to 4) will be dealt with in greater detail.

(d) Further details will also be given concerning problems raised by the languages which may be used in the arbitral proceedings (IV.C. 2 to 4).

(d) A distinction will be made between rules permitting proceedings by default on the basis of documentary evidence supplied and those permitting such proceedings on the basis of documentary evidence supplied or to be supplied.

10. It was agreed that such governments as thought fit to do so would forward to the Secretariat, before 1 January 1958, further suggestions concerning the subjects to be dealt with in the Handbook.

11. In order to be able to proceed at its next session to consider the possibility of standardizing to some extent the rules of the various national and international institutions active in the field of international commercial arbitration (TRADE/41, paragraph 14), the Working Group instructed the Secretariat to prepare, after a comparison of those rules, a document setting forth the differences and similarities between the solutions adopted by the various institutions on the matters dealt with in the Handbook. The Secretariat will endeavour to find a reasonable explanation for the differences observed. Where possible, it will submit suggestions with a view to the possible achievement of uniformity. The document will be transmitted, for comment, through governments to the various arbitral institutions concerned, with the request that any relevant comments they may wish to make be forwarded to the Secretariat in time for the Working Group's next session. The Secretariat document, together with the comments of the institutions concerned, will then be considered by the Working Group at its next session.

Bilateral agreements relating to the enforcement of arbitral awards and the organization of commercial arbitration procedure

12. The Group examined the revised document prepared by the Secretariat on bilateral conventions (TRADE/WP1/16). Certain corrections to be made to the final version of this document were suggested by certain delegations. In addition it was decided that the date of the conventions should be mentioned besides the name of each signatory country.

13. The document thus corrected will be made available to the general public in the same form as the various general conditions or contracts elaborated under the auspices of the Economic Commission for Europe.

Possible solutions for the difficulties noted in the practice of international commercial arbitration

14. The Working Group was informed of the preparations at present being made for the United Nations world conference on arbitration, to be held in New York in May 1958, and noted that the Working Group's deliberations would be brought to the notice of that conference. It felt that it could embark upon consideration of the solutions proposed in the note by the Secretariat, and also the possibility of concluding a European convention on arbitration, while refraining, as suggested in that note (TRADE/WP1/18, paragraph 2), from taking up a final position on the various matters considered until it was apprised of the results of the deliberations of the world conference.

(a) Ouster by an arbitration agreement of ordinary national jurisdiction in favour of foreign arbitrators (TRADE/WP1/18, paragraphs 6-8)

15. Whilst observing that, particularly in view of the revision, now proceeding, of the Italian Code of Civil Procedure, this problem did not present any real difficulties in practice, the Working Group felt that an agreement on international commercial arbitration should not fail to affirm the principle of the ouster by an arbitration agreement of ordinary national jurisdiction in favour of foreign arbitrators, a principle which appeared, moreover, in the 1923 Protocol. The Working Group accordingly expressed the view that, if a European agreement or a series of bilateral agreements on arbitration was to be concluded, such instrument or instruments should contain, either in the preamble or in one of the first articles, a recognition of the validity of arbitration clauses concluded between natural persons ordinarily resident, or corporate bodies having their main or subsidiary establishment, in two different countries.

16. Some delegations expressed their preference for a more comprehensive solution under which arbitration conventions could be concluded involving the ouster of ordinary national jurisdiction in favour of foreign arbitrators for all disputes relating to foreign trade, on the understanding that foreign trade would be taken to mean a movement of goods, services or currencies across frontiers. The Working Group felt, however, that that proposal should first be given close examination by governments.

17. One expert even wondered whether the ouster by an arbitration agreement of ordinary national jurisdiction in favour of foreign arbitrators should not be permitted for any dispute whatever, even where the dispute lacked any foreign element.

(b) Competence of aliens to act as arbitrators (TRADE/WP1/18, paragraphs 9 and 10)

18. The Working Group felt that it would be useful to embody in an intergovernmental convention a provision enabling aliens to act as arbitrators in all international commercial disputes on the territory of the Contracting Parties.

(c) Possibility of resort to arbitration by public corporate bodies in international commercial relations (TRADE/WP1/18, paragraph 11)

19. The Working Group felt that it would be useful, by means of a clause to be inserted in an international bilateral or multilateral agreement, to enable public corporate bodies under the jurisdiction of one Contracting Party to resort to arbitration in the case of contracts between them and natural persons ordinarily resident, or corporate bodies having their main or subsidiary establishment, in the country of another Contracting Party. The Working Party was compelled to recognize, however, that the adoption of such a solution might come up against serious difficulties in certain countries where public corporate bodies were at present denied the right to resort to arbitration.

(d) Plea as to jurisdiction (TRADE/WP/18, paragraphs 12-14)

20. The Working Group felt that it would be useful to make such provision in an international agreement as would ensure that, in the case of disputes between natural persons ordinarily resident, or corporate bodies having their main or subsidiary establishment, in two different countries, the plea as to jurisdiction would have to be lodged with the law court before the start of the hearing on the substance of the dispute, failing which it would be barred.

(e) Decision concerning the competence of the arbitrator and right to appeal (TRADE/WP1/18, paragraphs 48-58 and 73 and 74)

21. The Working Group felt that it would be useful to specify in any international agreement on arbitration that, in disputes concerning international commercial relations within the meaning of paragraph 13 above, the arbitrator should be entitled to rule on his own competence when that competence was questioned in his presence by either of the parties on the grounds that the arbitration agreement, or the main contract on which it depended, did not exist, was void, or had lapsed. It was stated, in particular, that the arbitrator was not obliged to stay the proceedings where such an objection on the grounds of lack of competence was raised in his presence, and that if he himself decided that the objection was not valid, he could continue the hearing.

22. According to the majority of the experts, a necessary consequence of that solution would be that intervention by the courts of law would be excluded until the arbitral award had been made, subject to the right of review which, after the issue of the arbitral award, the courts of law could exercise in respect of the arbitrator's decision as to his own competence.

23. The Netherlands and United Kingdom experts pointed out, however, that in their respective countries the right of the arbitrator to rule on his own competence did not exclude the possibility that the arbitrator himself, or one of the parties, might at the same time submit to a court of law the question of the arbitrator's competence. It was stated that that solution had never given rise to difficulties in practice. Other experts objected, however, that, although that solution might have yielded positive results in the Netherlands and in the United Kingdom because of the general attitude of courts of law towards arbitration, it might lead to troublesome consequences in other countries because of the possible clash between the arbitrator's decision as to his own competence and the decisions reached at the same time by the courts of law. The United States expert also made a reservation on this question.

24. The Swiss and United States experts stated that, in view of the federal structure of their countries, in which the subject of arbitration was largely within the competence of the individual States in the United States and of the cantons in Switzerland, they could not adopt any position, either on the present problem or on the other problems dealt with by the Working Group.

25. It was proposed that an international agreement on arbitration should, with regard to the plea as to the competence of the arbitrator, include a solution similar to that which had been adopted with regard to the plea as to jurisdiction of law courts (see paragraph 20 above). That would mean that a party which failed to raise, before the arbitrator, an objection on the grounds of the latter's lack of competence, before entering into the pleadings on the substance, was not entitled to contest that competence before the ordinary courts after the issue of the award.

26. While it was generally recognized that that solution was useful, the fear was expressed that it might act to the detriment of one party, because, not being advised by legal counsel in arbitral proceedings, it might, through ignorance, fail to raise the question of the arbitrator's lack of competence at the proper time or might raise it in unsuitable terms. It was suggested that the drawback referred to might be diminished if debarment was limited to cases where pleas of lack of competence were

based on the non-existence, voidance or lapse of the arbitral agreement and if, with regard to a too wide interpretation by the arbitrator of his powers during the proceedings, the parties were free to plead that lack of competence during the proceedings and more specifically, at the time when the arbitrator was preparing to deal with the question which one of the parties felt to be outside the scope of the submission.

27. With regard to the review by the law courts of the arbitrator's decisions concerning his own competence, the Secretariat withdrew its proposal that the arbitrator should be allowed to rule finally if the parties conferred that right on him in their arbitration agreement (TRADE/WP1/18, paragraphs 52 to 56). It maintained, on the other hand, the suggestion that any irregularities in an arbitral award should be penalized, both in the country where the award was given and in all the other countries concerned, not by annulment of the award but by refusal to enforce it (TRADE/WP1/18, paragraph 73). The representative of the Secretariat amended the latter suggestion in respect of the grounds justifying a refusal of enforcement in the country or countries to which application for such enforcement was made. Such penalization would be applicable to awards made in a matter which, according to the law of the country of enforcement, were not capable of being submitted to arbitration or had been placed beyond arbitration, or to awards made without the parties having had an opportunity to state their case, or the effects of which would compel the parties to commit an act contrary to public policy in the country of enforcement.

28. In support of this proposal several experts stressed the advantages for the development of international commercial arbitration which would accrue from a reduction of controls, especially as the effects of the award would affect the country in which it had been given only to the extent that that country was at the same time a country of enforcement. It was also stressed that, in the case of disputes which had any foreign element in them whatever, there seemed to be no valid reason in practice why an award might be annulled in its country of origin, with which country it would nevertheless have no real connexion other than the fact that it had been made there, should not be enforced in a country with which it was connected at several points.

29. Some delegations raised objections, however, to the mere idea that the authorities of the country in which the award had been given would have no right of scrutiny over the award except where enforcement of the award was applied for in

that country. From a more practical angle, it was pointed out that the existence of a double check had certain advantages in that the confirmation of the award in the country of origin by a judicial authority would temper the strictness of subsequent checks in the countries of enforcement whose authorities might be more exacting with regard to an award emanating from a private individual without being legalized in any way by a recognized authority in the country of origin. It was argued, in reply, that present experience provided no proof whatever that the existence of a double check made checking less strict in the country of enforcement or that the validation of the arbitral award in the country of origin could be achieved merely by having the signature of the arbitrator legalized by the competent authorities.

30. It was also argued during the discussion that the adoption of the system of checking arbitral awards in the country or countries of enforcement would greatly facilitate the solution of the enforcement problems involved. Under that system, it would no longer be necessary to stipulate that before the award could be enforced in a country other than that in which it was made, it must be "final" as specified in the 1927 Convention, or "final and enforceable", as proposed in the draft Convention to be discussed by the World Conference.

31. A further proposal was made with a view to mitigating the present drawbacks of the system of double checking of the arbitral award in the country of origin and the country of enforcement. It was submitted, specifically, that an award recognized in the country of origin as having been made on the basis of a valid arbitration agreement by an arbitrator acting within his powers should be enforced as legally binding in all the other countries parties to an international arbitration convention. To that it was objected that the proposal would impose a greater sacrifice on the country of enforcement than that which the country of origin would have to bear under the system suggested by the Secretariat.

32. It was thereupon proposed to recommend that governments should conclude bilateral conventions providing that an arbitral award recognized as regular as regards the competence of the arbitrator in his country of origin should be enforced in the other contracting countries provided the effects of the award did not involve the parties in action contrary to public policy in the country of enforcement. A similar suggestion was made on a multilateral convention whereby the award made in a country could be contested in the same country during a short time-limit, and solely on the grounds that the arbitrator was incompetent to hear the dispute or that the procedure

was irregular. On the expiry of this time-limit an award which was not set aside by the competent judge would become final and could be enforced in all the contracting states, except where the award had the effect of compelling the parties to act contrary to the public policy of the country of enforcement. In this way the existing inconveniences of the system of double control would be reduced by the fixation of a brief time-limit, uniform in all the contracting states, for the motion to set aside, and by the differentiation between the matters which could be covered by the respective controls exercised in the country of origin and in the country of enforcement.

33. In view of that clash of opinion, the experts still saw no possibility at present of adopting a position, either unanimously or by a large majority, on that crucial question. They decided to make a detailed study of the various solutions proposed and arguments advanced on either side and to resume consideration of the question as a whole at the Working Group's next session.

34. It was deemed useful, in any case, to recommend that arbitral institutions include in their Statutes a clause to the effect that where the competence of the arbitrator was challenged, a ruling on his competence would be given either by the institution or by the arbitrator himself. It was pointed out that where the institution itself exercised control over the competence of the arbitrators, it might be easier for governments to waive checking of the award by the law courts of the country in which the award was made.

35. It was also deemed useful, pending the conclusion of an international convention permitting the arbitrator to proceed with his award where his competence was challenged, to recommend that the parties to an international contract should include a clause in it inviting the arbitrator to rule on his own competence.

36. It was felt that the attention of parties to an international contract should also be drawn to the possibility existing in certain countries of empowering the arbitrator to give a final ruling on his own competence. It was thus open to the parties, in the case of contracts whose enforcement might be called for in those countries, to stipulate in their contracts, if they so desired, that the arbitrator, without any intervention by the law courts, would decide in the final instance on his own competence in the event of its being challenged on the ground of the non-existence, voidance or lapse of the arbitration convention.

37. In view of the close connexion between the proposed solution regarding judicial checking of the regularity of arbitral awards and any simplifications which might be made in enforcement procedure following its adoption, the Working Group decided to defer consideration of the various enforcement problems (TRADE/WP1/18, paragraphs 75-77) until its next session also.

38. The Working Group made it clear that the above-mentioned points concerning checking of the regularity of awards related only to penalties for irregular awards in the form of cancellation or refusal to enforce. The majority of the experts were able, on the other hand, to define their attitude on the possibility of appealing against awards, of appealing to the supreme court or - where it existed - of taking action for direct annulment. They recognized, in that connexion, that the arbitral award should not be subject either to appeal (unless the parties provided for a procedure of appeals against the award in their arbitration convention) or to appeal to the supreme court or to action for direct annulment.

(f) Organization of arbitration (TRADE/WP1/18, paragraphs 15-47)

39. The Group felt that provision might usefully be made within the framework of the Economic Commission for Europe for additional machinery to which the parties might have recourse should they otherwise fail to reach agreement on the arbitration procedure.

40. The United Kingdom delegation would have preferred the arbitration procedure so formulated within the framework of the Economic Commission for Europe to be primarily designed for sales contracts for plant and machinery, for it was in that field that the need for a new arbitration procedure seemed to be the most pressing at the present time. The need to extend it to other fields of European trade should be considered only after it had been tried out in that particular field.

41. Other delegations took the alternative view that arbitration rules capable of application throughout Europe might also be useful in other fields. In this connexion the Italian delegation drew the Working Group's attention to the necessity of a rapid solution of disputes which might arise with regard to contracts for the sale of perishable produce and in particular in the citrus trade. While realizing the necessity of taking account of existing arbitration facilities and using the services provided by non-governmental organizations in that respect, the Group took the general view that the most rational line of action would be to draw up general rules for arbitration which the ECE Working Parties dealing with conditions of sale for the various commodities could if necessary adapt to their special needs.

42. The rules would determine, inter alia, the procedure for appointing arbitrators, to be selected from a list drawn up in advance in the event of the parties failing to agree between themselves on their appointment, and also the solutions to be applied to the various questions concerning arbitration procedure which are normally defined in the rules of the existing national or international institutions.

43. It was proposed that such rules be purely optional and apply only if the parties to an international contract expressly referred to them. The arbitration rules which the Group proposed to formulate could form an annex to an inter-governmental convention on arbitration. The rules would therefore be applied in relations between the nationals of the Contracting Parties in cases where, after laying down the general principle of settlement by arbitration in the contract, they had failed to give the necessary details as to the nature of the arbitration procedure. It was decided that the Group would consider that proposal when it came to examine the Draft Rules for Arbitration which are due to be submitted to it.

44. The Group considered that the future arbitration procedure should be expeditious and inexpensive.

45. As regards the special problem of the procedure for appointing arbitrators to be selected from a panel drawn up in advance, most of the delegations felt that the system of small committees suggested by the Secretariat was too complicated, and that the appointment of the arbitrator(s) by a single person would be preferable. Several delegations took the view that the task of appointing the arbitrator(s) should be entrusted to the Executive Secretary of ECE. Others wondered whether it would not be preferable to leave it to the ECE Secretariat to exercise all the other tasks necessary for the proper functioning of the arbitration procedure, but to entrust that of appointing the arbitrator(s) to someone outside the Secretariat, who might be elected for one or two years under a procedure to be established later, so as to ensure equitable geographical distribution and representation of the various interests concerned by means of a system of rotation.

46. In that connexion, it was proposed that for the various commodities for which general conditions of sale had been drawn up under ECE auspices, the arbitrators would be appointed by a person to be elected according to the branch of trade concerned, and that for other products a single person would be elected to appoint the arbitrator(s) in each particular case.

47. On the basis of the above considerations and in the light of the comparative study of the statutes and rules of the various national and international institutions active in the field of international commercial arbitration which it had already undertaken, the Secretariat was instructed to prepare draft rules for the next session of the Group to serve as a background document for its discussion on that point.

(g) The applicable law (TRADE/WP1/18, paragraphs 59-70)

48. Several delegations raised both legal and practical objections to the Secretariat's suggestion that the arbitrator should be permitted to make his decision, if empowered to do so by the parties, on the basis of the contract, commercial practice and possibly also considerations of common sense and natural justice, without any reference to a specific national law. Against that, it was argued that the necessity of referring to a national law, if unspecified by the parties, created problems which the arbitrator would not always find it easy to resolve.

49. The Group finally adopted the following solution to reconcile those two contrary views: As regards the question of law, it would be specified in the Inter-governmental Convention on Arbitration or in the Model Rules that the applicable law (that term being conceived in the broadest sense and covering the contract, commercial practice and the national law) would be freely determined by the parties in their contract and that where the parties failed to specify the applicable law, the arbitrator would decide upon the basis of the contract, commercial practice and the national law applicable under the rule of conflict deemed by him to be applicable to the case in point. The fact that an arbitrator has based his award on natural justice, when the national law deemed to be applicable allows him to do so, and the parties have so authorized him, does not constitute a ground of refusal for enforcement.

50. The representative of the International Institute for the Unification of Private Law recalled, in that connexion, the solution adopted in article 30 of the draft Uniform Law on Arbitration providing that the clause concerning the law applicable should not involve the penalty of annulment of the award.

51. It would also be specified in the Inter-governmental Convention that the capacity of the parties to conclude the arbitration agreement or principal contract, and the form of that agreement, would be governed by the national law of each of the parties in his own case.

52. As regards the arbitration procedure, the parties would be free to specify in their contract the rules of procedure to be followed by the arbitrator. Where not specified by the parties, they would be determined by the arbitrator within the limits of the possibilities afforded by the law of the country in which the court of arbitration was located.

(h) Security to be given before and during arbitration proceedings held abroad (TRADE/WP1/18, paragraphs 71 and 72)

53. Consideration of that question, which appeared to have been of interest to only a small number of delegations, was deferred until the Group's next session.

(i) Clauses in general conditions of sale or contracts designed to bring moral pressure to bear on parties to an international contract containing an arbitration clause with a view to inducing them to fulfil arbitral awards given against them.

54. The Group took note of the clauses authorizing the arbitral institution mentioned in an international contract to publish the name of any party which failed to carry out, within the prescribed time-limit, an award given against it (TRADE/WP1/18, paragraph 77) and of the clause recently inserted in the contracts for the sale of cereals stipulating that "the defendant is entitled to refuse arbitration where it is found that the claimant has previously failed to fulfil an arbitral award made against him" (see, for example, contract No. 5A, document AGRI/WP4/25, clause 19.11).

55. As far as the validity of those clauses under the laws in the various countries was concerned, the Group considered that there seemed to be no major obstacles preventing their application.

56. It felt, however, that publication of the name of a party who had failed to carry out an arbitral award might give rise in certain countries to actions for damages. It would be for the arbitral institutions concerned to take account if necessary of any difficulties which the application of that clause might occasion under their national legal systems. From the more general standpoint, the arbitral institutions and parties to international contracts would themselves have to decide on the advisability of that clause. The former would in any case be consulted on that point in the inquiry which the Secretariat was to undertake on the possible unification of the Rules of Arbitral Institutions (see paragraph 11 above).

57. As regards the clause giving the defendant the right to refuse arbitration where the applicant had previously failed to fulfil an arbitral award made against him, and that if the competent Working Parties deemed it useful to extend that practice to the whole of the European grain trade there seemed to be no objection from the standpoint of arbitration technique. Certain delegations, however, questioned the value of a solution which gave one of the parties an advantage over the other; while others asked why the partner of a contracting party who had previously failed to fulfil an arbitral award had been given that advantage only when he was the defendant and not also when he was the claimant.

Questions to be dealt with at the Group's next session

58. Apart from the questions dealt with at the present session and further consideration of which was deferred until the next session, the following additional questions will be included in the agenda for that session:

(a) Publicity of arbitral awards (TRADE/41, paragraphs 87 and 88).

(b) Form of the arbitration clause (TRADE/41, paragraph 78).

(c) Negotiation of agreements between organizations of importers and exporters of various commodities for mutual assistance in the fulfilment of arbitral awards (TRADE/41, paragraph 66).

(d) Motivation of awards.

Date of next session

59. The Working Group will hold its next session from 27 August to 5 September 1958.